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Copyright

1. FRENCH COURT RULES THAT SCENTS ARE 'WORKS OF ART'

In 2003, cosmetic giant L'Oreal filed a lawsuit against Bellure, a Dubai-based perfume firm that was producing and selling near-identical copies of some of its major perfumes including Trésor, Acqua di Gio, Emporio Armani and Anaïs Anaïs. As Bellure did not copy the shape of the bottle and the name of the original products, L'Oreal could not sue on grounds of trade mark infringement or unfair competition. Instead, the company argued that Bellure had infringed the copyright on the smell of its perfumes.

The Tribunal de Grande Instance de Paris confirmed that a scent is a work of the mind, just like a sculpture, a photograph or a musical work and can therefore be protected by author's right according to article L 112-1 of the French intellectual property code. This article states that the provisions of the code shall protect the rights of the authors in all works of the mind, whatever their kind, form of expression, merit or purpose. The Court further stated that "a fragrance is the result of an intellectual research of a composer which appeals to his accumulated imagination and knowledge to create an original bouquet of odorous products chosen for an aesthetic goal, and thus constituting a work of the mind".

The Court, however, did not determine any copyright infringement. It decided that the originality and creative input of the works was not sufficiently established by the documentary evidence and that, consequently, there was no proof that the Bellure perfumes were exact replicas of the L'Oreal originals.

L'Oreal appealed the case and provided a chromatographic analysis of the constituent smells of one of the copycat perfumes. On 25 January 2006, the Paris Court of Appeal found that 50 out of the 52 elements of the copycat perfume were identical to the L'Oreal perfume. It decided that the olfactory architecture of Bellure's copycat perfumes was almost identical to that of the original ones and ordered Bellure to pay L'Oreal 1.48 million euros in damages.

This landmark decision was welcomed by perfume creators as it added a new weapon to their fight against counterfeiting, in addition to the classical protection provided by trade mark law, design law and unfair competition that was used until now. Bellure has not announced yet whether it will appeal the decision.

2. THE DROIT DE SUITE COMES INTO FORCE IN THE UK

The coming into force of the Artist's Resale Right Regulations 2006 (SI 2006/346) ("Regulations") introduced a new type of intellectual property right in the United Kingdom known as the resale right or the *droit de suite*. The Regulations implement European Parliament and Council Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art.

The resale right belongs to the civil law tradition. Before the Directive, the UK and other common law jurisdictions were unfamiliar with rights that entitled artists to receive royalties on the resale of their works, even when limited to sales that involve an art-market professional and when the sale price falls below certain thresholds specified by law. The power to grant the *droit de suite* has always received little support in the UK. In addition, the resale right has been kept as an optional element of the Berne Convention (Article 14).

The reticent attitude towards the resale right might be partly due to the similarity between such a right with moral rights. In fact, the Regulations specify that a resale right is not assignable (Regulation 7) and cannot be waived (Regulation 8). Similar to other moral rights, the heirs of an artist can also exercise the *droit de suite* (Regulation 9). However, now and until 2010 (or 2012 if the UK Government takes advantage of a further derogation), the resale right is only applicable to sales of the works of living artists. After this initial phase, the right will then extend to a period of 70 years after the author's death. The approach taken in the Regulations shows that time is required for all of the relevant stakeholders to adapt to the new right. For example, auction houses are clearly affected by the Regulations and they are currently conducting promotional campaigns in order to make their clients aware of the new 'levy'.

The introduction of the Regulations also has relevant implications for the remuneration of collective management of emerging artists. According to Regulation 14, a resale right can only be exercised through a collecting society. This would allow a higher degree of efficiency in terms of costs and ease of operation. The role of a collecting society in the implementation of the directive is also important in complying with the artist's right of information about sales. In the UK, the collecting society dealing with the *droit de suite* is the Design & Artists Copyright Society (DACS).

3. ALLAN WILLIAMS ENTERTAINMENT V HURD

Alan Williams Entertainment & Anor v Hurd & Ors [2006] EWHC Ch 81 involved a claim and a cross-claim for damages from the breach of a compromise agreement which specified that former members of a band could not trade as the original band. It was held that a proper construction of the agreement meant that each party was obliged to prevent the promotion of themselves as the original band, which included taking reasonable steps to correct erroneous third party descriptions.

The compromise agreement was formed with the 1999 split of a pop group known as "The Rubettes" who had had a hit single in the 1970s entitled "Sugar Baby Love". Following the split, two bands were formed by original band members. The compromise agreement specified, amongst other things, that none of the artists could trade under the original band name, that both parties make mutual undertakings not to disparage others to third parties and not to threaten each other and that each party was not to use the existing Rubettes logo. The Claimant, a former band member alleged that the Defendants, also former band members breached the agreement by effectively trading as The Rubettes through a series of statements on websites, in advertisements and in other promotional material. The Defendants cross-claimed that the Claimant had breached the agreement through statements on websites, in promotional material and also in the use of the Rubettes logo.

Two issues of construction of the compromise agreement were addressed by the court. The first concerned the meaning of the expression "trade as" and the second whether the agreement imposed any obligations to control the activities of third parties in connection with the prohibition on trading as The Rubettes.

On 2 February 2006 Mr Justice David Richards held that the ordinary meaning "trade as" extended to any promotion of the band as an original group which could be done by the impression given by an advertisement, website entry or other material. Second, the court held that each party had an obligation to take reasonable steps to prevent the promotion of themselves as the original band. This obligation included correcting any errors where either band had been incorrectly described as the original. Both the claim and the cross-claim partially succeeded as the promotional material of both bands had blurred the distinction between the later bands and the original group.

Patents

4. RESEARCH IN MOTION UK V INPRO LICENSING SARL

Research in Motion v Inpro Licensing SARL [2006] EWHC 70 (Pat) was a patent action for revocation of a European Patent (UK) belonging to the defendant, Inpro Licensing SARL ("Inpro"). The grounds for revocation were invalidity for lack of novelty, obviousness and excluded subject matter. Inpro's patent claimed a computer system that reduced the processing power used by portable computers making it quicker and easier to access the internet.

The claimant (RIM) was responsible for the well-known Blackberry device and Inpro counterclaimed for infringement against RIM and the mobile telephone service provider T-Mobile. The alleged infringement was said to occur when any Blackberry device downloaded a webpage including images transferred using the Blackberry service.

Before examining the case, Pumfrey J made clear that he was in disagreement with Laddie J's decision for a streamlined trial and that although speed is desirable in all cases, it should not be so at the expense of fairness especially in view of the commercial importance of the patent. The choice of expert witness made by Inpro was also criticised for a lack of objectivity which led to an unreasonable view being given.

On the issue of infringement, the Blackberry device was found to infringe both the web browsing and email services of the patent. The court relied on the recent decision in *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2004] UKHL 46 for a correct interpretation of the claims in line with Art 69 of the EPC.

Validity of the patent was challenged on grounds of anticipation and obviousness in view of three publications, and obviousness in view of a fourth publication. On the issue of anticipation, the court relied on the recent decision in *Synthon v SKB* [2005] UKHL 55.

RIM argued that the patent fell under the ambit of excluded subject matter as it claimed a collection of programs for computers. However, the claims themselves resulted in a technical effect in that the computers ran faster and transmitted information more efficiently. Pumfrey J stated that the correct approach was to ask what the claimed invention contributed to the art outside the excluded subject matter and that the exclusions were not to be given too wide a scope since modern industry depended on programmed computers.

The patent was found to be invalid for lack of novelty and inventive step, but not for excluded subject matter. The claim for revocation succeeded and the counterclaim for infringement failed.

Inpro has sought to enforce their patent across the EC, but has been unsuccessful in another action brought in the German Court in Munich where their German patent was invalidated. A settlement ended the long-running US case where RIM faced infringement allegations by NTP. The final settlement reached $612.5m (£349m) following dismissal of the case by court order allowing RIM to continue its Blackberry-related business.

5. RHONE-POULENC RORER V YEDA RESEARCH AND DEVELOPMENT

Rhone-Poulenc Rorer International Holdings v Yeda Research and Development [2006] EWHC 160 Ch involved the ownership dispute of a patent for therapeutic compositions containing monoclonal antibodies and anti-neoplastic drugs that together provide a cytotoxic effect (the killing of cancer cells) rather than a cytostatic effect (just preventing their replication). In the reference proceedings before the Comptroller of Patents, Designs and Trademarks, the claimant Yeda Research sought to amend its reference to allege sole proprietorship to the patent as an alternative to the joint proprietorship plea that it had raised earlier. The defendants Rhone-Poulenc, the registered proprietor of the patent, and Imclone, a licencee, argued that the amendment, if allowed, would bring a new claim that would be outside the two-year limitation period of section 37(5) of the Patents Act 1977, and could not be allowed as per the criteria of CPR rule 17.4.

The hearing officer accepted that section 37(5) of the Patents Act should be interpreted as a limitation period by virtue of Article 23 of the Community Patent Convention 1989 ("CPC") but held that he was not bound to apply CPR rule 17.4. He exercised his discretion to allow the amendments. The defendants appealed.

Lewison J while allowing the appeal laid down the following propositions:

- Section 37(5) imposed a limitation period that barred the making of a claim outside the two-year time limit, but it does not bar the grant of a particular remedy. Although the hearing officer was right that s 37(5) of the Patents Act is a limitation period and that he is not bound by CPR, his omission of not considering the effect of the amendments was incorrect. He just assumed (wrongly) that, if the amendments were allowed, the questions raised by the amendment could be considered by the Comptroller at a later stage.
- "Legal certainty" is the relevant underlying policy of s 37 of the Patents Act and Article 23 of the CPC. It militates against an amendment allowing a new claim to be made after the expiry of the limitation period that related back to the date when the claim was originally made, even if it did arise out of the same facts. The correct test is to see if a useful purpose can be served by allowing the amendment.

Since the amendments if allowed, would not relate back to the date of the original reference, the limitation defence to the new claims remained available and there was thus no useful purpose in allowing them.

6. NON-DISCLOSURE AGREEMENTS AND PATENT ENTITLEMENT

GE Healthcare Ltd v PerkinElmer Life Sciences (UK) Ltd & Anor [2006] EWHC 214 (Pat) involved a claim for patent infringement and a counter-claim for revocation of the patent or for a declaration that the Defendant, PerkinElmer, was entitled to the patent. The Claimant, GE Healthcare was known as Amersham Biosciences Corporation at the time the events in question took place and was referred to as Amersham throughout the judgment.

The patent in question concerned scintillation proximity assay technology ("SPA"). SPA technology allows the radioactivity in a solution to be measured by placing a treated surface (say a bead) in a solution without the need to separate the bead from the solution. This avoids unnecessary separation steps in complex microbiological or drug testing that might affect the results obtained.

PerkinElmer's case concerned a number of disclosures:

- repeated suggestions over a long period of time were made to Amersham in respect of certain types of surface treatment being used to reduce the quenching of the signal being measured;
- repeated suggestions over a long period of time were made in respect of the use of more advanced detectors to measure the signal produced;
- on several occasions, the combination of the two suggestions; and
- suggestions in respect of applying these principles to other testing apparatus.

On the question of entitlement, Mr Justice Kitchin summed up the test in *Markhem v Zipher* [2005] EWCA Civ 267: first, the entitlement claim must be that the inventor contributed to the formulation of the inventive concept underlying the invention and not merely insubstantial additional features; secondly, the entitlement claim must be based on some rule of law to establish title to the patent, such as a breach of confidence or contractual rule.

The parties accepted that a number of meetings between researchers had taken place in confidence. On the evidence, suggestions concerning the different technical aspects of the matter were made; however, often the suggestions involved other apparatus and the underlying technical features communicated to Amersham were ones that Amersham researchers would be aware of in any event.

Further, and importantly, it was held that the suggestions were made only at a time that Amersham was not interested in such knowledge. Thus, Amersham would not have 'picked up' knowledge from these apparent suggestions. In short, it was held that the invention was arrived at independently by Amersham.

Despite non-disclosure agreements being in place, without a real contribution to the underlying inventive concept, no claim to entitlement in the patent could result, even from apparently confidential commercial collaboration.

Patent entitlement only arose as a defence against a claim of infringement in this case due to an unusually set of facts. Further, the patent was found invalid in any event. Nevertheless, it is an important lesson to all technology companies entering commercial research collaboration. A non-disclosure agreement is not sufficient if you want to gain entitlement to inventions resulting from research collaboration. The best protection is explicit contractual agreement detailing the ownership of resulting inventions.

Trade marks

7. POLO-PLAYING HORSEMAN, SOAPS AND ABRASIVES

On 21 February 2006, the Court of First Instance ("CFI") delivered its judgment in the *Royal County of Berkshire Polo Club Ltd v OHIM* (Case T-214/04), allowing the Polo/Lauren Co. LP to retain its proprietary rights over the sign of a 'polo-playing horseman' drawing a comparison between toiletries and laundry products.

On 5 June 1997, the Royal County of Berkshire Polo Club Ltd applied for registration of a mixed sign containing a verbal element with words 'Royal County of Berkshire' overarching the figurative element of a 'polo-playing horseman' for goods in Class 3 of the Nice Agreement.

The Polo/Lauren Company LP opposed the application on the ground of likelihood of confusion under Article 8(1)(b) of Trade Marks Regulation. It claimed that the trade mark applied for could give rise to a likelihood of confusion with the earlier national trade marks that it owns in Germany, Spain, Greece, Sweden and United Kingdom.

Following the rejection of the opposition, Polo/Lauren Company LP appealed to the Board of Appeal ("BA") which held that while there was a likelihood of confusion between an earlier figurative trade mark registered in the UK for the goods consisting of cleaning preparations and other toiletries, there was no similar likelihood of confusion in respect of goods consisting of 'bleaching preparations and other substances for laundry use, polishing, scouring and abrasive preparations'.

The Royal County of Berkshire Polo Club Ltd challenged this decision before the Court of First Instance (CFI). The CFI held that because of their position and style the words were difficult to read, making the figurative element more dominant and easily remembered by customers. The decision in *Matratzen Concord v OHIM – Hukla Germany* (Case T-6/01) [2002] ECR II-4335, was cited, where it was held that the component which is likely to dominate is the image of the mark which the relevant public keeps in mind with the result that all other components of the mark are negligible within the overall impression created by it.

The CFI held that the mark applied for was not distinctive and had no connection with goods in class 3 and was thus not a mark of origin identifying products from appellant's club.

The CFI rejected the Royal County of Berkshire Polo Club Ltd's argument that the BA's decision gave a monopoly over the figure of polo-playing horseman, by holding that the said mark registered in the UK for goods in class 3, was highly distinctive and imaginative and, since it was arbitrary for such goods, it deserved protection against later applications for confusingly similar goods.

On the question of likelihood of confusion, the CFI took into account the global appreciation of the likelihood of confusion test as developed by *Sabel v Puma* (Case C-251/95) [1997] and upheld the BA's decision in identifying the similarities between the marks based on the similarity between the goods and the visual and conceptual features of the signs depicting the game of polo.

The CFI annulled the part of the BA's decision which allowed the registration of the Royal County of Berkshire Polo Club Ltd's mark for 'bleaching preparations and other substances for laundry use, and polishing, scouring and abrasive preparations' by drawing a comparison to the soaps for which the earlier mark was registered in UK, holding that both the goods are used as housekeeping products and were thus comparable.

8. COMPARATIVE ADVERTISING: WHEN DO WE TAKE ADVANTAGE UNFAIRLY?

On 23 February 2006, the European Court of Justice ("ECJ") handed down a judgment, in the case *Siemens AG v VIPA Gesellschaft für Visualisierung und Prozeβautomatisierung mbH* (Case C-59/05). The case refers to the interpretation of Article 3a(1)(g) of Council Directive 84/450/EEC concerning misleading and comparative advertising, as amended by Directive 97/55/EC. The reference for a preliminary ruling under Article 234 EC concerned the advertising engaged in by VIPA to promote certain products which were compatible with others manufactured and distributed by Siemens.

Article 2(2)(a) of Directive 84/450 provides that "comparative advertising" means "any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor". Article 3(a)(1)(g) of this Directive provides that "comparative advertising shall, as/or as the companies are concerned, be permitted when the following conditions are met:…..it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competency products."

Siemens manufactures and distributes, among others things, programmable controllers under the name "Simatic" and introduced some time ago a system of order numbers for those products and their add-ons to identify them. The core elements of the order number concern the nature of the product and its use in the control system.

VIPA also manufactures and distributes products that are compatible with "Simatic" controllers and for which, since 1988, an almost identical identification system has been utilised. The first part of characters used by Siemens in its order numbers has been replaced by the company's acronym "VIPA", followed by the core elements of the order numbers of the original Siemens products unvaried. VIPA therefore distributes components corresponding to the original Siemens product carrying order numbers identical to those used on the Siemens products save for the first part of such order numbers which have been replaced with "VIPA". On VIPA's products and catalogues it is indicated, among other things "*The order numbers correspond to those of Siemens programme modules*".

Siemens brought an action against VIPA alleging that the latter was taking unfair advantage of the reputation of its products. The first instance decision was favourable to Siemens but on appeal the decision was set aside and Siemens filed an appeal for "Revision" with the Bundesgerichtshof.

As to resolve the dispute it was necessary to interpret Directive 84/450/EEC, the Bundesgerichtshof decided to stay the proceedings and referred the following questions to the ECJ for a preliminary ruling:

- When an advertiser, using the identical form of the core elements of a distinguishing mark of a competitor, which is known in trade circles, refers to those identical elements in advertising, is the reputation of an other distinguishing mark within the meaning of Article 3a(1)(g) of Directive 84/450/EEC taken advantage of unfairly?
- In answering the question above, is the benefit to the advertiser and the consumer procured by the adoption of the identical system a relevant factor?

The Court pointed out that, according to the settled case-law, when assessing whether Article 3(a)(1)(g) has been observed, it is necessary to consider recital 15 to Directive 97/55, which affirms that there is no breach of the right to a mark when using a competitor's mark if such use complies with the conditions laid down by Directive 84/450 since the aim of such use is just to distinguish between the products and services of the advertiser and those of his competitor by highlighting the differences objectively. An advertiser cannot be regarded as taking unfair advantage of the reputation of a competitor's distinguishing marks if effective competition on the relevant market is conditional upon a reference to these marks.

Additionally, the Court stated that VIPA, by adopting the core elements of Siemens' order number system, informs the public that the relevant products are technically equivalent to the Siemens products. However, it is necessary to determine whether the adoption of the core element of the Siemens order number system might cause the public at whom VIPA's advertising is directed to associate Siemens' products with the competing supplier, since the public could associate the reputation of Siemens's products with the products distributed by the competing supplier. The Court stated that the relevant public is a specialist public which is not likely to associate Siemens's reputation with VIPA's products. Moreover, the Court added that the adoption by VIPA of its company's acronym to distinguish the products and the statements in its catalogues allows for a distinction to be drawn between the different entities identities and the origins of their respective products. It is also clear that the use of the core element of the order number is functional as it refers to the product's nature, but also its utilisation in the control system.

As to whether the benefit of the consumer and the advertiser procured by adopting a distinguishing mark in identical form should be taken into consideration, the Court stated that if VIPA used a different core element to identify its products, a user would be required to look at comparative listings to check the corresponding numbers of the goods sold by Siemens and this would be disadvantageous both to VIPA and consumers and could also have restrictive effects on the competition in the market.

Eventually, in light of the foregoing considerations, the Court held that Article 3a(1)(g) in question must be interpreted as meaning that by using in a supplier's catalogues the core elements of a competitor's distinguishing mark, known in trade circles, the reputation of that distinguishing mark is not taken advantage of unfairly by the supplier.

Technology

9. YAHOO SEARCH MARKETING FURTHER RESTRICTS BIDDING ON COMPETITORS' TRADE MARKED KEYWORDS

On 1 March 2006, Yahoo Search Marketing modified its editorial guidelines regarding the use of keywords containing trade marks. Under the new policy, U.S. advertisers can no longer bid on competitors' trade marked keywords.

Previously, Yahoo allowed advertisers to bid on a trade marked search term in three different circumstances:

- if they are resellers of the trade marked product advertised;
- if they operate an informational site that does not compete with the trade mark owner's products or services; or
- if the advertiser's site offers detailed comparative information about the trade mark owner's products or services in comparison to the competitive products and services offered or promoted on the advertiser's site.

Now, the last condition is no longer considered by Yahoo as a valid excuse for using a trade marked keyword.

Yahoo has long been more restrictive than another internet search company, Google, in allowing this type of advertising, so this further restriction apparently offers Google an even bigger bite of the search engine marketing cake. It is unlikely that impetus behind this move came from legal setbacks, because Yahoo has not been the subject of major litigation on this issue. Taking into consideration Yahoo's large-scale deals with major brands to advertise across its entire portal, the real reason may well be the desire to please brand-name advertisers who worry about being outbid for their trade marks by competing search advertisers.

Google, on the other hand, does not have a portal component and therefore does not have the same motivation as Yahoo to court big advertisers. It seems any policy change by Google is more likely to be motivated by an adverse legal ruling than by business pressures.

Google's practice has increasingly become the subject of much litigation. Last September, Google settled a trade mark lawsuit filed by insurance company GEICO because the court found that using the GEICO trade mark as a keyword was not going to confuse anyone. However, in France, a court ruled against Google in a lawsuit brought by Louis Vuitton. As a result, Google will not sell competitive trade marked keywords in Europe. In January 2006, CNG Financial Corporation filed suit against Google claiming that Google's sales of trade marked keywords harms its business by helping competitors poach customers. The issue remains far from resolved, though a recent court ruling suggests Google's approach may be lawful.

It seems that the courts are still trying to sort the issue out and trade mark issues on the internet are likely to continue to be decided on a case-by-base basis.

10. GOOGLE IMAGE SEARCH THUMBNAILS BREACH COPYRIGHT

In a hearing before Judge A Howard Matz of the Central District of California, internet search engine Google was found to be breaching copyright laws with its Google Image Search as a result of thumbnail images displayed on search results being copied from adult website Perfect 10.

In a preliminary ruling, Judge Matz found that Perfect 10 would be likely to succeed on the issue of the display of thumbnails and that a preliminary injunction would be granted on this aspect of the case. However, he also found that Perfect 10 would be unlikely to succeed on a claim that Google was liable for providing links to websites that were using images that were copied without authorisation from Perfect 10’s website.

In an earlier case in 2002, Perfect 10 had been unsuccessful against a search engine when the court found that the thumbnails themselves did not infringe copyright and were “fair use” of the original pictures. This time Perfect 10 argued that the quality of the thumbnails was so high that they could be downloaded onto mobile phones and therefore were directly competing with download service, which was licensed by Perfect 10. Thus, instead of paying for a download service, users could get the same pictures free from Google. Furthermore, Google was in fact making advertising revenue by using thumbnails of their images with their AdSense service. Perfect 10 argued that Google’s position was similar to the original Napster service but the court found that the only resemblance to Napster was that Google facilitated searches but it only located information that was already publicly available. The court rejected the claim of secondary copyright infringement. Google did not have any control over those websites. Further, if Google removed the relevant links, it would be possible to access the infringing websites and pictures.

Judge Matz acknowledged the enormous public benefit that search engines such as Google provided and he was reluctant to issue a ruling that might impede the advance of internet technology. However, existing judicial precedents did not allow such considerations to overcome a reasoned analysis of the relevant fair use factors.

Although this decision is just a preliminary ruling, it may transpire that the most important factor in the decision not to consider Google's use of the thumbnails as fair use was the high quality of the pictures and that they could be used as they were. Thus, there was an obvious competing use which directly affected the possibilities to generate further revenue by the website owner.

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