McDermott Will & Emery

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Patents

Sufficiency—when is a product a product (*Biogen v Medeva* revisited)?

In *H Lundbeck A/S v Generics (UK) Ltd and ors* [2008] EWCA Civ 311 (10 April 2008), the Court of Appeal handed down an important judgment concerning patent sufficiency. This article reviews the Court's decision.

BACKGROUND

The patent in dispute (EP (UK) 0 347 066) related to a category of antidepressant generally working as a selective serotonin reuptake inhibitor (SSRI) and was owned by the Danish company H Lundbeck A/S. The drug sold under this patent (called Cipralex) is boasted as being the top selling antidepressant (in terms of volume) in the world.

Before the present patent was filed, Lundbeck had a patent, now expired, for Citalopram, which is also an SSRI. Citalopram is sold in the United Kingdom under the brand name Cipramil; other serotonin inhibitors are fluoxetine (sold as Prozac) and paroxetine (Seroxat). Since the expiry of the Citalopram patent, the drug has been sold by a number of manufacturers in its generic form.

Citalopram is a racemate, consisting of equal numbers of two molecules called enantiomers. In brief, an enantiomer is a molecule that cannot be mapped to its mirror image by rotations and translations alone. The only physical difference between enantiomers is their effect on polarised light, causing rotation of the plane of light either to the left or right. A racemate is an equal mix of left and right-handed enantiomers that has no effect on polarised light. They are conventionally designated (+) and (-). It has been well known for many years that, despite their similarities, two enantiomers may bind to different proteins and produce different biological effects.

An example provided by the Court to illustrate how this works in practice was thalidomide, which consists of a (+) enantiomer, which was effective in preventing morning sickness in pregnant women and, unknown to the consumers, a (-) enantiomer, which was teratogenic and caused severe birth defects. It is now known as one of the best treatments for leprosy.

Separating a racemate into its constituent enantiomers is not a straightforward matter. Because they have the same boiling point, they cannot be separated by conventional means such as fractional distillation or fractional crystallisation. There are indirect methods of coming at the problem and Lundbeck set out to try to find one of them in 1980. This involved a good deal of trial and error and Lundbeck was not successful until 1987.

When they had resolved the racemate, Lundbeck found that the reuptake inhibitory effect was caused entirely by the (+) enantiomer, which is called escitalopram and led to the development of the current antidepressant, Cipralex. In 1989, Lundbeck applied for the patent in suit, EP (UK) 0 347 066, with a priority date of 14 June 1988.

The dispute was commenced by Generics (UK), Arrow Generics and Teva, which market the generic form of citalopram in competition with Lundbeck's Cipralex. They contended that Lundbeck was simply repatenting its previous invention of citalopram, or the active ingredient in that product, to extend its monopoly for another decade. They claimed revocation of the patent on three grounds:

1. Claims 1 and 3 lack novelty by reason of the disclosure of the racemate in Lundbeck's patent for citalopram
2. Claims 1, 3 and 6 are invalid for obviousness
3. Claims 1 and 3 are invalid for insufficiency because they claim the enantiomer made by any method, but the specification discloses only two ways of making it

Kitchin J at first instance rejected the first two grounds of attack, but accepted the arguments regarding the lack of sufficiency thereby revoking claims 1 and 3. He upheld claim 6. The parties appealed and cross appealed.

NOVELTY

A patentable invention must be new (Patents Act 1977, Section 1(1)(a)) and an invention is not new if it forms part of the state of the art (Section 2(1)). The state of the art comprises all matter made available to the public before the priority date (Section 2(2)). The claimants relied upon Lundbeck's U.S. patent for Citalopram as prior art, (U.S. 4,136,193, published 23 January 1979) which disclosed the chemical structure of citalopram and that it was a racemate.

In order to anticipate a patent, the prior art must disclose the claimed invention and (together with common general knowledge) enable the ordinary skilled person to perform it. It is agreed that the prior art did not anticipate the isolated enantiomer. It is settled jurisprudence in the European Patent Office (EPO) that disclosure of a racemate does not in itself amount to disclosure of each of its enantiomers. Therefore, Lord Hoffman was satisfied that the subject patent was novel.

INVENTIVENESS/OBVIOUSNESS

The Claimants' case at trial was that there were principally two methods or "routes" for resolving the racemate which would have been obvious to a skilled person at the priority date. Diastereomic salts of the amino diol (the last intermediate in the synthesis of citalopram) were resolved it into its enantiomers and then converted into the enantiomers of citalopram by a reaction that preserved their distinctive three-dimensional structures. This method was specified in claim 6 of the patent. The specification also disclosed another method which had not been said to be obvious and therefore need not be considered. Kitchin J found that the amino diol route was not obvious.

The judge heard a good deal of evidence on how the skilled person might set about trying to resolve citalopram. The parties agreed that he would initially try to resolve the molecules of the final product. Initially, 13 different possible techniques described in the literature were unearthed at trial and, although Kitchin J found that the skilled person would not have known about all of them, that still left several that he could and might try. In no case was the outcome predictable. Lord Hoffman agreed with Kitchin J that there were "a number of avenues of research" open to the skilled man seeking a solution to the problem and that therefore he would not have taken the diol route unless satisfied there was a "real prospect" that the necessary reaction would work. Experts for the Claimants were not deemed particularly helpful and their evidence was largely rejected. Once their evidence was dismissed, any issue regarding the obviousness of the patent faded away.

SUFFICIENCY

The Court of Appeal then addressed the issue of sufficiency and, in particular, the decision of *Biogen v Medeva*.

In *Biogen v Medeva*, the House of Lords considered the sufficiency of a product claim to a DNA molecule that defined the product partly by the way it had been made and partly by its function. The patent claim was held to be a class of products that satisfied the specified conditions, which could have been made by a wide variety of possible processes. The House of Lords held that the law of sufficiency in both the United Kingdom and the EPO, was that a class of products was enabled only if the skilled man could work the invention in respect of ALL members of the class. As the claim under dispute only described one method of making DNA and the patent specification disclosed no general principle, it was insufficient and therefore invalid.

In respect of Lundbeck's patent for Cipralex, Kitchin J held that claims 1 and 3 were insufficient. His reasoning was that claim 1, being a claim to the (+) enantiomer as a product, was a claim to a monopoly of that product however made. Lundbeck's inventive idea, however, was not to discover that the enantiomer existed and had a medicinal effect. Everyone knew that the two enantiomers existed and that one or other or both had a medicinal effect. What Lundbeck discovered was one way of making it. But that did not entitle them to a monopoly over every way of making it.

Lord Hoffman was sympathetic with this analysis but could not concur and stated:

"I can understand and sympathise with the judge's instinctive reaction to the inherent breadth of a product claim… [b]ut in my opinion his reasoning is not justified either by the statute or the authorities. In an ordinary product claim, the product is the invention. It is sufficiently enabled if the specification and common general knowledge enables the skilled person to make it. One method is enough."

The statutory basis for a claim for revocation on the grounds of insufficiency is Section 72(1)(c):

"[T]he court may revoke a patent [on the ground that] the specification of the patent does not disclose the invention clearly enough and completely enough for it to be performed by a person skilled in the art."

In order to decide whether the specification is sufficient, it is therefore first necessary to decide what the invention is by reading and construing the claims, in which the inventor identifies what he claims as his invention. Section 60(1) of the Patents Act makes it clear that a claim may be either to a product or a process. In the case of a product claim, performing the invention for the purposes of Section 72(1)(c) means making or otherwise obtaining the product. In the case of a process claim, it means working the process. A product claim is therefore sufficiently enabled if the specification discloses how to make it. There is nothing to say that it must disclose more than one way.

Kitchin J clearly reached his judgment entirely upon the decision of the House of Lords in *Biogen v Medeva*. Lord Hoffman reviewed the House of Lords decision and ultimately concluded:

"In my opinion, therefore, the decision in Biogen is limited to the form of claim which the House of Lords was there considering and cannot be extended to an ordinary product claim in which the product is not defined by a class of

processes of manufacture. It is true that the House in Biogen indorsed the general principle stated by the Board of Appeal in T409/91 Fuel Oils/EXXON [1994] OJ EPO, that 'the extent of the patent monopoly, as defined by the claims, should correspond to the technical contribution to the art in order for it to be supported or justified'….[w]hen a product claim satisfies the requirements of section 1 of the 1977 Act, the technical contribution to the art is the product and not the process by which it was made, even if that process was the only inventive step.

What the judge has done is to make the requirements for sufficiency under section 72(1)(c) differ according to the nature of the inventive step. If it is to "describe a new and non-obvious compound which has a beneficial effect", the judge acknowledges … that one way of making it will be sufficient. But the case is otherwise if the inventive step is to find a way of making an obvious compound. In my opinion, however, there is nothing in section 72(1)(c) which connects the requirements of sufficiency to the inventive step. What needs to be disclosed sufficiently to enable it to be performed is the invention as defined in the claim. That remains the same, whatever may have been the inventive step."

Lastly, Lord Hoffman stated: "*Biogen should therefore not be read as casting any doubt upon the proposition that an inventor who finds a way to make a new product is entitled to make a product claim, even if its properties could have been fully specified in advance and the desirability of making it was obvious."*

In a concurring opinion, Lord Justice Jacob agreed that Lundbeck's appeal should be allowed for the reasons given by Lord Hoffmann. Jacob LJ, however, wanted to provide his own spin on the main points under appeal and in particular on the issue of sufficiency. He stated:

"There is a very short answer to this point [re: sufficiency]. The claim is to the (+) enantiomer. That is novel and non-obvious. If one asks the straightforward question "Does the patent enable the skilled man to make it?" the answer is an equally straightforward: "Yes." So, in the language of Art 83, the patent discloses 'the invention in a manner sufficiently clear and complete for it to be carried out."

COMMENT

It is easy to see why Kitchin J was tempted to follow the Biogen decision straight down the line, especially as this area of law and the subject matter of the Lundbeck patent would not have made it any easier for the judge to see some of the subtleties of the case. He essentially saw one product claim as being very much the same as any other product claim but, that clearly was not the case and was expressly spelled out by Lord Hoffman in his judgment. There have been numerous cases invalidating patents on the grounds of insufficiency—for example, *Halliburton Energy Services Inc v Smith International Ltd* [2006] EWCA Civ 1715—and this latest decision will undoubtedly attract more scrutiny by patentees on how their "product claims" are drafted. Ordinary product claims will not be affected by the Biogen decision. However, in order to avoid Biogen insufficiency, applicants for products defined by either the process of their manufacture or by their properties must be very aware that sufficiency of the specification will be very much at the heart of the case.

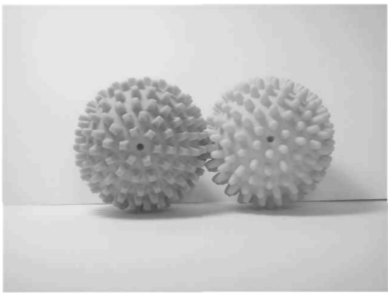
Designs

Dryer spiky balls—novelty and the relevant sector

In *Green Lane Products Ltd v PMS International Group plc* [2008] EWCA Civ 358 (23 April 2008), the English High Court has clarified what is the correct "audience" or "sector" for determining novelty in a design; namely the sector of the alleged prior art, not the sector for which the design was registered.

BACKGROUND

Green Lane make and sell spiky plastic balls for use in tumble dryers under the trade mark DRYERBALLS. There are blue balls with square nodes and pink balls with rounded nodes (see image below). They allegedly have the beneficial effect of helping to soften fabrics and reduce drying time by lifting and separating the laundry as it tumbles. Green Lane registered the design of its Dryerballs as Community Registered Designs (CRDs) under Nos. 000217187-0001 – 004 with an application date of 24 August 2004.



The Defendants, PMS, marketed spiky plastic balls (made in China from a tool created for PMS) extensively in the European Union from 2002. They were sold as massage balls, not as laundry balls, and are illustrated below:

In 2006, PMS decided to sell balls (of exactly the same design as its massage balls) for various other purposes. One of these purposes was as a laundry ball, although the balls were also marketed in packages marked "Massage, Hand Exerciser, Easy-Catch Toy and Dog Trainer".

Green Lane claimed that PMS was infringing its CRDs by continuing to sell the balls for anything other than use as massage balls. PMS argued the CRDs were invalid by reason of the prior sale of their massage balls. Green Lane countered by arguing that such prior art was irrelevant as a matter of law and, even if it was relevant, their CRDs were nonetheless valid.

ARGUMENTS AND FIRST INSTANCE DECISION

Green Lane argued that the extent of their rights under the CRDs was defined by Article 10 of the Community Designs Regulation (6/2002/EC) (CDR)—any article, whatever its intended purpose, will infringe unless it does not produce on the informed user a different overall impression. The only reason why continued sales by PMS of balls for massage purposes did not infringe was that such sales were protected by Article 22 (right of prior use). Even then, such sales are protected only to the extent provided by that Article.

PMS contended that Green Lane's design registrations were not "new" within the meaning of Article 5 or did not have "individual character" within the meaning of Article 6. They said this was because of their own prior sales in the European Union of what, for all practical purposes, was the very design complained of. In short, the design was old.

Green Lane countered by arguing that a design may be new or have individual character even if it is in fact old, as Article 7 says that a prior design is not taken to be made available to the public, even if it in reality was, where: "…these events [*i.e.*, prior use in trade] could not reasonably have become known in the normal course of business to the circles specialised in the sector concerned, operating in the Community."

According to Green Lane, the "sector concerned" meant the sector for which the design was registered, not the sector of the alleged prior art. Green Lane suggested that there was support for this construction in Article 36(2), which provides that a CRD application must indicate the products upon which the applicant intends to apply his design.

At first instance, Lewison J rejected Green Lane's submissions and ruled that "the sector concerned" was the sector that consisted of or included the sector of the alleged prior art; and that "the circles specialised in the sector concerned, operating within the Community" were "capable of consisting of all individuals who conduct trade in relation to products in the sector concerned, including those who design, make, advertise, market, distribute and sell such products in the course of trade in the Community".

COURT OF APPEAL DECISION

Jacob LJ's view on appeal was that "Lewison J was clearly right: the position is *acte clair* and there is no need for a reference [to the European Court of Justice]". The basic rule in order to obtain protection is that a design must be "new" and have "individual character" (Article 4.1). Article 5 elaborates on what is meant by "new" and Article 6 on what is meant by "individual character". In both cases the test involves consideration of an earlier design that is a design that "has been made available to the public." Jabob LJ drew an analogy with the novelty requirements under patent law regarding "state of the art" and absolute novelty, and held that this was applicable to registered designs and patents alike: "the state of the art shall be held to comprise everything made available to the public by means of a written or oral description, by use, or in any other way before the relevant date". The essence of Jacob LJ's judgment was that a registered design provided a monopoly right over any kind of goods made to the registered design. It therefore followed that the prior art for novelty purposes should also extend to all kinds of goods, subject to the limited exception of prior art, which was obscure even in the sector from which it came.

Jacob LJ considered in excruciating detail all rules, regulations, recitals and *travaux préparatoires* related to the CDR. In brief, the Court's analysis in relation to the parties' main submissions was as follows.

ARTICLE 7(1)

In relation to Article 7(1) CDR Jacob LJ concluded that:

- The only "circles" that could be referred to were those of the prior art
- The exception in the Article was clearly intended to be narrow
- The interpretation of the exception by the United Kingdom Intellectual Property Office (UK-IPO) was in line with that of PMS, namely that the "sector concerned" related to the prior art rather than the sector in which the design applicant operated

Jacob LJ was also keen to point out that Article 7 CDR does not limit infringement to "articles for which the design is registered". For example, "if you register a design for a car you can stop use of the design for a brooch or a cake or a toy, or if you register a textile design you can stop its use on wallpaper, a shirt or a plate". This is also read in conjunction with Article 10(1), *i.e.*, that "any design which does not produce on the informed user a *different* overall impression" will be prevented registration.

ARTICLE 36

Jacob LJ also rejected Green Lane's argument concerning Article 36. The Court considered that the Article related to *administrative* rather than substantive matters. Considering the compulsory provision in Article 36(2), Jacob LJ stated that this was not intended to affect the legal rights relating to the scope of protection or the validity of a design. He noted the optional class declaration in Article 36(3)(d), the purpose of which was to assist with design searches rather than to affect the scope of design protection.

Jacob LJ concluded that there was no link between what could be cited as prior art and any requirement in the CDR (whether compulsory or voluntary) to specify a class or the intended use for the design. He referred to Article 36(6) of the CDR in support of this finding.

COMMENT

Lord Justices Ward, Jacob and Rimer were keen to issue this judgment even though there was no requirement for issuing an order in view of the parties settling the matter after the appeal hearing. This decision may finally bring an end to the debate over the meaning of Article 7. That is to say, in determining the appropriate sectors or skilled persons required in assessing the merits of the registered design, the relevant sector for the purposes of Article 7(1) is the sector of the alleged prior art, rather than the sector for which the design is registered.

Trademarks

Likelihood of confusion, the availability requirement and the mere embellishment defence

On a reference from the Supreme Court of the Netherlands, in Case C-102/07 *Adidas AG v Marca Mode* 10 April 2008 (unreported), the European Court of Justice (ECJ) found that the requirement of availability of certain signs for use by competitors is not a relevant factor to be taken into account in the assessment of the likelihood of confusion in trade mark cases.

The case was brought by the famous sportswear manufacturer Adidas. The company was concerned by the use of two stripes, in relation to various footwear products, by a number of companies including H&M, C&A, and other well-known high street retailers across Europe. Adidas alleged that the marks were similar to its famous three stripe motif which is used on all its products worldwide. H&M *et al* disagreed.

The ruling has effectively curtailed the so-called embellishment defences that the sign consisted of something that was perhaps a decoration and therefore not inherently distinctive, which is often relied upon by defendants in trade mark infringement cases.

BACKGROUND

Adidas AG is the proprietor of figurative trade marks composed of three vertical, parallel stripes of equal width that are featured on the sides of sports and leisure garments in a colour that contrasts with the basic colour of those garments. Adidas Benelux BV is the holder of an exclusive licence to the trade marks for the Benelux countries, granted by Adidas AG. Having found that some of their competitors had begun to market sports and leisure garments featuring two parallel stripes, the colour of which contrasted with the basic colour of those garments, Adidas brought: i) interlocutory proceedings before the Rechtbank te Breda in the Netherlands against H&M; and ii) an action on the merits against Marca Mode and C&A to prohibit the use by them of any sign consisting of the three stripe logo registered by Adidas or a motif similar to it, such as the two stripe motif. Marca Mode, C&A, H&M and Vendex then brought their own applications before the Rechtbank te Breda for a declaration that they were free to place two stripes on their sports and leisure garments for decorative purposes.

After several rounds of litigation, in 2005, the Dutch Court of Appeal rejected the applications of both Adidas and H&M *et al* on the grounds that the trade marks owned by Adidas had not been infringed and that the scope of the claims filed by H&M *et al* against Adidas were too general.

The Dutch Court of Appeal stated that a three stripe motif, such as that registered by Adidas, is not very distinctive *per se* but that, owing to the investment in advertising by Adidas, the marks it owned had acquired considerable distinctive character and become well known. Those marks therefore enjoyed wide protection so far as concerns the three stripe logo. However, given that stripes and simple stripe logos were generally signs that must remain available and did not therefore lend themselves to exclusive rights, the marks owned by Adidas did not afford any protection against the use of two stripe motifs.

On their appeal on a point of law to the Supreme Court of the Netherlands, Adidas argued that the requirement of availability must be taken into account only when the grounds for refusal or invalidity provided for in Article 3 of the Directive apply.

The Supreme Court decided to seek the ECJ's guidance on whether the requirement of availability should be taken into account when assessing the scope of protection of a trade mark that is inherently non-distinctive or descriptive, but registrable as a result of distinctiveness acquired through use. It also wanted to know if it made any difference that the signs were perceived as decorative or that the registered mark was either inherently non-distinctive or descriptive.

ECJ'S DECISION

The ECJ noted that it had previously held that the requirement of availability is the reason underlying certain grounds for refusal of registration set out in Article 3 of the Directive (see *Windsurfing Chiemsee* [1999] ECR I-2779; *Linde* [2003] ECR I-3161 and *Libertel* [2003] ECR I-3793). When a third party relies on the requirement of availability to argue its right to use a sign, the relevance of such an argument must be examined in the light of Articles 5 and 6 of the Directive.

INTERPRETATION OF ARTICLE 5(1)(B)

In conferring on a trade mark owner the right to prevent competitors from using an identical or similar sign where there is a likelihood of confusion, and in setting out the uses of such a sign which may be prohibited, Article 5 of the Directive seeks to protect that owner from uses of signs likely to infringe that trade mark. The likelihood of confusion has been defined as the public believing that the goods or services in question come from the same undertaking. According to the Directive, the appreciation of such likelihood "depends on numerous elements and, in particular, on the recognition of the trade mark on the market, of the association which can be made with the used or registered sign, of the degree of similarity between the trade mark and the sign and between the goods or services identified". The likelihood of confusion must therefore be appreciated globally, taking into account all factors relevant to the circumstances of the case.

However, those factors did not, in the ECJ's view, include a need for the sign to be available for other economic operators. As is apparent from the wording of Article 5(1)(b), the assessment of likelihood of confusion must be based on the perception by the public of the respective goods covered by the respective mark. Moreover, signs that must generally remain available for use by competitors are likely to be used abusively in such a way as to create confusion in the mind of the relevant public.

Logically the ECJ went on to so say that "if, in such a context, the third party could rely on the requirement of availability to use a sign which is nevertheless similar to the trade mark freely without the proprietor of the latter being able to oppose that use by pleading likelihood of confusion, the effective application of Article 5(1) would be undermined" and this should apply particularly to stripe motifs.

In that respect, the ECJ then held that the public's perception that a sign is a decoration cannot constitute a restriction on the protection conferred by Article 5(1)(b) of the Directive when, despite its decorative nature, that sign is so similar to the registered trade mark that the relevant public is likely to perceive that the goods come from the same undertaking.

The ECJ then took the next step of determining whether the average consumer, when viewing sports or leisure garments featuring stripe motifs in the same places and with the same characteristics as the stripes logo registered by Adidas (except for the fact that they consist of two rather than three stripes), may be mistaken as to the origin of those goods, believing that they are marketed by Adidas AG. The Court stated that a case of "mistaken identity" depends not just on the degree of similarity between the trade mark and the competitor's sign, but also the ease with which the sign may be associated with the mark having regard, in particular, to the recognition of the latter on the market.

In other words, the more well known the mark is, the greater the number of operators who will want to use similar signs. The presence on the market of a large quantity of goods covered by similar signs might adversely affect the trade mark in so far as it could reduce the distinctive character of the mark and jeopardise its essential function, which is to ensure that consumers know where the goods concerned come from.

INTERPRETATION OF ARTICLE 5(2)

There was no dispute between the parties that the three stripe logo registered by Adidas is a trade mark with a reputation that benefits from both the protection conferred by Article 5(1) of the Directive and the extended protection granted by Article 5(2) of the Directive.

Article 5(2) of the Directive establishes, for the benefit of trade marks with a reputation, a form of protection whose implementation does not require the existence of a likelihood of confusion. Article 5(2) applies to situations in which the specific condition of the protection consists of a use of the sign in question which takes unfair advantage of, or is detrimental to, the distinctive character or the reputation of the trade mark.

The infringements referred to in Article 5(2) of the Directive, where they occur, are the consequence of a certain degree of similarity between the mark and the sign, by virtue of which the relevant section of the public makes a connection between the sign and the mark. That is to say, the public establishes a link between them even though there is no confusion present. It is not therefore necessary that the degree of similarity between the mark with a reputation and the sign used by the third party is such that a likelihood of confusion exists. It is sufficient for the degree of similarity between the mark with a reputation and the sign to have the effect that the relevant section of the public establishes a link between the sign and the mark. The existence of such a link must be appreciated globally, taking into account all the relevant factors relevant to the circumstances of the case.

In the Court's view, however, it was clear that the requirement of availability is extraneous both to the assessment of the degree of similarity between the mark with a reputation and the sign used by the third party and to the link that may be made by the relevant public between that mark and the sign. It cannot therefore constitute a relevant factor for determining whether the use of the sign takes unfair advantage of, or is detrimental to, the distinctive character or the reputation of the trade mark.

INTERPRETATION OF ARTICLE 6(1)(B)

Article 6(1)(b) of the Directive provides that the proprietor of a trade mark cannot prohibit a third party from using, in the course of trade, indications concerning the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of the service, or other characteristics of goods or services, provided he uses them in accordance with honest practices in industrial or commercial matters. Specifically, Article 6(1)(b) seeks to ensure that all individuals have the opportunity to use descriptive indications.

In the ECJ's view, however, the requirement of availability could not in any circumstances constitute an independent restriction on the effects of the trade mark in addition to those expressly provided for in Article 6(1). In that regard, in order for a third party to be able to plead the limitations of the effects of the trade mark in Article 6(1)(b), the indication used by it must relate to one of the characteristics of the goods marketed or the service provided by that third party.

COMMENT

The fact the public might view a sign as a decoration will not restrict the protection given to that sign by Article 5(1)(b). It is up to the national court to determine whether there is infringement by assessing whether, as in this case, the average consumer, when viewing a two stripe motif would be confused or misled. As to the descriptive use defence, according to the ECJ, Adidas' competitors were trying to rely on the purely decorative nature of the two stripe motifs to justify their use, whereas the placing by those competitors of stripe motifs on their garments is not intended to give an indication concerning one of the characteristics of those goods.

The fact that the two stripe motif is decorative will not prevent it from causing confusion with the Adidas brand, nor will the fact that the two stripes were decorative in nature allow competitors to invoke the Article 6(1)(b) defence under the Trade Marks Directive. In other words, for highly distinctive elements in trade marks, the "mere embellishment defence" will not be a viable argument, although the proverbial jury is still out on whether the same would apply when the elements are not so distinctive or famous.

Copyright

Format shifting exception—industry response

The Music Business Group (MBG) has taken exception to how the UK Government plans to "take forward" the Gowers recommendation to introduce a private copying exception to copyright infringement that would allow consumers to format shift music for use on different devices. This article sets out the MBG's position.

BACKGROUND

The format shifting exception, as proposed, would allow consumers to make a copy of music they have bought into another format so that it can be played back on a different device. The exception would apply only to personal or private use and the owner would not be permitted to sell, lend, or give away the copy, or share it more widely, for example, over the internet. The owner would not be entitled to hold on to the copy if no longer in possession of the original. Multiple copying would not be allowed and third parties would not be allowed to copy works on anyone's behalf.

In a consultation paper released in January 2008—*Taking forward the Gowers' Review of Intellectual Property: proposed changes to copyright exceptions*—the UK Intellectual Property Office (UK-IPO) discussed the possible parameters of the exception, including the types of work it should cover, whether consumers should be permitted to repeatedly shift content for use on different devices they own, and the timing of the application of the exception. Its thoughts were particularly clear, however, on the question of whether copyright levies, or anything equivalent, should be introduced to compensate rights holders for the effect of the new exception. Notwithstanding the requirement in Article 5(2) of the Copyright Directive (2001/29/EC), that private copying can be permitted as an exception only if fair compensation is available, the UK-IPO has taken the view that the concession as proposed is too narrow to warrant compensation under Article 5(2). In other words, there would be no significant harm to the rights holder that would need to be compensated. The MBG's view, however, is that the UK-IPO has missed the point.

MBG'S RESPONSE

The MBG delivered its collective response on 8 April. It starts positively enough by saying that the MBG wholeheartedly welcomes this debate. It concedes that whilst technically illegal in the United Kingdom, consumers want to format shift and place enormous value on the transferability of music. Music fans, according to the MBG, "clearly deserve legal clarity in this area as well as the freedom to enjoy any music they have legitimately obtained". However, the MBG clearly thinks that this freedom, to the extent that consumers are becoming accustomed to it, should come at a price.

The MBG's point is that it is not just music lovers who will benefit from the exception since enormous value is derived by technology companies and manufacturers who enable consumers to copy. Those that the MBG represents want their share and consider it unfair that they are excluded from the value chain, despite the fact that they are legally entitled to share in this value as they are the ones that hold the exclusive right to reproduce the music.

The MBG also says that the UK-IPO's recommendation, in its current form, leaves the United Kingdom at odds with the rest of Europe. It argues that in every other major European territory an exception for private copying is counterbalanced by mechanisms that compensate creators and rights holders. It suggests that this "principle" was reiterated by Internal Market Commissioner Charlie McCreevy in his call earlier this year for a revival of the debate over copyright levies, a debate that

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faltered in 2007 when it became clear that stakeholders were incapable of "finding a common way forward". Mr McCreevy did indeed say that "there can be no question of calling into doubt the entitlement of rights holders for compensation for private copying". He did not, however, acknowledge that such compensation should extend to format shifting. Nevertheless, the MBG tries to draw further support from the nited Kingdom's "largest academic survey into the music consumption habits of young people", undertaken by the University of Hertfordshire and British Music Rights. This found that 90 per cent of those who supported a licensing system agreed that creators should be compensated for private copying.

In a nutshell, the MBG's position is that "to restore a balance of copyright", the UK-IPO should turn to "an easily-implemented, flexible, future-proofed and transparent solution: an exception subject to licence". Rather than wholesale copying and sharing of music, this would allow consumers to transfer music they have purchased onto portable devices, "while ensuring that a fraction of the value is enjoyed by those who create music and invest in its creation". In the MBG's view, this licensing scheme should be restricted to copying "in the offline world". The MBG's generosity of spirit is encapsulated in the words of its Chairman, Stephen Navin: "…our willingness to license is part of our DNA, and in the existing shape of our collecting societies, the MCPS-PRS Alliance and PPL, we have the apparatus and expertise to make this happen".

COMMENT

The music industry wants to get its hands on some of the revenue that it believes hardware manufacturers and communications companies have derived from private copying in the United Kingdom. Besides the time shifting exception, the United Kingdom does not have currently a private copying exception of any sort, nor does it impose a private copying levy and there is no intention to introduce one. The United Kingdom has always shied away from introducing copyright levies that, although rife throughout the European Union, tend to be applied according to no clear formula. If the principle of compensation for private copying is clear, the correct level is far from it. Levies are hardly likely to be seen by the UK-IPO as a way forward; that leaves compensation by way of a licensing scheme. Indeed, Gowers suggested that the format-shifting exception should be introduced on the basis of a block licence administered by the collecting societies. The UK-IPO clearly considered this an impractical solution and basically ignored it. There appears to be nothing that the MBG can say that is likely to make it change its mind.

E-Commerce

EU study and recommendations on the regulation of video games

The European Commission has published a Communication on the protection of consumers, in particular minors, in respect of the use of video games. This article reviews the communications in which the Commission has set out its expectations in respect of the video games industry and the duty of public authorities in EU Member States to improve upon existing measures protecting minors from harmful video games distributed in the European Union.

BACKGROUND

In 2002, the European Council published a Resolution on the protection of consumers through the labelling of certain video and computer games according to age group. The self-regulatory Pan European Games Information age rating system (PEGI) was adopted in April 2003 as a voluntary, self-regulatory system designed to ensure that minors are not exposed to games that are unsuitable for their particular age group. The system replaced a large number of existing national age-rating systems. The Commission's Communication records the results of a survey conducted across all Member States to gather information and input for reporting in depth on trends in the protection of consumers in respect of video and computer games since the adoption of the Council Resolution. Questions covered age ratings, content rating systems, the sale of video games in retail shops, video game bans, effectiveness of current measures for the protection of minors, online video games and a cross-platform pan-European rating system.

AGE RATING/CONTENT RATING SYSTEMS

The survey revealed that the vast majority of EU Member States use PEGI, even if not all of these countries have specific legislation in place. In the United Kingdom, the computer games industry uses PEGI for most video games. Video games with material of a sexual nature, or portraying gross violence, are subject to the approval of the British Board of Film Classification (BBFC) which then awards age-related classifications that differ from PEGI. In France, PEGI is used to classify labelled video games, and recent amendments to French criminal law provide for age classification and labelling of video games according to age group. Belgium, Bulgaria, Denmark, Estonia, Hungary, Ireland, Spain and Sweden all apply PEGI, but have no specific legislation. Germany and Lithuania have specific binding legislation. In Germany, the self-regulatory PEGI system is not used; German law on the protection of young people includes specific measures for age rating and labelling of video games. Certain countries, including Cyprus and Slovenia, have no age or content rating system in place and no related legislation.

Thus, there is room for improvement with regards to the take-up of the PEGI system and the compatibility of applicable national provisions with PEGI.

SALE OF VIDEO GAMES IN RETAIL SHOPS

The Commission's survey also revealed that half of the Member States have specific civil and criminal provisions concerning the physical sale of video games with content harmful to minors and there are various penalties to enforce these provisions. Member States aiming at or already using classification for distribution, circulation and advertising based on an age-content rating include Estonia, Germany, Greece Italy and the United Kingdom. France, Sweden and the Netherlands prohibit certain violent video games under criminal law, and, for lawful games, Swedish retailers have agreed to follow the PEGI rating system for sale. A number of countries, however, have no specific legislation governing the sale of video games. The Commission believes that the next logical step is a Code of Conduct for video games retailers. It refers, by way of example, to the U.S. system, marshalled by the Entertainment Software Rating Board (ESRB) which, with industry co-operation, advises parents and other consumers on rating matters. Consumers can report infringements to retailers and to the ESRB website.

BANS ON VIDEO GAMES

Only four Member States—Germany, Ireland, Italy and the United Kingdom—have actually banned certain video games. In the United Kingdom, the Manhunt 2 debate received significant press attention. In June 2007, the BBFC refused a certificate to Manhunt 2. This was overturned by the Video Appeals Committee and, notwithstanding a successful judicial review by the BBFC, the Video Appeals Committee upheld its own decision and the BBFC was forced to issue an 18 certificate. By contrast, in Italy, dissemination of Manhunt 2 was blocked in June 2007 by the Minister of Communications.

ONLINE VIDEO GAMES

The Commission's survey revealed that the vast majority of Member States do not have specific legislation for online video games, like World of Warcraft, that allow players to interact with each other online. However, some do use PEGI Online and a number apply by analogy general and specific legislation concerning offline video games. In Ireland, for example, offline and internet video gaming activities are treated equally under the law and a hotline has been set up to report any illegal or harmful material on the internet. Overall, however, the Commission considers that additional efforts are needed with regard to online video games, in order to take account of their specificities. The Commission argues that a swift and effective mechanism for age verification is needed and particular attention should be paid to chat rooms.

A CROSS-PLATFORM, PAN-EUROPEAN RATING SYSTEM

The Commission notes that the majority of Member States favour cross-platform pan-European classification and that PEGI is considered both useful and feasible, with potential for further development. There is, however, resistance from France, Hungary and Portugal, all of which consider a cross-platform classification system impossible. These countries argue that different types of media need different conditions for dissemination and access and specific types of consumption require different classifications and regulations. Additionally, they regard different cultural and moral sensitivities as an obstacle to a single classification system. Germany, similarly, is happy with its own system. Nevertheless, the majority of Member States favour the promotion of self-regulatory and co-regulatory systems. The UK system, as proposed, reflects the prevailing attitude.

CONCLUSIONS

The good news is that most Member States apply PEGI, the vast majority have related legislation and quite a number have recently improved their legislation or are in the process of doing so. Some Member States have even based this legislation on PEGI. A number of Member States have been found wanting, however, and those that don't carry any age-rating initiatives are urged to do so. Additionally, the majority of Member States do not have specific legislation for online video games although some consider the legislation of offline video games applies by analogy and some use PEGI Online.

Against this background, the Commission has now reached a number of conclusions and has made several recommendations. These include suggesting that Member States integrate into their national systems the information and classification systems under the PEGI framework and PEGI Online. Additionally, it calls upon the video games and consoles industry to improve the PEGI systems, in particular by regularly updating the criteria for age rating and labelling and advertising PEGI more actively. The Commission would also like to see further commitment to the offline retail side. It calls specifically for a pan-European Code of Conduct on the sale of games to minors and commitments to raise awareness of the PEGI system. Finally, it encourages Member States and all stakeholders to take initiatives to improve the media literacy applied to video games. Ultimately, the Commission is seeking harmony and consistency between systems adopted at national level. Whilst the attitude of certain Member States suggests that this is not entirely achievable, the United Kingdom should monitor closely and participate in the European developments to avoid adopting measures that are not more confusing or less workable than those adopted in other parts of the European Union.

File sharing and ISP responsibility

This article examines the ongoing debate over whether or not internet service providers (ISPs) should be legally required to monitor and take responsibility for preventing their customers from infringing copyright when online file sharing.

BACKGROUND

The UK Government, in its recent Creative Britain Green Paper, promised that, should "voluntary, preferably commercial solutions" not be forthcoming, it would consult on legislation that would require ISPs and rights holders to co-operate in taking legal action on illegal file sharing, with a view to implementing legislation by April 2009. The Green Paper made no specific mention of adopting a "three strikes and you're out" approach to voluntary enforcement of anti-file sharing policy by ISPs. However, it is that model, as adopted by the music industry and ISPs in France, with the backing of the French Government, that the International Federation of the Phonographic Industry (IFPI) hails as the template for communications companies made to face up to their role in policing copyright infringements across their networks. Indeed, some jurisdictions have gone even further: Belgium ordered Tiscali to implement filtering software to block illicit content in the SABAM case.

Nonetheless, the rights holder lobby has been confronted with some formidable obstacles, not least the law as it currently stands. With the review of the E-Commerce Directive (2000/31/EC) postponed for another year, the "mere conduit" and "hosting" safe harbours currently protecting ISPs from liability deter ISPs from becoming actively involved in anti-file sharing policies. Case law has not come to the music industry's aid either. The European Court of Justice recently found in the *Promusicae* case that ISPs cannot be forced to disclose the identities of individual file sharers to rights holders seeking to bring civil proceedings against those individuals unless the Member State in which disclosure is sought has implemented a specific derogation from the obligation on ISPs under the E-Privacy Directive (2002/58/EC) to respect the confidentiality in electronic communications.

In the United Kingdom, ISPs themselves appear divided on the issue of what their role should be. Virgin Media is working with the British Phonographic Industry (BPI) on piloting a system of warnings to file sharers, followed by disconnection for persistent infringers. Virgin Media is reportedly willing to work with BPI technicians to trace illegal music downloading to individual accounts and match them to names and addresses. Virgin Media will then send a warning letter notifying customers of their infringement, followed by suspension of internet access for a second infringement and, ultimately, disconnection if necessary. TalkTalk, however, has taken an opposing stance and is stressing that the BPI's demands for ISPs to disconnect people who ignore requests to stop file sharing are "unreasonable and unworkable" (Policing Internet "not ISP's job", BBC News), and that the role of an ISP is to act as a mere conduit that gives users access to the internet, rather than an operation that controls what users do on the internet.

AN *IMPASSE?*

Ultimately, however, such intransigence on the part of ISPs will not be welcomed by the music industry. Many in the industry cannot see why ISPs, when notified of an infringing account, cannot take at least the first step of notifying the individual behind that account that his activities are unlawful. Beyond that point, however, the position becomes more complicated in both legal and practical terms. The E-Commerce Directive and the decision in *Promusicae* complicate the legal position for rights holders whilst offering a line of defence to the ISPs. Furthermore, as noted by the Electronic Frontier Foundation's European Co-ordinator, Erik Josefsson, if ISPs are to be legally bound to monitor and enforce actions against copyright infringing users, "as encryption techniques improve, the surveillance will become more vigilant and slow down everyone's traffic in order to actually work. Files identified as infringing may in fact be legitimate or justified by the exceptions and limitations of copyright, yet 'graduated response' affords no due process to appeal mistaken claims". The UK Government's follow-up to its Green Paper (expected any day now) will make interesting reading and will no doubt come in for some criticism if it does not address all of these issues.

Unfair contract terms—National Consumer Council survey and findings

The National Consumer Council (NCC) has continued its campaign against onerous terms in IT and user licence agreements (EULAs) with the publication of its findings following a survey conducted last year into B2C software supply. The findings of the NCC are summarised in this article.

BACKGROUND

In April 2007, the NCC carried out a shopping survey of 25 popular software products, aimed at assessing compliance with consumer protection regulations. The products were chosen to reflect different types of software commonly used in home computers, specifically: security and anti-virus; digital media; office suites; lifestyle and hobbies; games and educational. The NCC's research followed a typical consumer journey from the purchase of a product through to the installation process. The NCC then analysed the terms laid out in each EULA to see how they stood up against UK consumer protection legislation. The NCC looked at the gaps in consumer rights protection, and in particular how the exemption for intangible goods from the Sale of Goods and Associated Guarantees Directive (1999/44/EC) affects the level of protection available to consumers when they buy software.

PRE-SALE NOTIFICATION

The NCC found that 14 of the 25 products surveyed included no mention at all that installation of the software depended on the user accepting a licence agreement. For those that did, only four gave a uniform resource locator (URL) where users could obtain an online copy of the agreement. Only one product, the *Kaspersky Anti-Virus 6*, gave sufficiently up-front information. This had a seal on the CD case with instructions to read an enclosed paper copy of the licence before installation. Even then, however, the NCC was not happy as the agreement was only readable after the packaging had been opened which, in its view, meant that the product could not be returned under the Distance Selling Regulations (SI 2000/2334).

This is not a view shared by the Office of Fair Trading (OFT). In its recent web selling analysis, the OFT emphasised that the consumer's duty is to take reasonable care of goods prior to return, which may involve inspection of the goods and would clearly stretch to reading a paper copy of the licence agreement. Nevertheless, the main focus of the NCC's study is the imbalance in the respective rights and obligations of supplier and consumer. The lack of "up-front" information, in the NCC's view, clearly adds to that imbalance. Most of the products merely presented the licence agreement on screen during installation and one (the *AA Route Planner 2007*) actually prevented the customer from retaining a copy.

CONSUMERS AT A DISADVANTAGE

The NCC also found what it considered a potential to mislead consumers in the way terms and conditions were presented to the consumer in relation to several products. In the majority of cases, it found that the text of the agreement was set out in a small window, forcing the user to scroll through to read the whole agreement. The NCC considered that putting the onus on the user to decide to see the whole agreement increased the likelihood that the user would accept the terms without reading them.

INTERNATIONAL SUPPLIERS

The NCC accused international suppliers of attempting to shift legal uncertainty over the validity and application of terms in the EULA onto the user. In fact, only one of the 25 products asked for information about the country in which the software would be used and this used exactly the same text for countries with the same language regardless of differences in local consumer law. In particular, the NCC criticises the use of the "catch-all disclaimer heavily skewed in favour of the provider", which appeared to put the onus on the consumer to check the relevance of the applicable law on each of the terms and, whether, if that law was unenforceable, to second guess how a reworded contract might affect their use of the product. Most of the products surveyed carried this type of disclaimer.

TERMINATION

Another problem area was termination. The UTCCRs provide that terms may be unfair if they have the object or effect of enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice, except where there are serious grounds for doing so. In this respect, the NCC noted that certain packaging referred to the provider's right to suspend services for either misuse of the software or suspected failure to comply with the agreement. This provided that the consumer would need to clear his or her name in court before being able to use certain features again and even then there would be no guarantee that their data would still be available. In the NCC's view, the potential destruction of personal data without notice "…signals a significant imbalance between the rights of the consumer and the rights holder".

LEGAL JARGON

A further concern of the NCC was the small print cliché: "this does not affect your statutory rights", a phrase that the NCC considers legal jargon, rather than plain intelligible language, as required by the UTCCRs. Legal jargon had a habit of creeping into commonly used and invariably sweeping indemnity clauses. Such jargon was said to be unlikely to be understood by the consumer.

ANALYSIS

In the "analysis" section of the report the NCC refers to two main "fault lines" in the relationship between providers and end users.

The first is the "information asymmetry" already discussed, that suppliers are accused of exploiting to maintain the upper hand. The second is characterised by a number of loopholes in the legal framework that exclude digital software. In this respect, the NCC refers specifically to the Sale of Goods and Associated Guarantees Directive which is implemented in the United Kingdom by the Sale and Supply of Goods to Consumers Regulations 2002/3045. The Directive provides protection for consumers in relation to purchased products that do not conform to the sales contract. The seller is liable to the consumer for any "lack of conformity" that comes to light for up to two years after the sale. In the United Kingdom, this has been extended to six years after purchase. The scope of protection, however, is limited to "tangible moveable items". Purchasers of "intangible" items, like software, don't enjoy the same protection.

The NCC suggests that the use of disclaimers and warranty limitations highlights the problem for software consumers. For example, the licence agreement for one product surveyed excludes liability "to the extent not prohibited by law" for what the NCC considers a wide variety of scenarios that would cause consumer detriment. If the software, for instance, contains a bug that damages a computer, the provider will not compensate the consumer unless legally obliged to do so.

The NCC obviously considers this to be a serious gap in the legal framework, and is lobbying the European Commission, which is currently reviewing the Directive as part of its wider review of the consumer acquis, to plug the gap by including software and data within the Directive's ambit.

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UTCCRs

The NCC then went on to find support for its interpretation of some of the shortcomings on the suppliers, covered by its survey in a number of OFT and Office of Communications (Ofcom) investigations under the UTCCRs.

The NCC noted that regulators have a clearly defined role in enforcement of the UTCCRs, including an obligation to consider any complaint made about the fairness of any contract term not individually negotiated. Regulators may seek assurances from, or even injunctions against, suppliers in relation to unfair terms. The NCC notes that whilst only a court can determine whether a term is legally in breach of the UTCCRs, the OFT and other regulators have successfully negotiated revised contracts in a number of cases. In this respect, a term is considered unfair if, contrary to the requirement of good faith, it causes a significant imbalance in rights and obligations to the detriment of the consumer.

By way of example, the NCC refers to Ofcom's 2006 investigation relating to the mobile operator *3* and its standard service agreement. The term included a statement that the agreement was governed by English law and that the two parties agreed to only bring legal action under the agreement in an English court. Ofcom considered this potentially unfair because consumers should be entitled to have their legal rights considered by a local court and subject to local law, regardless of where they live in the United Kingdom. The clause represented a potential breach of the UTCCRs that state that terms excluding or hindering the consumer's right to take legal action are potentially unfair. The NCC came across similar governing law statements in most of the agreements covered by its survey.

RECOMMENDATIONS

On the basis of its findings, the NCC made the following recommendations to software providers:

- Supply information up-front about the licence and access to the terms and conditions, before the consumer has purchased the product.
- Ensure that licence agreements are written in plain English and presented in a clear and accessible format.
- Do not shift the legal burden onto the consumer (*i.e.*, the content of licence agreements should be relevant to the product and the applicable law of the consumer).
- Take active steps to ensure that terms and conditions are not unfair (i.e. they should not simply passively wait for regulators to act or the courts to enforce the law).

COMMENT

The NCC's study is notable for its insight into the types of terms and conditions that regularly fall foul of the relevant legislation and the UTCCRs in particular. The NCC is not the first to criticise the "take it or leave it" approach in EULAs, which, to the NCC, read "more like legal mandates than consumer options… they create their own opaque, legal framework".

The NCC's study also highlights software suppliers' desire for complicated, non-negotiable terms that mean little to the average consumer who has no specialist legal or ICT knowledge. Indeed, the NCC considered most of the licensing agreements in its survey virtually unreadable and riddled with terms totally at odds with the duty under the UTCCRs that require that contracts are expressed in plain and intelligible language.

Consequently, the NCC has called upon the OFT to "examine" the potentially unfair contract terms identified in its report. The NCC's interpretation in most respects echoes existing concerns raised in a series of investigations over the last two years by the OFT and Ofcom in relation to potentially unfair terms in the EULAs and service agreements of IT and communication suppliers of varying sizes.

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