



ADVERTISING & MARKETING

The Office of Fair Trading's Quick Guide: Business-to-Business Promotions and Comparative Advertisements

The "quick guide" on business-to-business promotions and comparative advertisements published by the Office of Fair Trading (OFT) at the end of March 2009 tells us nothing we don't already know about the Business Protection from Misleading Marketing Regulations 2008 (BPRs). However, it is worth a look if only to confirm the regulator's approach to enforcement of the BPRs. Although the examples it gives of infringement are simplistic, businesses can have little excuse for breaching the regulations through any of the practices to which the guidance refers.

BACKGROUND

The BPRs came into force on 26 May 2008 alongside the Consumer Protection from Unfair Trading Regulations 2008 (CPRs). Misleading advertisements directed at consumers are now dealt with under the CPRs. The BPRs prohibit businesses from advertising products in a way that misleads traders and sets out conditions under which comparative advertising, to both consumers and business, is permitted. The BPRs also require code owners (namely traders and bodies responsible for codes of conduct or monitoring compliance with such codes) not to promote misleading advertising and comparative advertising, which is not permitted.

MISLEADING ADVERTISING

As the OFT points out,

If your business advertises goods or services to other businesses, or if in your advertisements to businesses or consumers you make comparisons that identify a competitor, or products offered by a competitor, the regulations are likely to apply to your business.

The BPRs cover conventional forms of advertising as well as marketing and promotional activities such as details in catalogues or websites and descriptions on packaging. In general terms, an advertisement will be misleading if it deceives or is likely to deceive the trader to whom it is addressed or whom it reaches and, by reason of its deceptive nature, is likely to affect their economic behaviour or, as a

result of the economic effect on traders, it injures or is likely to injure a competitor in some way.

An advertisement can be deceptive if it contains a false statement of fact, conceals or leaves out important facts, promises to do something where there is no intention of carrying it out, or creates a false impression. The new guidance also illustrates the concept of injury to a competitor as a result of the effect on the trader's economic behaviour.

In determining whether an advertisement is misleading, account must be taken of all its features and in particular any information about the characteristics of the product, such as its availability or fitness for purpose. The guidance provides the following example of misleading advertising.

A computer company advertises high definition computers on its website. On purchasing some computers for his office the trader discovers that the computers are not high definition but could be if further software is bought. This requirement was not mentioned on the website. The representations made on the company's website would be considered misleading regarding, amongst other things, the nature and specification of the product.

COMPARATIVE ADVERTISING

Comparative advertising is now regulated under the BPRs and, insofar as it is directed at consumers, also to some extent by the CPRs. A comparative advertisement is one that identifies a competitor or products offered by a competitor either explicitly or by implication.

The OFT's guidance sets out a comparative advertising compliance checklist, *i.e.*, those features that a comparative advertisement must not contain and gives several examples of prohibited comparative advertisements. These include

Manufacturer A's website compares the price of their desk chairs to that of manufacturer B's, highlighting the fact that their chairs are £100 cheaper than manufacturer B's. Manufacturer B's chairs are more expensive as they are made of leather, whilst manufacturer A uses faux leather.

This comparative advertisement could be misleading under the BPRs (*e.g.*, deceiving traders and, as a result, affecting their economic behaviour) since it is potentially deceptive in terms

of the lack of information provided about the composition of the product.

ENFORCEMENT

The BPRs place a duty on the OFT to enforce breaches of the BPRs alongside other enforcement authorities, in particular, local authority Trading Standards Services. The trader may be required to publish a corrective statement about the advertisement. The OFT says that it will generally seek to ensure compliance with the BPRs through education, advice and guidance in the first instance. An injunction will be sought generally only after the OFT has consulted with the trader in an attempt to obtain compliance. The enforcement authority may accept undertakings from the trader that the breach will be rectified. Misleading advertising is also a criminal offence, punishable with up to two years' imprisonment and/or an unlimited fine.

COMMENT

Businesses do not have a direct right of action under the BPRs although, in its response to the consultation leading up to implementation, the Government indicated that it would keep this under review. Nonetheless, there was speculation over how competitors might exploit the interaction of the BPRs with, for example, the enforcement of intellectual property rights, false attributions of which may amount to misleading advertising under Regulation 3. A veiled allegation of criminality can have a sobering and inhibiting effect on even the most aggressive comparative advertiser.

COMMUNICATIONS & NEW MEDIA

Retention of Internet Communications Data

The Data Retention (EC Directive) Regulations 2009 came into force on 6 April 2009, transposing into UK law the internet data requirements of the Data Retention Directive (2006/24/EC). The Directive's requirements for communications data for fixed network and mobile telephony were implemented in October 2007 by the Data Retention (EC Directive) Regulations 2007. Those Regulations are superseded and replaced by the new Regulations which cover all communications data relating to fixed and mobile telephony, internet access, internet email and internet telephony that are generated or processed in the United Kingdom by public communications providers in the process of supplying communications services. Under the 2009 Regulations, public communications providers are required to retain such data for a minimum of 12 months. To avoid duplication, where more than one service provider has access to data, only one need retain the data for the purposes of the Regulations.

The new Regulations replace the United Kingdom's voluntary regime for retention of communications data under Part 11 of the Anti-Terrorism, Crime and Security Act 2001, which has

been in place since the end of 2003 and was formalised in the Code of practice on voluntary retention of communications data. The requirement under the Code was for internet data to be retained for six months. The rationale behind the retention of communications data is to allow access to such data for law enforcement authorities to assist with investigations into criminal activities, particularly terrorism.

Communications data is essentially data about the traffic of communications generated or processed on the networks of communications providers or by the use of their services. Such data is used for a variety of business reasons, including billing, network management and prevention of fraud. It is defined in the Regulations as "traffic data and location data and the related data necessary to identify the subscriber or user". Traffic data and location data have the same meaning as under the e-Privacy Regulations 2003/2426 (which also governs the use of unsolicited commercial email). Location data is any data processed in an electronic communications network indicating the geographical position of the terminal equipment of a user. Traffic data is defined as any data processed for the purpose of the conveyance of a communication on an electronic communications network or for the billing in respect of that communication, including data relating to the routing, duration or time of a communication. Communications data therefore includes numbers dialled, the date and time of the start and end of a communication and IP addresses, but not the content of any communication.

COMMENT

On the basis that most communications providers already retain communications data, or because their business practices mean that the required data is retained by another public communications provider in the United Kingdom, most public communications providers should not be affected unduly by full implementation of the Directive. As under the 2007 Regulations, the Home Secretary may reimburse any expenses incurred by a public communications provider in complying with the provisions of the new Regulations, subject to expenses having been notified and agreed in advance.

The 2009 Regulations, however, are not end of story. On 27 April the Home Office published its consultation, Protecting the Public in a Changing Communications Environment, in which it ruled out the controversial idea of a central communications database but unveiled plans to legislate further to ensure that all the data that public authorities might require (subject to safeguards under the Regulation of Investigatory Powers Act 2000), including third party data, is collected and kept in the United Kingdom. It outlined the implications as follows

Communications service providers based in the UK would therefore continue to collect and retain communications data relating to their own services but also collect and store the additional third party data crossing their networks. This would

therefore include communications data which does not come under the scope of the EU Data Retention Directive... This option would put additional demands on industry, especially around the collection and retention of third party communications data not required for the business purposes of communications service provider

The Home Office, however, recognises that while this would resolve the problem that some communications data, which may be important to public authorities, will not otherwise be retained, “it would not address the problem of fragmentation: as data is increasingly held by a wider range of communications service providers”. It has a solution, which is to “require communications service providers not only to collect and store data but to organise it, matching third party data to their own data where it had features in common... This would require additional legislation.” The question of cost and reimbursement is likely to figure highly in the responses to the consultation.

Privacy, Profiling and Targeting

The collection and storage of user data by online service providers has become controversial. Service providers insist on the need for such processing while consumer groups raise concerns over the duration of data retention periods and the perceived invasive nature of some of these services. In a speech in Brussels in March, the European Consumer Commissioner, Meglena Kuneva, delivered a message to online service providers that “the current situation with regard to privacy, profiling and targeting is not satisfactory”. She highlighted three areas: privacy policies, commercial communications and commercial discrimination.

PRIVACY POLICIES

The Commissioner stated that “on the internet, consumers are in fact paying for services with their personal data and exposure to ads”. She opined that privacy policies must “submit to the same fairness and transparency standards that are commonly accepted in commercial contracts”. Maintaining the status quo is not an option.

Referring to the recent controversy over the change in terms and conditions of a popular social network, where it required 175 million users to notice the change and with internet users not normally reading contractual online terms, she posed the question “are we willing to delegate onto consumers the full task of monitoring the internet for abuses in the existing myriad of incomprehensible policies?” Clearly she thought not.

We must establish the principles of transparency, clear language, opt-in or opt-out options that are meaningful and easy to use...the right to have a stable contract and the right to withdraw...fair clauses and the right to participate in economic activity without selling your whole self indiscriminately as commercial fodder to the entire world.

COMMERCIAL COMMUNICATIONS

Of the risks associated with building user profiles, she is concerned that knowledge of users’ personal circumstances such as financial status or information relating to health, can potentially “translate into pressure”. She gave the following example

Assume for a second you receive an unsolicited message that your cholesterol is up alongside a recommended treatment. Is this help or pressure? What if the message is about your weight? Is it enough to signal the commercial nature of the message?

Ms Kuneva stated that there is evidence that individuals might abdicate their own evaluation of risks when given individual advice by an expert. This “reinforces the need to enforce the principle of identifying commercially sponsored messages” and those who send them.

Ms Kuneva noted that young people and children are being particularly targeted as “conduits” for advertisements. She wants to develop guiding principles in order to combat the dangers of over aggressive commercial messages and to establish criteria for a commercial message not to mislead by passing as personal advice.

COMMERCIAL DISCRIMINATION

The possibility for discrimination arises because personal and behavioural information can reveal how much the user is actually willing to pay for a service as well as the risks he or she is likely to take. It can also reveal the likelihood that the user will return the goods.

Ms Kuneva suggests that such information has the potential to be used to extract “the maximum price possible from you or to block your access to some services altogether”. This in turn would “damage the confidence in digital trade and services”. Excessive targeting in the form of price or commercial discrimination could potentially inhibit the ability of users to predict and compare prices, thus undermining competitiveness in a particular market. We must, she suggests, “start thinking about the parameters for legitimate discrimination”.

COMMENT

The language is emotive, the message emphatic. This is a “last chance given to business to improve the situation”. It is a “warning signal...but we cannot afford foot dragging in this area”. An inadequate response from online businesses could well mean legislative intervention. As Ms Kuneva puts it, “we will not shy away from our duties”. Industry therefore has some thinking to do.

Trade Mark Infringement and Those Links “At the Top of the Search Results”

In *Rescuecom Corp v Google Inc* [2009] (U.S. Court of Appeals for the Second Circuit), the U.S. Court of Appeals for

the Second Circuit overruled a district court decision that Google's sale of third party trade marks as keywords does not amount to use in commerce for the purposes of trade mark infringement under the Lanham Act.

BACKGROUND

In addition to displaying a list of links to websites in response to users' search terms, Google responds to a search request by showing context based advertising. An advertiser's purchase of a particular term causes the advertiser's ad to be displayed whenever a purchased term is searched. Controversially, Google's Keyword Suggestion Tool may suggest to an advertiser that it also purchase a competitor's trade mark.

THE CLAIM

Rescuecom sued Google for trade mark infringement, false designation of origin and dilution under the Lanham Act, 15 U.S.C. Sections 1114 and 1125. Rescuecom alleged that the recommendation and sale of its mark to advertisers so as to trigger their advertisements and links misleads the user to believe that the ads that appear on the screen are in fact part of the relevance-based search results.

DISTRICT COURT DECISION

The U.S. District Court dismissed Rescuecom's action on the grounds that Google did not use Rescuecom's trade mark in commerce within the meaning of the Lanham Act. The Court read *1-800 Contacts Inc v WhenU.com Inc* [2005] 414 F.3d 400 (2d Cir.19) to compel the conclusion that this was an internal use and therefore could not be a "use in commerce" under the Act.

COURT OF APPEAL'S DECISION

The Court of Appeals held that the district court misinterpreted the ruling in *1-800*. It rejected Google's submission that *1-800* suggested that the inclusion of a trade mark in an internal computer directory cannot constitute trade mark use. Google's recommendation and sale of Rescuecom's mark to its advertising customers were not internal uses. Furthermore, *1-800* did not imply that use of a trade mark in a software program's internal directory precluded a finding of trade mark use. The Court also rejected Google's argument that its use of RESCUECOM was no different from that of a retail vendor who uses "product placement" to allow one trader to benefit from a competitors' name recognition.

COMMENT

This latest U.S. case doesn't suggest that confusion between sponsored links and search results is out of the question but appears to refocus the debate on the less clearly delineated sponsored links at the top of the research results list.

SPORT

UK Department for Culture, Media and Sport Launches a Public Consultation on the Designation of Major National Events

On 8 April 2009, the United Kingdom's Department for Culture, Media and Sport launched a public consultation on the designation of major national events as "listed events" that must be shown on free-to-air television. The Free-to-air Events Review Consultation seeks views on three main areas: the principle of having a list; the criteria against which events might be listed; and the content of the list itself, including whether any non-sporting events meet the criteria. The list was last revised in 1998 and currently includes only major sports events. The most significant potential change likely to come out of the review is therefore the possible inclusion of non-sporting events.

BACKGROUND

The Audiovisual Media Services Directive (2007/65/EC) lays down the framework conditions in which the public may be guaranteed free access to the broadcast of events of major importance to society. Article 3 of the Directive enables, but does not require, each Member State to draw up legislation designating events which it considers to be particularly important for society and which should be made available on free-to-air television to as much of the population as possible. This is implemented in the United Kingdom by Sections 97 to 104 of the Broadcasting Act 1996 and is supplemented by the Code of Sports and Other Listed Events and Designated Events originally drawn up by the Independent Television Commission (ITC) and adopted by Ofcom. The events in the United Kingdom's list are split into two groups. The current list is as follows

Group A (full live coverage protected)

- The Olympic Games
- The FIFA World Cup Finals Tournament
- The European Football Championships Finals Tournament
- The FA Cup Final
- The Scottish FA Cup Final (in Scotland)
- The Grand National
- The Derby
- The Wimbledon tennis finals

Group B (Secondary coverage protected)

- Cricket test matches played in England
- Non-finals play in the Wimbledon Tournament
- All other matches in the Rugby World Cup Finals Tournament
- Six Nations Rugby Tournament matches involving home countries
- The Commonwealth Games
- The World Athletics Championship

- The Rugby League Challenge Cup Final
- The Rugby World Cup Final
- The Cricket World Cup – final, semi-finals and matches involving home nations
- The Ryder Cup
- The Open Golf Championship.

SHOULD LISTING CONTINUE?

The consultation paper reminds us that there is no obligation to list events, it is an option for which Member States can avail themselves.

ARE THE CURRENT CRITERIA RIGHT?

In 1998, certain criteria were considered in compiling the list and the panel wants to know whether the essential criterion test should remain and, if not, what should replace it in a sporting context and what the essential criteria should be for non-sporting events, should they be included.

Having qualified under the essential criterion test, an event was more likely to be listed if it exhibited particular characteristics such as being likely to command a large television audience or having a history of being broadcast live on free-to-air television. The panel wants to know whether these characteristics remain appropriate.

The panel also seeks opinions on whether the list should remain divided in this way.

WHICH EVENTS SHOULD BE LISTED?

The options here are to maintain the *status quo*, move existing events between the A and B groups, add new events, or remove existing ones. The panel, however, is seeking views on whether specific tournaments should be listed in their entirety or only selected stages, events or matches involving national teams or representatives.

COMMENT

The panel will take into account responses to the consultation when putting together its recommendations to the Secretary of State as to what, if any, changes should be made to the United Kingdom's current list. It is interesting to note that the panel is seeking views specifically on whether entire tournaments should be listed or just parts of them, as it has been suggested that the United Kingdom's list contains an anomaly in that only the final of the Rugby World Cup is listed whereas the entire European Championship (football) is listed.

The sports rights market is increasingly competitive, none more so than football and the DCMS has already acknowledged that listing an event inevitably depresses the value of the rights in that event. There are countervailing benefits of increased sponsorship resulting from guaranteed live free-to-air coverage, although this is apparently becoming less significant as the

increased rights on offer, including new media rights, maintain the value of events for large sponsors.

It will be interesting to see how the panel addresses the tension between the financial implications on the collective and specific markets for sports rights subject to statutory listing and political commitment to the concept of a sports event of "major importance for society".

COMMERCIAL

Construction of Contract Terms: The Courts' Reluctance To Declare Terms Void

In *Anglo Continental Educational Group (GB) Ltd v Capital Homes (Southern) Ltd* [2009] EWCA Civ 218, the English Court of Appeal ruled that where neither party's interpretation of a clause, which was poorly drafted and difficult to interpret, provides a satisfactory solution, the Court prefers an interpretation that makes the clause effective, over an interpretation that results in the clause being void.

BACKGROUND

The parties in this case reached an impasse over a contractual provision for a discount in the calculation of the purchase price for two properties. The properties fell within a conservation area and were subject to covenants that prevented their development without the consent of the covenantees, the trustees of the Cooper Dean Estate. The parties entered into an agreement on 4 January 2006 subject to the buyer, Capital Homes, obtaining planning permission for the development of the properties. Both parties had the right to terminate the agreement if planning permission was not obtained within nine months, subject to Capital Homes' right to waive planning permission.

Under the agreement, the purchase price was £862,000 "less the amount (including covenantees' fees and costs) required to obtain a deed of release/variation of the covenants...to enable the development to be implemented". Those fees were estimated between £8,000 and £10,000.

Capital Homes decided to waive the condition requiring planning consent. Completion did not, however, take place because a dispute arose as to the precise amount payable.

THE DISPUTE

Anglo Continental issued proceedings claiming that no discount was payable where the buyer had waived the planning condition and no deed of release/variation of the covenants was in existence at the contractual completion date. Capital Homes counterclaimed for damages for breach of contract, claiming that the discount was allowable but, as it couldn't be calculated at completion, a term should be implied for the deduction of an estimated amount at completion with the true amount to be determined at a later date.

At first instance, the judge disagreed with both interpretations. He declined to make a declaration as to what in his judgment was the true interpretation of the agreement, asserting that the declaration should only be made on the basis of a submission advanced by one or other of the parties.

COURT OF APPEAL DECISION

According to the Court of Appeal the agreement was not well drafted and neither party's interpretation produced a satisfactory solution. However, where an agreement was susceptible to an interpretation that would make it enforceable and effective, the Court should prefer that interpretation to any interpretation that would result in it being void. The Court should also prefer an interpretation that produced a result that the parties were likely to have agreed over an improbable result. The judge considered it improbable that the parties would have agreed that there should be no discount for the cost of obtaining release of the covenants where the planning condition had been waived.

In the Court's view, the discount was not conditional on planning permission and was calculable on the basis of what was reasonably required for the purpose of obtaining the release/variation of the covenants such as would enable the development.

In addition, it was held that the judge had been wrong to find that he had no jurisdiction to make a declaration.

COMMENT

This was an expensive way for the parties to find out that neither of them was right. As the recession hits, businesses may be tempted to cut costs and ask lawyers to put together deals on a shoestring or, worse, cobble agreements together themselves, storing up expensive problems for the future, with poor drafting of contractual terms at the heart of them.

DATA PROTECTION

Financial Fraud: Data Transfer "Necessary for Reasons of Substantial Public Interest"

In the matter of Bernard L Madoff Investment Securities LLC [2009] EWHC 442 (Ch), Mr Justice Lewison granted an application for the transfer of personal data in the possession of the joint provisional liquidators of a UK subsidiary to the trustee in bankruptcy of its parent company in the US, Bernard L Madoff Investment Securities LLC. The application was granted on the basis that it was necessary for reasons of substantial public interest. Although the judge acknowledged that the order could also be made on the basis that the transfer was necessary insofar as it related to legal rights and proceedings, he did not, however, go so far as to extend the order to "unspecified" information to be determined by the liquidators at their discretion as necessary for those purposes.

BACKGROUND

Bernard Madoff, former head of the Nasdaq stock market, stands accused of perpetrating possibly the biggest fraud in history. Some U.S. \$50 billion worth of investments made by individuals and organisations all over the world, including a large number of charities and public authorities, has apparently disappeared into the black hole of Mr Madoff's hedge fund and investment advisory business. Mr Madoff is alleged to have run a fraudulent investment scheme, paying investors from money paid in by other investors rather than from real profits.

CURRENT APPLICATION

The application before Mr Justice Lewison was brought by the joint provisional liquidators of the English company, Madoff Securities International Ltd, under Section 112 of the Insolvency Act 1986. The application sought various directions relating to the transfer of data regulated by the Data Protection Act 1998 and in particular the eighth data protection principle:

Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.

Neither the United States nor New York State is a territory that "ensures an adequate level of protection" for the purposes of the Directive. However, there are exceptions to the eighth data protection principle. In particular, Schedule 4 paragraph 4(1) disapplies the eighth principle where "the transfer is necessary for reasons of substantial public interest". The trustee and the liquidators' case was that the transfer of the information was necessary in order to unravel the alleged fraud and what has happened to the assets that had been invested in the Madoff empire.

JUDGE'S DECISION

Granting the application insofar as it related to specific data, the judge said that he was satisfied that it was in the public interest for an alleged fraud on this scale and of this complexity to be investigated. On the evidence, he was satisfied that transfers of the information were necessary for reasons of substantial public interest.

The judge also held that he would have granted the order to that extent under further exceptions to the eighth principle set out in paragraph 5 of Schedule 4, specifically where the transfer is necessary in relation to legal proceedings, for the purpose of obtaining legal advice, or for the purposes of establishing, exercising or defending legal rights. The fraud would undoubtedly involve legal proceedings; indeed, the liquidations of the companies involved in this application were two such proceedings. The establishment of legal rights would no doubt be necessary in order to wind up the affairs of both companies. It was also likely that the transfer was necessary to establish,

exercise or defend legal rights, although the judge made no finding to that effect.

However, the judge was not prepared to extend the order to information that was unspecified and which gave the joint provisional liquidators the discretion or the ability to make value judgments as to what they consider to be necessary. Lewison J did not consider that the Court should make a blanket order of that kind without knowing what it was that it was being asked to authorise.

Finally, the judge held that there was nothing in Section 235 of the 1986 Act that limited the liquidators' ability to have whomsoever they pleased at interview. However, it was clear from this provision that an interviewee could only be required to answer questions about the liquidators' company and not his own. Thus, the liquidators would be entitled to ask questions about the English company, which might shed light on the dealings and affairs of the American company, but Section 235 was not, in the judge's view, a short cut to an application by the American trustee in bankruptcy under Article 21 of the Cross-Border Insolvency Regulations.

COMMENT

The general reaction to this decision is that it is correct based on its particular facts. The scale of the fraud and the significance of the investigation into it means that there were particular reasons for allowing the transfer of data. However, this cannot be interpreted as generally liberalising the transfer of personal data to the United States as part of an investigation into the dealings of a company and its individuals. In practice, EU Member States are likely to have different ideas about where the "substantial public interest" threshold lies. U.S. multinationals, for example, have found themselves between a rock and a hard place in relation to the compatibility of U.S. whistleblowing schemes under the Sarbanes-Oxley Act (SOX), which apply to EU subsidiaries and EU restrictions on the transfer of personal data. To date, the EU authorities and national courts have taken a restrictive view on whether a U.S. company's obligations under SOX legitimise data transfer without consent. Such is the scale of the wrongdoing in this latest case that Lewison J's decision is unlikely to be interpreted as indicating otherwise.

TRADE MARKS

Budvar of Attrition

In *Anheuser-Busch Inc v OHIM* [2009] T-191/07 (unreported), the latest installment of the dispute over the use of the BUD and BUDWEISER trade marks by Anheuser-Busch and Czech company Budejovicky Budvar (Budvar), the European Court of First Instance (CFI) upheld a decision of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) Board of Appeal preventing Anheuser-Busch

from obtaining a Community Trade Mark for BUDWEISER. Rejecting various procedural grounds of appeal, the Court held that Budvar had made genuine use of its earlier international registration for BUDWEISER under Article 43 of the Community Trade Mark Regulation (40/94/EEC) (Regulation).

BACKGROUND

In April 1996, Anheuser-Busch filed a Community Trademark application for BUDWEISER for "beer, ale, porter, malted alcoholic and non-alcoholic beverages" in Class 32. Budvar opposed the application on the basis of its prior international registration for the word BUDWEISER for "beers of any kind" and two prior international registrations for figurative marks including the word BUDWEISER. OHIM rejected Anheuser-Busch's application on the basis that the trade mark applied for was identical to the earlier international word mark BUDWEISER, protected in particular in Austria and Germany. Anheuser-Busch appealed to the Court on a variety of procedural grounds and argued that the OHIM Board of Appeal had misinterpreted Article 43 of the Regulation on the basis that the evidence provided by Budvar was insufficient to prove genuine use of the earlier word mark.

THE DECISION

Analysing the case law on genuine use, the Court noted that there was genuine use of a trade mark where the mark was used in accordance with its essential function, namely to guarantee the identity of goods or services for which it is registered. Moreover, genuine use did not include token use for the sole purpose of preserving the rights conferred by a registration. When analysing whether use of the trade mark was genuine, the Court had to have regard to all the circumstances relevant to establishing whether the commercial exploitation of the mark was real in the particular case, including the nature of the goods and services, the characteristics of the market and the scale and frequency of use of the mark.

On the facts, the relevant evidence consisted of seven advertisements in Austrian newspapers and magazines which appeared between 1995 and 1997 and eight advertisements from German magazines which appeared between 1996 and 1998, in which the word "Budweiser" was used in connection with beer. Budvar also submitted 23 invoices issued to Austrian customers between 1993 and 2000 and 14 invoices issued to German customers between 1993 and 1997. The Court agreed with the OHIM Board of Appeal that Budvar had submitted sufficient evidence to show genuine use of the mark BUDWESER in connection with beer covering the relevant five year period before the publication of Anheuser-Busch's Community Trade Mark application required by Article 43 of the Regulation.

Anheuser-Busch's argument that OHIM should not have taken into account certain evidence that Budvar filed late was rejected on the basis that OHIM had a wide discretion to decide whether to consider such documents.

COMMENT

The case confirms the principles set out in previous European case law that even minimal use of a mark is sufficient to constitute “genuine use,” provided that it has a real commercial purpose. Although Budweiser was denied a Community Trade Mark, the ruling will not affect the trade mark rights that it holds in individual European countries.

A Community Trade Mark Application Cannot be Implicitly Withdrawn

In *Laytoncrest Ltd v OHIM* [2009] T 171/06 (unreported), the Court of First Instance (CFI) annulled a decision made by the Second Board of Appeal of the Office for Harmonisation in the Internal Market (OHIM), finding that the Board had erred in finding that a Community Trade Mark (CTM) application had been implicitly withdrawn and in fact, withdrawal of a trade mark application must be express and unequivocal.

BACKGROUND

In July 2001, Laytoncrest filed an application for a CTM for the word TRENTON in Classes 7, 9 and 11. Erico International Corp filed an opposition based on its earlier registration of LENTON in Classes 6 and 7; the specification of goods in Class 7 being identical for both marks.

Laytoncrest did not file any observations on Erico’s opposition and was notified by OHIM that OHIM proposed to rule on the opposition on the basis of the evidence before it. The Opposition Division rejected the opposition, finding that there was no likelihood of confusion between the marks, despite the partial identity and partial similarity of the goods concerned.

Erico appealed to OHIM’s Second Board of Appeal stating that Laytoncrest did not exist, given its “complete procedural inactivity“. In the absence of Laytoncrest’s response, the Board of Appeal sought confirmation by telephone that no observations were to be submitted.

Subsequently, it was held that, on account of its procedural inactivity, Laytoncrest had implicitly withdrawn its application. The Board stated that while it is normal for this to be done explicitly, the CTM Regulation does not exclude the possibility that the withdrawal of a trade mark application could be implicit, if it could be inferred clearly from the circumstances. Laytoncrest appealed to the CFI under several of the Rules implementing the CTM Regulation, and Articles 44(1) and 73 of the CTM Regulation.

DECISION

The CFI held that the Board of Appeal had taken from Laytoncrest the benefit of its CTM application and the effects of that decision were not limited to those goods that were the subject of Erico’s opposition. The CFI upheld Laytoncrest’s argument that the Board of Appeal decision contravened Rule 54, which requires the Board to notify an applicant of any loss

of rights that ensue from application of the Rules or the CTM Regulation.

The CFI was further convinced by Laytoncrest’s argument that Article 44(1) of the CTM Regulation required a withdrawal of a trade mark application to be express and unequivocal, finding that the right to withdraw the application or to restrict the specification of goods and services vested in the applicant alone. In this regard, the CFI pointed out that the implicit withdrawal of the whole of an application could not possibly be inferred from the fact that the Applicant did not defend itself against an attack mounted against only part of its application.

The CFI ordered that the decision of the Second Board of Appeal be annulled and that OHIM should bear its own costs and those of Laytoncrest, while Erico was to bear its own costs.

COMMENT

Whilst these procedural decisions do not make the most exciting reading, this case provides important clarification of the scope of OHIM’s powers as it is the first time that the question has arisen as to whether the withdrawal of a CTM application could be implicit.

Community Trade Mark Oppositions Based on National SPA Marks: Relevant Public

In *L’Oréal SA v OHIM* T-21/07 and *L’Oréal SA v OHIM* [2009] T-109/07 (unreported), L’Oréal was prevented from registering SPALINE and SPA THERAPY as Community Trade Marks (CTM) for cosmetic products. In both cases, it was the perception of the public in Benelux of the word “spa” that was decisive.

SPALINE

L’Oreal sought to register SPALINE as a CTM in respect of toilettries. Spa Monopole, compagnie Fermière de Spa SA/NV, a company established in Spa, Belgium, opposed the application on the basis of its earlier registration in Benelux for the mark SPA for mineral waters and other non-alcoholic beverages. Although the goods were dissimilar, Spa Monopole relied upon its reputation, and the position adopted by the Court of First Instance (CFI) in *Spa Monopole v OHIM* [2005] T-67/04 ECR II-1825 to base its opposition on Article 8(5) of the Community Trade Mark Regulation (40/94/EC) (taking unfair advantage of the reputation of a well known mark).

Spa Monopole’s opposition succeeded at Office of Harmonization for the Internal Market (OHIM) and L’Oréal appealed to the CFI.

The CFI noted that Article 8(5) of the Regulation is subject to three conditions: that the marks at issue are identical or similar; that the earlier mark has a reputation; and that there is a risk that the use without due cause of the mark applied for would take unfair advantage of, or be detrimental to, the distinctive character of the earlier mark. These conditions are

cumulative and failure to meet any one of them would render the provision inapplicable.

The CFI held that the presence of the element SPA at the beginning of both marks gave a degree of similarity. Following *Meric v OHIM* [2006] T-133/05 ECR II-2737, the consumer pays more attention to the beginning than to the end of a mark. The Court held that the element LINE was so frequently used in the area of cosmetics that the element SPA was the more distinctive. The CFI was unconvinced by L'Oréal's argument that the word "spa" was descriptive of cosmetic products, finding that it was descriptive only of hydrotherapy centres in which such products were used.

Having found that there was a similarity between the marks, the CFI determined that the relevant public (being average consumers in the relevant Member States) would be liable to establish a link between the marks as mineral waters and mineral salts could be used in the production of cosmetic products; mineral water operators sometimes sell cosmetics containing mineral waters.

Following *Sigla v OHIM* [2007] T-215/03 ECR II-711, it was not necessary for the owner of the earlier mark to show actual and present harm to the mark, but the owner must show a future non-hypothetical risk of detriment or unfair advantage. The Court noted that the stronger the link between the two marks, the higher the risk of unfair advantage and that there was a risk in the present case. The two marks targeted the same public, the goods covered by the two marks were "not so different" and the image of the earlier mark conveyed a message of health, beauty, purity and mineral richness. The same message could apply to the goods for which L'Oréal sought registration, with the result that L'Oréal could take unfair advantage of the reputation of the earlier mark.

SPA THERAPY

L'Oréal also sought registration of the mark SPA THERAPY in respect of cosmetics. Spa Monopole opposed the mark on the basis of a likelihood of confusion under Article 8(1)(b) of the CTM Regulation, with a number of its earlier Benelux marks, including SPA with respect to cosmetic and laundry uses. It also invoked Article 8(4) and (5), relying on a number of previous registrations. Again, OHIM upheld Spa Monopole's opposition and L'Oréal appealed to the CFI.

The CFI noted that beyond the usual scenario where the consumer perceives a mark as a whole, it is possible that where an earlier mark forms part of a composite mark, the component that is the same as the earlier mark may have an independent, distinctive role in the composite mark, even if it is not the dominant element. The CFI found this to be true in this case, in which THERAPY had been added to the earlier mark. The CFI held that SPA was averagely distinctive in the context of the goods and services in question. As with the SPALINE case above, the CFI held that the word "spa" was descriptive of hydrotherapy centres and not of cosmetic products themselves.

The CFI held that the word "therapy" was not a widely known commercial name within the context of *Medion* [2005] C-120/04 ECR I-8551 and did not have a strong distinctive character with respect to cosmetics, such that it could be understood as referring to the benefits of the goods. Finally, since cosmetics manufacturers frequently market several lines of products under different sub brands, the juxtaposition of the word "spa" with the word "therapy" could lead consumers to believe that it was a line of products marketed by Spa Monopole.

The CFI concluded that differences between the signs as a result of the presence of the word "therapy" in the mark applied for were not such as to outweigh the significant similarities between the signs at issue resulting from the presence of the earlier mark at the beginning of the mark applied for. Furthermore, since the goods covered by the marks at issue were identical, it was concluded that the relevant public would believe that they come, at least, from economically-linked undertakings.

COMMENT

These two cases highlight the fact that confusion between two marks, or the enhanced reputation of a mark, is viewed from the point of view of the "relevant public", which may be a small sub section of the whole of the Member States' public. In this case, the earlier mark was registered in Benelux, with the result that the meaning of the word "spa" was determined in respect of perceptions in Benelux of the word "spa" based on the town of Spa, the original home of hydrotherapy, in Belgium. Had the "relevant public" been Community consumers generally, it is possible that awareness of the origin of the word would have been lower and L'Oréal may have argued successfully for a descriptive meaning of the SPA element, such that the LINE and THERAPY elements of its marks were the more distinctive elements.

NAKED Appeal

In *Creative Resources LLC's Application* (No 300765009) (Court of First Instance, Hong Kong High Court [2009], the Hong Kong High Court overturned the decision of the Trade Marks Registry that NAKED was descriptive for condoms.

BACKGROUND

On finding that the trade mark was devoid of distinctive character, the examiner said that the consumers would perceive the mark as nothing more than describing a characteristic of the goods applied for, as opposed to denoting trade origin. It was held that condoms were sheath like coverings that were often promoted with reference to their sheer thinness enabling users of them to feel naked or almost as if there is no covering.

DECISION

Overturning the Registry's decision, Reyes J said:

I would accept that, as a word, "naked" may be as "down-to-earth" as one may get. But again, precisely because of the

paradox inherent in describing a form of covering as an absence of covering, the link between “nakedness” and the characteristics of a condom is not immediately discernible.

Reyes J referred to the opinion of Advocate General Jacobs in *P WM Wrigley v OHIM (DOUBLEMINT)* C-191/01, specifically that:

...there is clearly a line to be drawn between terms which may be used to designate products or their characteristics and those which are merely suggestive of such characteristics... It seems obvious that there is no clear-cut distinction between indications which designate a characteristic and those which merely allude suggestively to it.

Considering this, Reyes J held that the term “naked” bore no direct objective relation to a condom and would not conventionally be used in English to modify the word “condom”. In fact, it would be contradictory to describe a condom (a form of covering) as being naked (being without covering).

Turning to the question of whether the word “naked” was capable of identifying condoms that originated from a particular undertaking, the judge held that since the term was unlikely to evoke a specific bundle of attributes in the minds of consumers. Instead, it was likely to connote different things to different people, the mark was capable of identifying the products of a particular undertaking in the mind of a given person and was capable of bearing distinctive character.

COMMENT

The judge reached a different conclusion from the examiner, based largely on the notion that “naked” is not an adjective normally used to qualify the word “condom”. In that sense, the case is a source of encouragement for those seeking to register marks that pun or represent a paradoxical play on concepts embodied in characteristics of the goods or services for which registration is sought.

Landmark Victory for eBay in Trade Mark Infringement Case

On 13 May 2009, eBay, the world’s largest online auctioneer, claimed a landmark victory against L’Oréal after the Tribunal de Grande Instance de Paris (Paris first instance civil court) ruled that eBay was not liable for selling counterfeit products and luxury goods imported from outside the European Union on its website.

L’Oréal sued eBay in Belgium, France, Germany, Spain and the United Kingdom, alleging that eBay was profiting from the sale of fake L’Oréal products or those imported from outside the European Union. In the context of the French case, L’Oréal argued that the auction site went too far in asking brand owners to help police auctions. L’Oréal also claimed that eBay was an actual participant in its customer’s sales rather than merely a

venue through which sales were conducted, as its software bids on behalf of buyers, handles payments and ensures the delivery of goods. In response, eBay argued that it actively polices its website to combat counterfeit goods by employing a team of 2,000 people and allocating an online crime fighting budget of U.S. \$10 million a year.

The Court ruled that by “establishing means to fight counterfeits on its online platform”, eBay had “fulfilled its obligations in good faith”. According to Judge Elisabeth Belfort, preventing counterfeits would “only be effective through a close collaboration between rights holders and eBay.” The Court asked the companies to engage in mediation in order to develop a course of action, which must be placed before the Court for approval by 25 May 2009.

The win follows a similar victory against L’Oréal in Brussels, which ruled in favour of the auction website in August 2008. Decisions are still awaited in Spain and the United Kingdom. Although courts in other European countries are not bound to follow the French decision, the decision may support eBay’s contention that it is taking sufficient steps to combat counterfeiting.

The ruling is a major victory for eBay in France. Last year, after a two year legal battle with LVMH, a French court ordered eBay to pay €40 million in damages for selling fake luxury goods on its website. The court ruled that eBay had committed “serious faults” through its failure to exclude counterfeit goods from its site and that eBay had damaged the reputations of Louis Vuitton and group company Christian Dior Couture by selling counterfeit products.

The English High Court gave its judgement on 22 May 2009 which has referred a number of legal questions to the European Court of Justice. For a detailed review of this judgement please see next months EU IP Bulletin.

PATENTS

Infringement and Added Matter

In *Napp Pharmaceutical Holdings Ltd v Ratiopharm GmbH; Napp Pharmaceutical Holdings Ltd v Sandoz Ltd* [2009] EWCA Civ 252, on appeal from an English High Court ruling that two patents for a controlled release tablet were valid but not infringed, the Court of Appeal has determined that both patents were valid *and* infringed. The Court considered whether the product fell outside the scope of the claims on the proper construction of those claims and also whether or not the patentees had added matter to the patent during its prosecution.

DECISION

Regarding infringement, the Court held that the trial judge had erred in finding that the phrase “spheronising agent” was limited to non water soluble materials that were incorporated to

give plasticity in a spheronisation process. According to Jacob LJ, HPMC (an ingredient of the tablet product that was alleged to infringe the patents) fell within the definition of a spheronising agent as set out in the patents, which stated that “the spheronising agent may be any pharmaceutically acceptable material that, together with the active ingredient can be spheronised to form spheroids”. The Court held that the fact that HPMC also acted as a binder was irrelevant.

The Court also held that a tablet, which otherwise infringed the patent, did not fall outside the claims by addition of extra active ingredient on the surface of the tablet. There was nothing in the claim language that excluded a tablet that had all the characteristics of the claim, but with the additional feature of external application of the active ingredient. There was also no commercial or technical reason for thinking that the patentee would have wanted to limit his claim in this way.

Regarding added matter, the Court upheld the trial judge’s finding that the skilled person would understand from the patent that acrylic resins were suitable materials for achieving pH-independent release, but the combined effect of the disclosure and the disclaimer (relating to such acrylic resins) inserted during prosecution was that such materials were not claimed. The skilled person would not derive from the disclosure any technical teaching about pH-dependent acrylic resins.

COMMENT

Interestingly, the German courts in Dusseldorf have come to a different conclusion regarding the German parts of the patents, finding that the relevant product does not infringe. A determination of validity of one of the patents is pending in Germany.

Process Patents: Slowing Down the Competition

In *Scinopharm Taiwan Ltd v Eli Lilly & Company* [2009] EWHC 631 (Pat), the English High Court rejected an attack on the validity of a process patent brought on grounds of obviousness, based on reading two prior art publications in combination. The Court held that it was only permissible to read two documents together if it was obvious to do so. An attack on grounds of insufficiency also failed.

BACKGROUND

Eli Lilly’s patent relates to a process for making a drug, gemcitabine, used in the treatment of cancer and follows on from an earlier patent on gemcitabine that expired in 2009.

OBVIOUSNESS

The patented process involved a reaction proceeding via the S_N2 mechanism whereas the prior art disclosed this reaction proceeding via the S_N1 mechanism. The question of obviousness hinged on whether it was obvious, as Scinopharm alleged, to try and induce the reaction disclosed in the prior art to proceed via the S_N2 mechanism. On that basis, Kitchin J identified this as an “obvious to try” case and, as such, a case in

which there was a fair expectation of success (*Conor v Angiotech* [2008] UKHL 49).

Scinopharm’s case depended, in part, upon reading two items of prior art together. Scinopharm contended that it was permissible to do this if they were in the same technical field. The judge disagreed, stating that it was only permissible to read two documents together if it was obvious to do so.

Kitchin J stated that although he had no doubt that the skilled person would have read the prior art with interest with the aim of finding a better way to make gemcitabine, he did not accept that the skilled person would have approached the documents with a predisposition to look for a way of persuading the reaction to proceed by the S_N2 process.

In particular, the skilled person would have known from his common general knowledge that S_N2 reactions are rare for the type of compound at issue and general knowledge did not provide any signposts as to what would be successful. Moreover, the skilled person would also have appreciated that there are many steps involved in the synthesis of gemcitabine and these provided lots of scope for optimisation and improvement. So, looking at the synthesis as a whole, there were many areas worthy of study apart from the synthesis step at issue in this case.

In light of the evidence, Kitchin J held that the process for producing a high yield of gemcitabine as described in the patent was not obvious and Scinopharm’s allegation of obviousness therefore failed.

DOMAIN NAMES

The Problem with Parking Sites

In *Oasis Stores Ltd v J Dale* [2009] DRS 06365, a Nominet Appeal Panel allowed the Respondent’s appeal against an expert’s decision, transferring the domain name oasis.co.uk to the clothing retailer. On evidence adduced for the first time on appeal, the panel found that by choosing to use as keywords with Yahoo! (and possibly also as metatags on its own website) text that corresponded to the domain name, Oasis had to some degree caused the parking page to which the domain name was linked to behave in the manner alleged to be abusive, *i.e.*, displaying advertising for clothing retailers and links to Oasis’s website.

BACKGROUND

Oasis, which runs a chain of women’s clothes shops, owns a number of registered trade marks that comprise or incorporate the word “Oasis”. In October 2008, it filed a complaint with Nominet against the registration of oasis.co.uk. The domain name was registered at some time before August 1996 and at the time of the complaint the website was hosted by Imodo and

displayed a number of “sponsored listings” for women’s fashion, including the Complainant’s products and those of others.

The Respondent failed to respond to the complaint and the expert duly ordered the transfer of the domain name to Oasis. The Respondent, who said that the posted copy of the complaint was sent to an out of date address and an emailed copy was overlooked, appealed.

APPEAL

The core of the Respondent’s defence in the appeal was that the particular use of the domain name that had occurred, in terms of the links displayed on the parking page hosted by Imodo, had been caused by the Complainant.

The Respondent argued that the Complainant was paying Yahoo! for the use of “keywords” comprising the text strings “oasis.co.uk” and “oasis.com” with the effect that the search results, if the relevant term was used for a search, were weighted in some way to the sites the advertiser selected to associate with such keywords; in this case, the Complainant’s own website. The parking page displayed advertising that was “extrapolated” from the search results that Yahoo! returned for the domain name in question. Thus it was the Complainant’s own behaviour that caused the parking page to start displaying links to which the Complainant objected.

There was no evidence (beyond the evidence of how the parking page behaved) that the Respondent purchased the domain name with any intent to target the Complainant’s business or to associate it with that business. The question of whether the registration was abusive therefore turned upon the use that had been made of the domain name since the Respondent acquired it by using it as a “parking page”. This in turn depended on how that parking page had behaved and what its contents had been.

The panel found the Respondent’s arguments compelling and found that the Complainant had not given a full and comprehensive rebuttal of them. Accordingly, the panel overturned the original decision.

COMMENT

Oasis appears to have fallen into the trap of merely denying the respondent’s allegations rather than rebutting them with evidence. It would appear that the clothing retailer really was the author of its own downfall. The decision should serve as a lesson to brand owners of the dangers of not ensuring that their IP portfolios, including domain names, correspond with their marketing strategies, in this case the buying of keywords from search engines like Yahoo! and Google. Failing to have a comprehensive set of domain names, in generic and country code top level domains, reflecting the brand and its trade mark registrations, can have unforeseen consequences, particularly where the mark consists of generic terms.

Brand owners may argue that registrants should know that using domain names to resolve to parking sites that attract keyword generated advertising is likely to generate links to brands. Under paragraph 4.e. of Nominet’s dispute resolution policy, an expert is expected to take into account “the nature of the advertising links on any parking page associated with the Domain Name”. That, however, as demonstrated by this latest decision, is not a straightforward exercise.

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Three Strikes and You’re Out in France

After a long and hard fought battle, President Sarkozy’s government has finally been able to force through a controversial “three strikes” law against illegal file sharing. Under the new law, known as loi Hadopi after the initials of the agency set up to police it, the first time that a user is suspected of infringing copyright by file sharing, a warning e-mail is sent. A second instance would result in a letter being sent and the third occasion would result in disconnection from the internet. This disconnection may last between two and 12 months and there is no right of judicial appeal against such a disconnection. It was this lack of recourse to the courts that the bill’s opponents objected to particularly, as they complained that the actions of hackers, using fake IP addresses to hide their activities, may lead to innocent users being disconnected. This led to calls for the European Commission to recognise internet access as a fundamental right that cannot be taken away without a right of appeal. The opposition in the French parliament also focussed on a clause that meant that disconnected users would still be liable to pay their internet service provider. The original bill had been passed by the Senate, but was, surprisingly, rejected by the National Assembly.

The law is supported by the film and record industries, which are also lobbying for similar measures to be adopted in the United Kingdom that would involve a series of warnings and “graduated technical solutions” to prevent further illegal activity.

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