



## DATA PROTECTION

### Data Protection Offences: Custodial Sanctions

The Ministry of Justice Consultation Paper (CP22/09) on the knowing or reckless misuse of personal data, published on 15 October 2009, sets out the UK Government's proposals to introduce custodial sanctions for offences committed under Section 55 of the Data Protection Act 1998 (the DPA) of knowingly or recklessly disclosing personal data to third parties who have no right to that data. The Government is proposing that those convicted under Section 55 should face up to two years imprisonment on indictment and up to 12 months on summary conviction, in addition to financial penalties currently set at £5,000 on summary conviction or unlimited fines on indictment.

Sections 55(1) and (3) of the DPA make it an offence to obtain or disclose personal data, or the information contained in personal data, or procure the disclosure to another person of the information contained in personal data, if the person acted knowingly or recklessly and without the consent of the data controller. Sections 55(4) and (5) also make it an offence to sell or offer to sell personal data that has been obtained (or, in the case of offering to sell, is subsequently obtained) in contravention of the provisions of Section 55(1). These offences are subject to a number of defences.

In September 2006, the Government consulted on whether to introduce custodial penalties for offences under Section 55 and the length of the proposed sentences. The Government subsequently gave itself the power provided by Section 77 of the Criminal Justice and Immigration Act 2008 (the CJIA) to introduce the possibility of custodial sentences for those convicted of Section 55 offences. The CJIA also introduced a new journalistic defence which is not yet in force but which is expected to come into force on the introduction of custodial sanctions.

Responding, it would seem, to the Information Commissioner's requests made to the Select Committee for the immediate introduction of custodial sentences, the Government's intention is to make an order under Section 77 of the CJIA amending Section 60 of the DPA (which sets out the sanctions available to courts for DPA offences) to allow, on conviction under

Section 55, for up to 12 months imprisonment on summary conviction and/or a fine of up to £5,000 and up to two years on indictment and/or an unlimited fine.

### COMMENT

As the impact assessment that accompanies the consultation acknowledges, the new proposals go beyond the minimum sanctions requirements set out in Article 24 of the Data Protection Directive (95/46/EC). The Government, nonetheless, clearly thinks that they are justified at a time of "growing public concern about the misuse of personal data", in particular identity fraud.

## INTELLECTUAL PROPERTY

### P2P File-Sharing and the Fundamental Right to Internet Access

The controversial plan by UK Secretary of State, Peter Mandelson, to add withdrawal of users' internet access to the list of back-stop technical measures Ofcom might require internet service providers (ISPs) to impose upon subscribers who persistently infringe copyright by sharing unlawful music files is looking more viable than it did a couple of months ago. Lord Mandelson proposed a third strike sanction that appeared to fly in the face of opposition in principle at European Union (EU) level. The reason the ultimate third strike, albeit as a "last resort", is looking less unlikely is that the European Parliament has withdrawn its controversial amendment to the European Commission's package of telecoms reforms that would have guaranteed that any decision to suspend an individual's access, which, in the Parliament's view, is a "fundamental right", would be the sole preserve of the judiciary.

### BACKGROUND

The European Parliament has twice adopted and twice all but abandoned its fundamental rights amendment to the telecoms package that was intended to protect users' rights to internet access. Earlier this year, a series of negotiations led to an informal agreement between the Council and Members of the European Parliament (MEPs) on the wording of the protections for internet users, watering down substantially Parliament's original proposal (Amendment 138) so that it referred only to "the right to a judgment by an independent and impartial tribunal". Parliament then reinstated the amendment to the effect that "no restriction may be imposed on the fundamental

rights and freedoms of end users, without prior ruling by the judicial authorities... save when public security is threatened". The Council intimated immediately that it would not accept the amendment and rejected it formally on 6 October, consigning the whole package to conciliation. This potentially put back the negotiations 18 months, even though agreement had been reached on every other aspect of the reforms. The only way the reforms could be saved, it seemed, was if the European Parliament capitulated. It would now appear that it has.

#### CONCILIATION AND CAPITULATION

Formal conciliation proceedings on the telecoms package were opened between Parliament and Council on 4 November 2009 with internet access the sole point of discussion. The Conciliation Committee, comprising 27 MEPs and 27 Council representatives (one per Member State), has until 30 December 2009 at the latest to find an overall agreement in the form of a joint text. Within a further six to eight weeks, both Parliament and the Council must hold their third and last readings approving or rejecting the joint text as a whole without any further amendments, failing which the telecoms package will be deemed not adopted.

The European Parliament issued a press release on 10 November 2009 stating that the MEPs and Council representatives have agreed on internet access safeguards. The MEPs and Council representatives agreed that:

*Restrictions on a user's internet access may "only be imposed if they are appropriate, proportionate and necessary within a democratic society". Such measures may be taken only "with due respect for the principle of presumption of innocence and the right to privacy" and as a result of "a prior, fair and impartial procedure" guaranteeing "the right to be heard (...)" and the right to an effective and timely judicial review". "In duly substantiated cases of urgency" appropriate procedural arrangements may be made provided they are in line with the European Human Rights Convention.*

This compromise still has to be approved by the full Parliament and Council.

#### COMMENT

So Amendment 138 is a mere shadow of its former self. Gone is any mention of "prior ruling by the judicial authorities" only to be replaced by woolly language like "only be imposed if they are appropriate, proportionate and necessary within a democratic society", arguably leaving the door open for Lord Mandelson's "last resort" suspension of user accounts.

## COMMERCIAL

### Exclusive Jurisdiction Clause: Claims Arising out of the Agreement Against Affiliates

In *Morgan Stanley & Co International plc v China Haisheng Juice Holdings Co Ltd* [2009] EWHC 2409 Comm, Morgan Stanley & Co International plc (MSIP), an English company within the Morgan Stanley group, filed a claim for a declaration and a final anti-suit injunction against China Haisheng, a Cayman Islands company listed on the Hong Kong stock exchange. The claim was based on an exclusive English jurisdiction clause in an International Swaps and Derivatives Association (ISDA) Master Agreement and was brought after China Haisheng commenced proceedings in the Intermediate Peoples' Court of Xi'an, Shaanxi Province in China against MSIP and also Morgan Stanley Asia Ltd (MSAL) a Hong Kong company in the Morgan Stanley group that was not party to the agreement.

#### BACKGROUND

On 2 July 2008, MSIP and China Haisheng entered into an ISDA Master Agreement (2002 form) as amended by a Schedule.

Clause 13 of the Master Agreement provided that it would be governed by and construed in accordance with the laws of England and Wales. It also contained an exclusive jurisdiction and third party rights clause 13(b), as follows:

- (i) **Jurisdiction.** With respect to any suit, action or proceedings relating to any dispute arising out of or in connection with this Agreement ("Proceedings"), each party:
  - (1) *irrevocably submits to the exclusive jurisdiction of the English courts; and*
  - (2) *waives any objection which it may have at any time to the laying of venue of any Proceedings brought in any such court, waives any claim that such Proceedings have been brought in an inconvenient forum and further waives the right to object, with respect to such Proceedings, that such court does not have any jurisdiction over such party.*
- (ii) **Third Party Rights**
  - (1) *Subject to this clause, a person who is not a party to this Agreement has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Agreement.*
  - (2) *Notwithstanding the foregoing, an Affiliate may enforce the rights expressly granted to an Affiliate under this Agreement, if any, subject to and in*

*accordance with this clause, Section 13(a) and (b) of this Agreement and the provisions of the Contracts (Rights of Third Parties) Act 1999. However, such an Affiliate may not bring proceedings to enforce any of those terms unless it has first given written notice to the parties (in accordance with Section 12 of this Agreement) agreeing to the provisions of Section 13 of this Agreement. The parties to this Agreement do not require the consent of any Affiliate or other third party to rescind or vary this Agreement.*

#### **PROCEEDINGS**

On 2 April 2009, China Haisheng issued proceedings in China against MSIP and MSAL. It claimed rescission of currency swap transactions and compensation for losses suffered.

On 13 May 2009, MSIP issued proceedings in England against China Haisheng claiming sums due under the Master Agreement and also seeking declaratory and injunctive relief on the basis that by the terms of the exclusive jurisdiction clause China Haisheng had agreed to bring its claims against both it and MSAL in England.

China Haisheng accepted that it could not prevent MSIP from pursuing its claim for sums due under the Master Agreement in England. However, it maintained that the exclusive jurisdiction clause only extended to the claims it had brought against MSIP and did not extend to the claims against MSAL.

#### **RULING ON JURISDICTION**

Mr Justice Teare held that the exclusive jurisdiction clause applied only to the claims between MSIP and China Haisheng. It did not extend to those against MSAL and as such China Haisheng could not be restrained from pursuing those claims in China.

In this case, Teare J considered that the key question was whether the exclusive jurisdiction clause would reasonably be understood to mean that MSIP and China Haisheng promised each other that claims arising out of or in connection with the Master Agreement would be brought in England "regardless of whether the claims were against the other or a non-party to the Master Agreement".

Having regard to the whole of clause 13 and the imbalance or difference between the position of the parties *inter se* and the position of the parties and non-parties *inter se*, the judge did not consider that clause 13 could reasonably be understood to mean that MSIP and China Haisheng promised each other that claims arising out of or in connection with the Master Agreement were to be submitted to the English court regardless of whether the claims were against each other or a non-party.

#### **INJUNCTION**

With China Haisheng free to sue MSAL in China, the question that remained was whether an injunction should be granted against it with regard to its claim in China against MSIP.

Teare J considered that this was one of those cases where the court could not ensure that all issues were determined in one jurisdiction. The best that the court could do legitimately in accordance with the ends of justice was to ensure that at least all claims and counterclaims concerning MSIP were heard in one jurisdiction. Therefore, Teare J granted an anti-suit injunction so that all claims and counterclaims concerning MSIP would be heard in England.

#### **COMMENT**

Once the judge had determined on the basic principles of construction that the exclusive jurisdiction clause could not be read to extend to disputes with third parties arising out of a relationship between the parties to the Agreement, the principle that the court should seek in serving the "ends of justice" to ensure that all issues are determined in one jurisdiction came under tension. With the potential for inconsistent decisions arising from disputes involving one member of a group of companies in one jurisdiction and its affiliate in another now unavoidable, the best the judge could do to serve those ends was to ensure that the claims and counterclaims between the parties to the agreement would be in one jurisdiction, *i.e.*, England.

## **TRADE MARKS**

### **Budweiser Dispute Returns to the ECJ**

In the latest development in a dispute which has been going on across the world for almost 100 years, the Court of Appeal has made a reference to the European Court of Justice (ECJ) on the meaning of various terms in the Trade Marks Directive.

The case in question, *Budejovicky Budvar Narodni Podnik v Anheuser-Busch Inc* [2009] EWCA Civ 1022, concerns the validity of two trade mark applications for the word BUDWEISER, made by Anheuser-Busch, the American brewers (AB), and the Czech brewer Budweiser Budvar (BB).

As a result of their respective applications and oppositions filed by the other party, BB had two UK trade mark registrations, one for BUD (from 1976) and one for BUDWEISER (from June 1989). AB had a registration for BUDWEISER (from 1979). The two BUDWEISER registrations were placed on the register on the same day in 2000, following a decision of the Court of Appeal allowing for concurrent registration.

The day before the fifth anniversary of that registration, AB applied to the Trade Marks Registry for a declaration that BB's BUDWEISER registration was invalid. This was on the basis

that, although both marks were put on the register on the same day, AB's was an "earlier trade mark" by virtue of Article 4(2) of the Trade Marks Directive, as its application date was earlier. The marks and goods were identical and therefore BB's mark was liable to be declared invalid. There was no question of acquiescence because the five year period provided by Article 9 was not over.

The timing was such that, by the time that BB learned of it, it could not launch a counter-attack on AB's BUDWEISER mark. It would have been able to do so earlier and may well have succeeded on the basis of confusion with its earlier BUD mark, but such an attack would now be met by a plea of acquiescence by virtue of Article 9. If correct, this would mean that AB held a registration of BUDWEISER that cannot be attacked, and which it could therefore assert against BB, even though BB's use of the mark in the United Kingdom started in 1973. Although it was not clear whether AB would succeed in such an action, it was clear that BB would be worse off by having lost its own BUDWEISER registration.

Having comprehensively reviewed defences under English law and the *travaux* to the original Directive, the Court of Appeal decided to ask the ECJ for clarification on: the meaning of "acquiesced" in Article 9(1), when the five year period for acquiescence commences, and whether Article 4(1)(a) allows the proprietor of an earlier mark to prevail despite a long period of honest concurrent use. Although the outcome will be a welcome clarification of these confusing provisions, it is doubtful whether it will finally resolve the dispute between the two parties.

### **Application for Restitution Out Of Time: Communication to Representative**

In *Evets Corp v OHIM* joined cases T-20/08 and T-21/08, the Court of First Instance (CFI) ruled that where an applicant for a Community Trade Mark (CTM) appoints a representative, the Office for Harmonization in the Internal Market (OHIM) is entitled to treat communication with that representative as communication with the applicant. This is deemed to have taken place as soon as the representative has received notice from OHIM.

Evets was the proprietor of two CTMs for DANELECTRO and QWIK TUNE. In September 2005, OHIM issued notifications that the marks would lapse if renewal fees were not paid by 30 April 2006. Under the rules, Evets could renew the marks during a further period of six months after expiry by paying the fees and an uplift.

On 21 and 23 November 2006, OHIM issued notifications that the respective marks had been removed from the register, due to non-payment of the renewal fees. Under Article 81(5) of the CTM Regulation (2007/09/EC), an application for restitution

must be made within two months of the "removal of the cause of non-compliance". In any event, the application must be made within a year from the date on which the renewal fee was not paid. In this case, the cause of non-compliance was Evets non-receipt of the renewal notice and the removal of the cause of non-compliance was when Evets received notification that the mark had been removed from the register due to non-payment of the renewal fee.

On 26 January 2007, Evets' representative filed an application for restitution of the marks, stating that the responsibility for renewal had been entrusted to a third party that did not have the correct address for Evets. Evets had not become aware of the lapse of the rights until 26 November 2006, when its representative had forwarded OHIM's notification.

OHIM's Trade Marks and Register Department refused the application for restitution, finding that it had been submitted in good time and was admissible, but that Evets had not taken adequate care to check that the renewal had taken place.

The Fourth Board of Appeal dismissed Evet's appeal, finding that the application for restitution had been made out of time, as the two month period ran from the date on which OHIM informed Evets' representative and not the date on which Evets itself became aware of the non-payment of the fee. Evets appealed to the Court of First Instance, arguing that if the legislature had intended the two month period to run from the date on which the representative was made aware of non-payment, then there would be no need for the 12 month long-stop date.

The CFI also refused Evets' appeal, ruling that the two month time period in which an application could be made for restitution of a mark ran from the date on which Evets' representative was informed of the removal of a mark from the register and not the date on which Evets itself became aware of the removal. Where an applicant for a CTM appoints a representative, the CFI found, OHIM was entitled to treat communication with that representative as a communication with the applicant itself.

The 12 month long-stop date in the restitution provisions of the Regulation did not solely concern applications in cases of non-submission of a request for renewal, but also concerned failure to observe time limits where the non-observance in question had the direct consequence of causing the loss of any right or means of redress. The non-observance and the removal of its cause could take many forms. Consequently, the one year time limit was laid down as an absolute deadline.

The CFI refused to admit evidence of the practice of the European Patent Office's (EPO) Boards of Appeal, as the CTM regime is an autonomous system with separate rules and objectives. Following the opinion of Advocate General

Sharpston in *P OHIM v Kaul* [2007] C-29/05 ECR I-2213, whilst identically or similarly worded provisions in the field of European intellectual property law must where possible be interpreted with consistent effect, the European Patent Convention is not a Community instrument, nor is the EPO a Community body. The case law of the Boards of Appeal within that office therefore has no binding authority in Community law.

## Exclusively Decorative Function

In *Evets Corp v OHIM* joined cases T-20/08 and T-21/08, 29 September 2009 (unreported), the Court of First Instance (CFI) has upheld the findings of the Office of Harmonization for the Internal Market's (OHIM) Fourth Board of Appeal that a mark consisting of half a smiley mouth was devoid of any distinctive character.

### BACKGROUND

Mr Loufrani applied for an international trade mark designating the European Union in respect of the mark set out below, in respect of jewellery, luggage and clothing.



OHIM refused the mark on the basis that it was devoid of any distinctive character. Mr Loufrani appealed to the Fourth Board of Appeal, which dismissed the appeal. At this point, Mr Loufrani transferred the international mark to the Smiley Company, which took over conduct of the proceedings.

Smiley appealed to the CFI, arguing that the nature of the goods for which the application was made meant that consumers would be more than usually attentive to the mark and that it had characteristics that were sufficiently specific for it to be regarded as possessing the minimum degree of distinctiveness required in order for it to be protected in the Community.

### DECISION

The CFI held that there was no aspect of the trade mark that might be easily and instantly memorised by an even relatively attentive public and that would make it possible for it to be perceived immediately as an indication of the commercial origin of the goods in question. It upheld the findings of the Board of Appeal that the mark would be perceived exclusively as a decorative element whether it related to jewellery, or to luggage and clothing. The CFI held that the mark did not make it possible for any of the goods at issue to be distinguished from competing goods.

The CFI upheld the Board's finding that the mark was a simple and banal design that had an exclusively decorative function and would not be perceived as an indication of the commercial origin of the goods in question.

The CFI also rejected Smiley's argument that the mark would be perceived by the public as half of a smiley mouth, the smiley itself having been registered as a separate Community trade mark. The Court ruled that this argument was inadmissible and irrelevant as the assessment of the distinctive character of a mark for the purposes of the Community Trade Mark Regulation (40/94/EC) must be based on that mark's ability to distinguish the applicant's goods or services from goods or services of the same type offered by competitors.

### COMMENT

This decision, coupled with the recent CFI decision in *Joop! V OHIM* 30 September 2009 T 75/08 underlines the fact that marks must always meet the basic requirements for distinctive character. As always, Smiley remains free to re-apply for this mark in the future, if it can supply evidence of acquired distinctiveness and show that its mark has truly gained recognition amongst the public through use.

## Reputation in the Community

On a reference from the Austrian Supreme Court in relation to *PAGO International GmbH v Tirolmilch registrierte Genossenschaft mbH*, 6 October 2009 C 301/07 (unreported), the European Court of Justice (ECJ) has ruled that, for the purposes of Article 9(1)(c) of the Community Trade Mark Regulation (40/94/EC), reputation in a single Member State of the European Community can, on the facts, form a sufficient basis for a Community wide injunction to prevent a competitor from taking unfair advantage of a Community Trade Mark. (CTM)

### BACKGROUND

PAGO International GmbH was the proprietor of the following figurative CTM in respect of fruit juices.



Tirolmilch marketed a fruit and whey drink called "Lattella" which it had repackaged in glass bottles. The bottle design was similar to that depicted in PAGO's CTM and in its advertising Tirolmilch used a representation that included its bottle next to a full glass.

PAGO brought proceedings against Tirolmilch in the Vienna Commercial Court, seeking an interim injunction to prohibit Tirolmilch from promoting, marketing, offering for sale or otherwise using its drink in the bottles at issue and from advertising by means of a representation of the bottles together with a full glass of fruit juice.

The Commercial Court granted the injunction, but this was overturned on appeal by the Higher Regional Court of Vienna. PAGO appealed to the Austrian Supreme Court, which took the view that there was no likelihood of confusion between the bottles, as the labels on the bottles clearly included the words "PAGO" and "Lattella" respectively, each of which was widely known in Austria.

However, since PAGO had claimed, for the purposes of Article 9(1)(c) of the CTM Regulation, that Tirolmilch was taking unfair advantage of the reputation in Austria of its CTM, the Supreme Court expressed uncertainty as to the meaning of the words "has a reputation in the Community" in the context of that Article. It therefore decided to seek the ECJ's guidance on the correct interpretation of the phrase.

In its reference, the Supreme Court stated that it assumed that, following *General Motors* [1999] C-375/97 ECR I-5421, concerning the expression "reputation in the Member State" as used in Article 5 of the Trade Marks Directive (89/104/EEC) (which is analogous to Article 9 of the Regulation), it would suffice if the mark were to have a reputation in a "substantial part" of the Community. But, since PAGO had applied for a Community wide injunction and its mark had a reputation only in Austria, the Court sought clarification on whether such a wide injunction could be granted.

#### **DECISION**

The ECJ held that following *General Motors* C-375/97, it could not be required that a mark be known by a given percentage of the public and the required degree of knowledge must be considered to be reached when the CTM was known by a significant part of the relevant public. In determining this, the ECJ held that a national court must consider all the relevant facts of the case, in particular the market share held by the trade mark, the intensity, geographical extent, duration of its use, and the size of the proprietor's marketing spend.

The ECJ concluded that Article 9(1)(c) must be interpreted as meaning that, in order to benefit from the protection afforded in that provision, a CTM must be known by a significant part of the public concerned by the products or services covered by

that trade mark, in a substantial part of the territory of the Community, and that, in view of the facts of the main proceedings, the territory of the Member State in question might be considered to constitute a substantial part of the territory of the Community.

#### **COMMENT**

It is clear from the ECJ judgment that the Court agrees with Advocate General Sharpston in one regard, which is that the answer to the Austrian Court's question as to whether or not a Member State could be a substantial part of the Community was not a matter of "yes or no". The ECJ held that Austria, on the facts of this case, could be a substantial part, but stopped short of saying that any Member State, regardless of its size and of the size of the relevant market within it, would be considered substantial.

## **PARALLEL IMPORTS & EXHAUSTION**

### **Sub-Licensing: The Issue of Implied Consent**

In *Makro Bediengroothandel v Diesel SpA*, C 324/08 15 October 2009 (unreported), the European Court of Justice (ECJ), on a reference from the Hoge Raad der Nedeleranden, has ruled that it is irrelevant, for the purpose of determining whether or not goods bearing a trade mark have been placed on the market within the European Economic Area (EEA) with the proprietor's consent, whether those goods were first placed on the market inside or outside the EEA. Rather, it must be demonstrated that the trade mark owner has renounced unequivocally his exclusive rights in order for a defence of exhaustion of rights to succeed.

#### **BACKGROUND**

In 1994, Diesel SpA's distributor in Spain, Portugal and Andorra, Distributions Italian Fashion SA (DIFSA) appointed Flexi Casual SA, a footwear distributor, on an exclusive basis for the whole of its territory. Later that year, DIFSA granted Flexi a licence to manufacture and distribute shoes of its own design bearing the DIESEL mark, in order that the shoes could be distributed by Diesel, or alternatively, that the licence could be assigned to Diesel.

In 1997, Flexi granted a licence to Cosmos World SL to manufacture bags and shoes under the DIESEL mark. Cosmos manufactured shoes under this agreement, without reference to DIFSA or Diesel. The Cosmos shoes found their way to the cash and carry outlet Makro in the summer of 1999.

Diesel brought an action in the Rechtbank te Amsterdam, seeking an injunction to prevent copyright and trade mark infringement by Makro. This injunction was granted and upheld on appeal.

On a further appeal to the Hoge Raad der Nederlanden, Makro claimed that Diesel's rights in its mark were exhausted because Cosmos had marketed the shoes with Diesel's consent within the meaning of Article 2.23(3) of the Benelux Convention on intellectual property and Article 7(1) of Trade Marks Directive (89/104/EEC).

#### REFERENCE

The Hoge Raad stayed the proceedings and referred questions to the ECJ as to whether:

1. where goods bearing a trade mark have been placed on the market within the EEA, but not by the proprietor or with his consent, the criteria to be applied in determining whether this has occurred with the (implied) consent of the proprietor are the same as where such goods were placed on the market outside the EEA by the proprietor or with his consent and;
2. if the answer to the first question is no, what criteria should be applied in order to determine whether or not the proprietor has given (implied) consent within the meaning of the Trade Marks Directive.

#### DECISION

The ECJ held that there was nothing in the wording of the judgment in *Zino Davidoff and Levi Strauss* [2001] joined cases C-414/99 to C-416/99 ECR I-8691 that gave grounds for concluding that the statements made by the Court concerning the facts and circumstances from which the implied consent of a trade mark proprietor may be inferred, were applicable only in a factual context in which the goods had been placed on the market outside the EEA and imported into it without the consent of the proprietor.

Following *Sebago and Maison Dubois* [1999] C-173/98 ECR I-4103, *Peak Holding* [2004] C-16/03 ECR I-11313 and *Zino Davidoff*, the ECJ held that, in order to ensure the protection of the rights conferred by the trade mark and to make possible the further marketing of goods bearing a trade mark without the proprietor of the trade mark being able to oppose that, it is essential that the proprietor can control the first placing of those goods on the market in the EEA, irrespective of the fact that they may have first been marketed outside that area.

The ECJ concluded that Article 7(1) of the Directive must be interpreted as meaning that the consent of the proprietor of a trade mark to the marketing of goods bearing that mark carried out directly in the EEA by a third party who has no economic link to that proprietor may be implied, insofar as such consent is to be inferred from facts and circumstances prior to, simultaneous with, or subsequent to, the placing of the goods on the market in that area. In the view of the national Court, this demonstrates unequivocally that the proprietor has renounced his exclusive rights.

The case now returns to the Hoge Raad to determine whether, on the facts, Diesel so renounced its rights.

#### COMMENT

The ECJ's answer in this case will be welcomed by brand owners as it clearly confirms that its ruling in *Zino Davidoff* on the criteria applicable to the determination of whether a trade mark proprietor has (impliedly) consented to goods being placed on the market in the EEA is not restricted to circumstances where the goods are first marketed outside the EEA. Brand owners may also derive a useful lesson from the circumstances of the dispute to the effect that they should ensure any flexibility afforded to distributors is clearly delineated so that further sub-licensing does not undermine the strength of their brand.

## PATENTS

### Restoration Application and Intention of the Applicant

In *Orkli (UK) Ltd*, BL O/302/09 30 September 2009, a United Kingdom Intellectual Property Office (IPO) hearing officer held that it is the intention of the patent proprietor and not his representative that is relevant in determining whether an application for the restoration of a patent under Section 28(3) of the Patents Act 1977 should succeed.

#### BACKGROUND

Orkli initially filed a British (GB) patent application followed by a European (EP) patent application designating the United Kingdom, for the same invention. Since a GB and an EP patent designating the United Kingdom cannot co-exist in respect of the same subject matter, as is common practice, Orkli's patent agents wrote to the European Patent Office (EPO) requesting that the UK designation be removed from its EP application, when it became clear that the GB patent would be accepted by the UK IPO. Whether or not this letter arrived at the EPO is not clear, but unbeknownst to Orkli or its agents, the letter was not acted upon.

Subsequently, Orkli's agents received a letter from the EPO stating that the European patent with a UK designation (EP (UK)) had lapsed due to non-payment of renewal fees (*i.e.*, the designation had never been withdrawn). In the meantime, the GB patent had been revoked because an EP (UK) patent had been granted for the same subject matter.

#### RESTORATION PROCEEDINGS

Orkli immediately began restoration proceedings in respect of the EP (UK) patent, which was refused because it considered that Orkli had never intended to pay the renewal fees in respect of this patent and its intention had been to abandon the application in favour of the duplicate GB patent.

Orkli requested a hearing in respect of its restoration application. At the hearing, Orkli gave evidence that it had intended to maintain patent protection in the United Kingdom via the EP (UK) patent. The decision to proceed with the GB patent was taken by Orkli's agents who took the procedural step of requesting that the EPO withdraw the EP (UK) designation.

Orkli accepted that its representatives had failed to notice the grant of the EP (UK) patent, which would have made it clear that the designation had not been removed, but argued that, following the High Court decision in *Textron* [1988] RPC 177, they should not suffer for the mistakes of its representative or those of the EPO.

#### **DECISION**

The hearing officer stated that, given the error at the EPO and the failure of its representative to notice the mistake, he considered that it would be unjust for Orkli to suffer the loss of its patent. Because the evidence also indicated that Orkli had intended to maintain the EP (UK) patent, the requirements for restoration had been met.

#### **COMMENT**

The decision highlights the fact that the test (in the amended 2005 Patents Act) of there being the patent proprietor's intention to pay the renewal fee presents a lower hurdle than the previous test of the patent proprietor taking reasonable care to pay the renewal fee.

Interestingly, the hearing officer was satisfied that the patent agents decision to maintain the GB patent rather than the EP (UK) without taking explicit instructions from the client on this point was justifiable, finding that the formalities of patent prosecution are highly technical and that procedural decisions can reasonably be taken without recourse to the client.

#### **Threat to Infringe**

In *Boegli-Gravures SA v Darsail-ASP Ltd* EWHC 2690 Pat, 29 October 2009, the High Court of England and Wales held that a test purchase of an essential element of a patented invention carried out by a private investigator on behalf of the patentee is not itself an infringement, but is evidence of a threat to infringe. A director of Darsail was found to be jointly liable for infringement.

#### **BACKGROUND**

Boegli was the proprietor of a patent relating to the embossing of packaging foils by use of rollers with pyramidal, or conical teeth.

Darsail supplied rollers that Boegli considered to be an "essential element of the invention" which, when supplied to a person other than a licensee or other person entitled to work the invention, would infringe its patent under Section 60(2) of the Patents Act 1977. Boegli sued Darsail after procuring a test

purchase of the rollers from Darsail using a private investigator.

#### **DECISION**

After establishing that Darsail's rollers had all the features required by the relevant patent claim integers that relate to the rollers, Arnold J turned to the question of infringement.

Darsail submitted that case law in the area of test purchases did not apply to the specific tort in Section 60(2) for which supply to a person "other than a licensee or other person entitled to work the invention" was an essential ingredient, because purchase of rollers by the private investigator acting for the patentee failed to provide this ingredient. Arnold J agreed with Darsail on this point, but viewed Darsail's activities as evidence of a threat to infringe because Darsail had no idea whether the investigator was entitled to work the invention or not and made no enquiry in this regard.

Separately, Boegli argued that Darsail's website contained an offer to supply infringing rollers to the United Kingdom, whereas Darsail argued that the website was an offer to supply the world at large and was not directed at the UK market. Arnold J held that the website content did constitute an offer to supply infringing rollers, but that it did not set out Darsail's delivery terms and as such was not sufficient to constitute an offer to supply rollers in the United Kingdom.

Finally, Boegli sued Andrei Pyzhov, a director and shareholder of Darsail, arguing that he was a joint tortfeasor with Darsail. Mr Pyzhov was found to be jointly liable because his dealings with Boegli's investigator had gone beyond merely performing his constitutional role in the company to the extent that he was personally involved in committing the infringing act.

#### **Aircraft Seating Systems: The Court of Appeal Upholds Patent on Aircraft Seating Systems**

In *Virgin Atlantic Airways Ltd v Premium Aircraft Interiors UK Ltd* [2009] EWCA Civ 1062, the Court of Appeal of England and Wales upheld a patent relating to aircraft seating systems and given useful guidance on the expected level of knowledge of patent law of the notional skilled reader.

Virgin, the well known airline, commissioned Contour to manufacture seats for its Upper Class cabins. Virgin alleged that the seats subsequently made by Contour for other clients infringed Virgin's European Patent (UK) 1,495,308 (the Patent), and also Virgin's unregistered design rights in the seats made for it by Contour.

One of the stated objects of the Patent, which was a divisional application, was the optimisation and utilisation of space behind the seat, referred to as "lost space". Virgin contended that, on their proper construction, the words of claim 1 of the Patent simply required that, as well as having elements that

could form a seat, each seat unit also had elements that could form a substantially flat bed and that there was no requirement that the elements forming the bed should be completely distinct from the elements forming the seat.

Contour, on the other hand, contended that claim 1 was limited to “flip-over” seats, in which the rear part of the seat back forms part of the bed, which Contour referred to as the “true bed meaning”. Contour’s design was such that the seat reclines to form part of the bed *i.e.*, the passenger sits and sleeps on the same side of the seat back. It was common ground that on Contour’s interpretation of claim 1 there was no infringement.

At first instance, the Patents Court concluded that the Patent was valid, but was limited to the “true bed meaning” and therefore was not infringed by Contour’s designs. The Court stated that, if the Patent were to be construed in the manner that Virgin contended, which would encompass Contour’s design, the Patent would be invalid for added matter, but rejected all other attacks on the Patent. Virgin appealed.

The Court of Appeal agreed with Virgin that the focus of the claim was on maximising length by using lost space behind the seat, regardless of whether the seat flipped, as there was nothing in the claim limiting it in that way. Accordingly, the claim was not limited to flip-over seating, and was therefore infringed by Contour’s design. The Court disagreed with the finding of added matter, as well as rejecting the other validity attacks and held the Patent to be valid and infringed.

It also stated that the notional skilled reader of a patent is expected to know about patent law and drafting conventions. Accordingly, it held that the skilled reader would know that reference numerals shall not be construed as limiting the claim and that the reader would recognise the pre-characterising part of a claim as denoting those matters that the patentee considers to be old. Likewise, when there is a reference to a patent being a divisional application, it would be perverse to work on the basis that the skilled reader would not know what that means. A real skilled reader who was not familiar with such concepts would take steps to find out their significance.

The Court of Appeal judgment includes the following quote from Lord Hoffmann in *Kirin-Amgen*: “... The words [in a patent claim] will usually have been chosen on skilled advice.” The judgment reinforces the fact that such skilled advice is not to be ignored when interpreting patent claims.

## E-COMMERCE, IT & BANKING TECHNOLOGY

### Distance Sales: Right of Withdrawal and Seller Compensation

*Pia Messner v Firma Stefan Krüger* 3 September 2009 C-489/07 (unreported) was a reference to the European Court of Justice (ECJ) from a German court on the interpretation of Article 6 of the Distance Selling Directive (97/7/EC). The proceedings were between a consumer, who was claiming a refund and an online mail order business, which was claiming compensation.

#### BACKGROUND

On 2 December 2005, the Claimant, Ms Pia Messner, bought from the Defendant a second hand laptop for €278. The Defendant’s standard terms posted online stated that the purchaser would be liable to pay compensation for value in respect of deterioration in goods through use for their intended purpose. In August 2006, Ms Messner informed the Defendant that the computer display was defective. The Defendant refused to repair the defect free of charge. On 7 November 2006, Ms Messner informed the Defendant that she was revoking the contract and duly sought a refund of the purchase price. Because Ms Messner had not been notified properly of the period for withdrawal, this revocation was within the period for withdrawal provided by the German Civil Code.

Ms Messner issued proceedings in the local court for reimbursement of the €278. The Defendant counterclaimed for compensation under the Civil Code for value in as much as Ms Messner had been using the laptop computer for approximately eight months. It argued that the average market rental for three months would be €118.80 and that it was therefore entitled to €316.80.

The local German court decided to refer to the ECJ the question of whether Article 6 of the Directive precluded a provision under national law which provided that, in the case of withdrawal by a consumer within the withdrawal period, a seller could claim compensation for the value of the use of consumer goods acquired under a distance contract.

#### ECJ DECISION

The ECJ noted that under Article 6 the only charge that may be imposed on the consumer by reason of the exercise of his right of withdrawal is the direct cost of returning the goods.

The right of withdrawal was designed to protect the consumer in the particular situation of mail order sales, in which he “is not able actually to see the product or ascertain the nature of the service provided before concluding the contract”. The right of withdrawal was therefore intended to offset the disadvantage for the consumer by granting an appropriate period for

reflection during which he could examine the goods. A general requirement to pay compensation for the value of the use of consumer goods acquired under a distance contract would impair the right of withdrawal and was therefore incompatible with those objectives.

However, the ECJ conceded that the Directive was not intended to grant the consumer rights going beyond what was necessary to allow him effectively to exercise his right of withdrawal. Consequently, Article 6 did not preclude, in principle, a national provision that required a consumer to pay fair compensation where he had made use of the goods in a manner incompatible with the principles of civil law, such as those of good faith or unjust enrichment. Member States should not, however, impose conditions and arrangements following the exercise of the right of withdrawal which are contrary to the purpose of the Directive. This would be the case if the amount of compensation were disproportionate to the purchase price of the goods.

#### COMMENT

In a nutshell, Member States cannot provide for a general right of compensation for suppliers but they can allow for the supplier to be compensated where the consumer has used the goods "in a manner incompatible with the principles of civil law". In any event, such compensation must be proportionate. It therefore seems unlikely that the Defendant in this case would be entitled to claim more in compensation than the price of the laptop in the first place. It is less clear, however, whether this particular supplier would be able to claim compensation at all. The difficulty in the case has arisen as a result of the supplier not providing the requisite information under the German Civil Code so as to trigger the withdrawal period. Ms Messner therefore had use of the computer for several months. While it would seem fair that Ms Messner should account to the Defendant for the benefit of such use, the question remains whether use of a product during a statutory period of withdrawal is *per se* incompatible with the principles of civil law.

## ADVERTISING & MARKETING

### On and Offline Price Comparisons

A national press advertisement for Tesco was headlined "Fill Your Boots At Tesco" and showed photographs of various products alongside the prices at which they were sold at Boots and Tesco. The advertisement claimed "All This £5.99 Cheaper Than Boots". One of the items was Gillette MACH3 razor blades; the advertisement stated the price at Boots was "£11.24" and the price at Tesco was "£9.76". Text stated "Also available at [www.tesco.com](http://www.tesco.com)". Small print stated "Prices checked online at Boots.com on 25/03/09".

### THE COMPLAINT

Boots pointed out that the price quoted for the Gillette MACH3 razor blades was an online price only and the Boots store price was £9.60. They alleged that the advertisement was misleading, because it did not make clear that the prices used in the comparison did not apply in-store.

### RESPONSE

Tesco began by stating that its online and in-store prices were the same and it had compared its prices with Boots' online prices since April 2008. It explained that, having conducted several exercises to compare Boots' in-store and online prices, the online prices typically either matched or were cheaper than those in-store and were a reasonable and accurate way to check Boots' prices for comparison against its own.

Tesco stated that the only possible amendment to the advertisement would be a disclaimer stating that Boots' online and in-store prices ought to match, online promotions and errors excepted, but thought that such a disclaimer would be disproportionate to the issue.

### DECISION

The Advertising Standards Authority (ASA) was satisfied that the comparison was fair, in the sense that Tesco had compared prices from the same sales channel. It accepted Tesco's assertion that it had come across some instances of Boots' online prices being cheaper than its in-store ones but only one instance (the razor blades) of a store price being cheaper than an online price.

The ASA was also satisfied that the advertisement was not misleading.

The ASA considered that, without essential information explaining how frequently Boots' in-store and online prices differed, to require Tesco to state explicitly in the advertisement that Boots online and in-store prices differed was unnecessary. It also considered that, in the circumstances, the first part of the small print "Prices checked online at Boots.com on 25/03/09", which appeared in bold, was sufficient, because it was likely to suggest that the prices used in the comparison might not apply in-store.

The ASA concluded that the advertisement was unlikely to mislead and cleared Tesco of breaches of CAP Code clauses 3.1 (Substantiation), 7.1 and 7.2 (Truthfulness) and 18.1 (Comparisons with identified competitors and/or their products).

## Gambling Advertisements Featuring Young Persons

### THE ADVERTISEMENT

The provisions of the Code of Advertising, Sales Promotion and Direct Marketing (the Code) on gambling prohibit (amongst other things): the communication from being likely to be of particular appeal to children or young persons, especially by reflecting or being associated with youth culture (clause 57.4l); and anyone who is, or seems to be, under 25 from being shown gambling or playing a significant role in a marketing communication (clause 57.4n).

Betfair was found by the Advertising Standards Authority (ASA) to have breached these provisions when it created an e-mail advertisement for its online poker site that showed a photograph of a young woman with the text "ONLINE EXPERIENCE IS MEASURED IN GAMES, NOT YEARS. JOIN THE NEW BREED. Annette Obrestad – "ANNETTE\_15"". Note Ms Obrestad was actually 20.

### THE COMPLAINTS

A complainant objected that the advertisement was irresponsible, because it might encourage children and young people to gamble. The ASA challenged whether the advertisement breached the gambling provisions of the Code, because it understood Annette Obrestad was under 25 years of age.

### RESPONSE

Betfair said that it did not believe that the advertisement encouraged children to gamble because it only distributed the e-mail to registered users of Lucky Lotto, who were already confirmed to be over 18 and because of the technical measures it used to prevent young people from gambling on its site.

Betfair argued that, at 20, Ms Obrestad was an adult and outside the definition of a child or a young person under the Code and the Gambling Act.

### DECISION

As far as the ASA was concerned, the fact that the advertisement was not deliberately targeted at young people did not alter the position that marketing communications should not, under the Code, be likely to be of particular appeal to children or young persons, especially by reflecting or being associated with youth culture.

Because the online handle implied that Ms Obrestad was even younger than she was, the ASA concluded that it was likely to have particular appeal to children and young people and that, by representing a successful young poker player with the implication she was 15 years old, it could encourage young people to gamble and was therefore irresponsible. On this point the advertisement breached CAP Code clauses 57.2 and 57.4l (Gambling).

As Ms Obrestad is a professional poker player and as she was represented as such in the communication, this qualifies as playing a significant role in the marketing communication, and the ASA therefore found the advertisement in breach of CAP Code clause 57.2 and 57.4n (Gambling).

### COMMENT

The rules are clear as far as the watchdogs are concerned and any advertiser planning a campaign would do well to avoid featuring young people playing an active role in the gambling process, or using youthful looking people, for fear of either appealing to children.

## DOMAIN NAMES

### Mutwal Community Football Club Loses mcfc.com Domain Name

In *Manchester City Football Club Ltd v Vincent Peeris, Renown SC* WIPO D2009-0686 2 October 2009, a sole panellist ordered the transfer of the domain name mcfc.com to Manchester City, despite the involvement of the registrant with a community sports club in Sri Lanka called the Mutwal Community Football Club. The decision provides a good illustration of The World Intellectual Property Organization (WIPO) looking beyond the facts of a case to examine the registrant's motives in acquiring a domain name.

Vincent Peeris acquired the domain names mcfc.com and manchestercityfc.com, which he used to generate revenue through parking pages displaying pay-per-click advertising. Links on the advertising pages resolved to websites about Manchester City and other Manchester or sport-related websites. The domain name mcfc.com also contained a link that resolved to a page soliciting bids for the domain name. In April 2008, Peeris approached Manchester City by e-mail offering to sell both domain names to Manchester City for £175,000. He followed this up with an e-mail stating that he was "fielding offers" of £3 million from third parties and ultimately offered to sell them to Manchester City for £2 million.

Manchester City filed a domain name complaint under the Uniform Dispute Resolution Procedure (UDRP) with WIPO on 26 May 2009. In its complaint, Manchester City gave evidence that Peeris, or his business Renown, had been the respondent in five separate domain name complaints resulting in orders to transfer the domain names to the complainant, giving rise to a strong inference that Peeris made a business out of buying and selling domain names.

Peeris claimed that he had a legitimate interest in the domain name mcfc.com because he used it in connection with a local football club in Sri Lanka, called the Mutwal Community

Football Club. He asserted that the use of the domain name and his offer to sell it to Manchester City was not in bad faith.

Sole panellist Mark Partridge reached an uncontested conclusion that manchestercityfc.com had been registered and used in bad faith and should be transferred to Manchester City before considering the position regarding mcfc.com.

Mr Partridge observed that actual use of a domain name is not conclusive of a legitimate interest in that name. Mr Partridge noted that the Mutwal Community Football Club was set up after Peeris' business partner had acquired the domain name. He considered that there was "much that was suspicious" about the sequence of events and questioned why a community sports club would pay U.S.\$20,000 for a domain name to use for a website to sell handicrafts to make money for itself. He also doubted Peeris' evidence that the club had bought the domain name manchestercityfc.com for U.S.\$2,200, in order to give it to Manchester City free of charge, in a possible deal with the club for the mcfc.com website, particularly since at the time that it bought manchestercityfc.com, Peeris' business had not yet acquired mcfc.com from his business partner.

Mr Partridge considered that the fact that the Mutwal Community Football Club was set up after acquisition of the domain name mcfc.com was "too convenient to be dismissed as mere coincidence", suggesting that the name was chosen to avoid the UDRP. He went on to find that even if the name had been chosen in good faith, it did not indicate that the acquisition of the domain name was also necessarily in good faith. He noted that Peeris had acquired the domain name manchestercityfc.com in order to facilitate a deal with Manchester City as evidence that Peeris had intended to acquire the domain name in order to sell it to Manchester City.

In conclusion, Mr Partridge found that the actions of Peeris were consistent with those of a cybersquatter, using or creating a sports club as a cover and were inconsistent with those of a *bona fide* sports club. It was not a case of a party that owns a domain name to which it was entitled later offering to sell that domain name for a profit. Instead, it was an instance of a party buying a domain name in order to sell it to a rightful user of that name for profit and engaging in deceptive negotiations, having never used the domain name in connection with a legitimate business.

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