

Newsletter  
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# Intellectual Property

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Lovells' Intellectual Property practice advises, in the context of European Union, English, German, French, Italian, Dutch, Spanish, Polish, Czech, Slovak, Croatian, Russian, Chinese (PRC mainland and Hong Kong), Singaporean, Vietnamese and international law (including WTO issues), in relation to all areas of intellectual property: trade marks, patents, design rights, copyright, and rights arising from IT. We also advise our clients in the fields of entertainment and the arts. Many of our lawyers have a scientific background, enhancing their understanding of the technical and commercial issues involved.

We offer a complete global domain name protection service including clearance searches, registration, watch and investigation covering all generic TLDs (top level domains) but also, importantly, most country TLDs in some 200 jurisdictions.

In protecting the intellectual property rights of our clients we act at all levels, from advising on, applying for, registering and enforcing rights through to devising strategies and the investigation of infringement and counterfeiting activities. In addition, we act in structuring, negotiating and drafting licences and technology transfer transactions and have considerable experience in IP disputes before the Industrial Property Offices and in IP litigation before the courts, especially in cross-border or multi-jurisdictional disputes.

Applications and registrations are not currently handled in all legal systems listed above. However, we offer a complete trade mark and design filing and prosecution service at the Community Trade Mark Office as well as trade

mark, industrial design, appellations of origin and domain names searches, clearances, filing and prosecution services before the national Industrial Property Offices in France, Germany, Russia (together with all other CIS Member States), Croatia, Poland, Hungary, China, Hong Kong, Singapore, Indo-China (Vietnam, Cambodia and Laos) and elsewhere in South-East Asia.

This newsletter is written in general terms and its application in specific circumstances will depend on the particular facts.

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# Trade marks

## Advocate General criticises commercialisation of Picasso name

In a setback for the Picasso family an Advocate General's opinion issued by the European Court of Justice (ECJ)<sup>1</sup> recommended rejection of the Picasso Estate's opposition to DaimlerChrysler's application for the trade mark PICARO. The Picasso Estate, which licences the use of Picasso's name on the Citroen Xsara Picasso car, argued that the name Picaro, a character in Spanish literature, is too close to Picasso. The Advocate General disagreed. He accepted the Court of First Instance's analysis which had acknowledged the phonetic and visual similarities between the two marks but had focused on the conceptual differences. The fact that Picasso had a clear and specific meaning - referring to the famous artist - meant that the conceptual differences were enough to counteract the relatively minor phonetic and visual similarities.

### Famous names not automatically distinctive

The Advocate General emphasised that famous names do not have an automatic distinctiveness outside the field in which the famous person earned his reputation. Picasso was not distinctive for cars and the Picasso Estate's Community trade mark PICASSO was therefore not entitled to benefit from the greater protection afforded to highly distinctive marks. In making this point he underlined that distinctiveness in relation to trade marks was connected to the mark's ability to inform the consumer about the commercial origin of the goods and services - a famous name used in an unrelated field did not necessarily have the ability to do this. This raises a controversial point about merchandising generally - does the fact that the goods or services are licensed under the famous name suggest a connection between the licensor (here the Picasso Estate) and the

commercial origin of the goods in the sense that the licensor is controlling the quality of the goods? It will be interesting to see whether the Court comments on this point in its judgment. The Court is not obliged to follow the Advocate General's opinion but it often does.

In the course of his opinion the Advocate General makes his reverence for Picasso as a great artist clear. But he strongly criticises the commercialisation of the Picasso name expressing his fear that exploitation of the Picasso name is likely to endanger the respect with which the artist is regarded. He expresses the view that there is a general public interest in protecting the names of famous artists as a universal cultural heritage from insatiable commercial exploitation in order to avoid their work being damaged by trivialisation.

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<sup>1</sup> Advocate General Ruiz-Jarabo Colomer Opinion in case C-361/04 8 September 2005 Available on [www.curia.eu.int](http://www.curia.eu.int).

## FIFA "World Cup 2006" trade marks - are they valid?

On 3 August 2005, the German Patent and Trade Mark Court partly confirmed, partly rejected the cancellation of two FIFA trade marks for the Soccer World Cup 2006 in Germany, namely "WM 2006" and "Fussball WM 2006". "WM" is the current abbreviation for "weltmeisterschaft" (= world cup).

FIFA registered several word marks for the world cup, for example, "WM 2006", "Fussball WM 2006", "Fussball WM Deutschland", "WM Deutschland 2006". All the marks are registered widely for goods and services in nearly all classes. Ferrero (Hanuta, Duplo etc.) and several other companies filed cancellation actions against these trade marks and argued that they merely describe a well-known sports event which cannot be monopolised by FIFA. The German Patent and Trade Mark Office agreed and ordered the cancellation of the trade marks at first instance.

On appeal the Federal Patent and Trade Mark Court then decided that the marks are protectable, for all goods which have no direct relationship to the Soccer World Cup. Trade mark protection was therefore confirmed for several merchandising products like T-shirts, sweaters, caps and also for snacks and other food products. However, the Trade Mark Court confirmed the cancellation of the marks for all goods which have a direct connection to the sports event, like flags, soccer equipment, posters and printing media.

The decision is not yet final. Both parties have filed appeals to the German Supreme Court but a decision may not be given until after the Soccer World Cup has taken place (June 2006). Therefore, until the Supreme Court has decided on the case, civil courts will consider themselves to be bound by the registration of the marks. The big question therefore remains: To what extent may companies refer to the Soccer World Cup 2006 in advertising material, labels etc. without having a license from FIFA? Naturally, FIFA is of the opinion that nearly any commercial reference to the World Cup requires permission, particularly if the consumer might otherwise erroneously assume that the product

has been licensed by FIFA. In fact, FIFA has already obtained many injunctions in its favour. Therefore, companies should take particular care when planning marketing activities for what is in fact the biggest sports event in Germany for decades.

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## Well-known trade marks recognised by China's trade mark authorities

In a development that is likely to boost foreign investor confidence, China's trade mark authorities have recognised 79 well-known trade marks since the beginning of 2004.<sup>2</sup> Recognition as a well-known trade mark makes the mark eligible for wider trade mark protection in China and makes it easier for the owner to take action against local businesses which try to cash in on the repute of famous marks. It is, however, only relatively recently that such recognition has been afforded to foreign trade marks on any scale.

Well-known trade marks may be recognised either by the State Trade Mark Office of China (STMO) or by the Trade Mark Review and Adjudication Board (TRAB) the Chinese administrative enforcement bodies such as the Administration for Industry and Commerce, or the Chinese Courts.

In the second half of 2004, the State Administration for Industry and Commerce (SAIC) began launching special campaigns for the protection of registered trade marks. The campaigns focus on the protection of well-known trade marks and foreign related trade marks, and on investigating and punishing infringements against food and medicine trade marks. Many well-known trade marks were recognised for the first time as part of these campaigns.

Among the trade marks recognised are: automobile manufacturer "NISSAN", zipper manufacturer "YKK", diamond producer "DE BEERS", clothing designer "YSL YVES SAINT LAURENT", a Chinese-character trade mark for Johnson and Johnson's Nizoral (dandruff shampoo), and hotel management "Shangri-La".

This is the first time the STMO has recognised well-known trade marks in the service classes of financial services and leasing and management of real estate.

Of the 64 well-known trade marks recognised by STMO, 5 were recognised in opposition proceedings. In these proceedings, the owners of well-known trade marks opposed the registration of other trade marks on the ground that the trade marks seeking registration were copies, imitations or translations of their well-known trade marks. In the course of the opposition proceedings, the well-known trade marks were recognised.

The remaining 59 well-known trade marks were recognised where the owners believed trade marks used by others were similar to their own and asked the local branches of SAIC to take enforcement actions against such use. In this process, the applicants in the administrative enforcement actions were allowed to request to have their trade marks recognised as well-known trade marks.

TRAB is a trade mark authority under SAIC and separate from the State Trade Mark Office. Its duties include, among other things, accepting and judging the merits of applications from owners of well-known trade marks who claim that trade marks registered by third parties are copies, imitations or translations of their well-known trade marks and therefore should be cancelled. In this process, the applicant's trade mark can be recognised as a well-known one by the TRAB.

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## No property right in a domain name

The German Federal Supreme Court has clarified the legal status of domain names in Germany. The Court rejected the idea previously argued by some commentators that domain names are intellectual property rights comparable to patents, trade marks and copyrights. It pointed out that the owner of a patent, trade mark etc has an exclusive right based on statute which can be asserted against third parties. By contrast a domain name is simply an address on the Internet. At least under German law the rights of the domain name owner merely arise out of its contract with the relevant domain name registry. Any exclusivity afforded to the domain

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<sup>2</sup> According to an announcement by the State Administration for Industry and Commerce on 23 June 2005.

name owner arises as a technical matter (because the registry will not register the same name twice).

### Can effective security be taken over domain names?

The issue is particularly relevant for taking security over domain names. Based on the German court decision the benefit of the contract with the registry can, in principle, be the subject of security.

However, the question whether this security is likely to be effective in practice will depend on the terms of the contract. In particular, will the contract survive the insolvency of the domain name owner and is there a contractual right to transfer the domain name to a third party, thus allowing the security to be realised by a sale of the domain name? Another important practical issue is whether the security taker is able to guard against the danger that the domain name owner will sell the domain name to a third party who is not aware of the security taker's rights. In that event the third party may take the domain name free of the security taker's rights.

Domain names can be very valuable and increasingly security documents do attempt to take security over them. In large transactions security may be taken over domain names worldwide. However, as this German case highlights, the effectiveness of the security will vary depending on the terms of the contracts with the different registries, whether under the laws of the different jurisdictions the domain name itself may be regarded as a property right rather than a mere contractual right, and whether the lender's ability to realise the security may be affected by any domain name registration requirements (such as a local presence or a trade mark that is identical to the domain name). A difficult issue for lenders is that many domain name registries do not allow the lender to register its interest against the domain names. Indeed some domain name registries have displayed some hostility towards the concept that domain names may be given as security. As a result the lender often does not have a secure way of giving notice of his interest to third parties and this may result in a purchaser taking it free of the lender's rights. A possible solution to this problem would be for the lender to register the domain name in its own name so that it has control of all dealings in it. This would, however, result in the lender's name appearing on WHOIS database searches - a prospect

which is not generally attractive either to the lender or to the domain name owner. The use of an independent trustee as domain name owner under a contractual trust arrangement with both parties can be an option to avoid this downside.

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## When is a mark contrary to public policy?

The European Court of First Instance (CFI) has confirmed<sup>3</sup> that it is the trade mark itself, not the circumstances relating to the conduct of the person applying for registration that is to be assessed in order to determine whether a mark is contrary to public policy or accepted standards of morality. Such trade marks cannot be registered.<sup>4</sup>

This confirmation came in the context of betting services. Sportwetten GmbH Gera (SG), the proprietor of the German national trade mark INTERTOPS SPORTWETTEN registered for betting services brought an invalidity action against a figurative Community trade mark incorporating the word INTERTOPS which had been registered by Intertops Sportwetten GmbH (IS), also in respect of betting services. After SG's application for a declaration of invalidity was rejected by OHIM, it appealed to the Court of First Instance.

In coming to its conclusion, the CFI rejected SG's argument that because IS was not licensed to offer or advertise betting services in Germany the mark was contrary to public policy or accepted principles of morality in Germany and in other Member States.

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<sup>3</sup> Case T-140/02 Sportwetten GMBH Gera v Office for Harmonisation in the Internal Market (trade Marks and Designs) 13 September 2005 available on [www.curia.eu.int](http://www.curia.eu.int).

<sup>4</sup> Art 7 (l)(f) Community Trade Mark Regulation No 40/90

## UK Government publishes Bill on use of Olympics symbols

Soon after it was announced that London had won the fight to stage the 2012 Olympics, the UK Government published a Bill to regulate the use of the Olympic five ring symbol, motto and Olympic words. This is designed to limit use (on payment of a fee) of the protected terms and signs to sponsors of the Games and specifically licensed companies.

The Bill introduces a new intellectual property right - "the London Olympics association right" - to be administered by the London Organising Committee for the Olympic Games (the "LOCOG"). Anyone who, without the LOCOG's permission, represents that they have an association with the forthcoming Olympics, may find themselves subject to a civil infringement action and even to criminal penalties. Obvious culprits are market traders selling unauthorised "London Olympics" memorabilia.

The Bill is also designed to outlaw more sophisticated, unauthorised, means of cashing in on the kudos of the Olympics. Previous hosts of the Olympics have had to deal with "ambush marketing", often by competitors of major sponsors. An example is the advertisement by a company of its products or brands along with images of athletes without specific reference to the games, or its description of itself as the "unofficial sponsor" of the games.

The Department of Culture, Media and Sport has issued a factsheet explaining how the right can be obtained and how it will operate. This also seeks to counter a number of myths that have emerged since the Bill was published, for example that any reference to the word "games" or "gold" would be prohibited. This factsheet is available on the Department's website (<http://www.culture.gov.uk/>).

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## The effect of a disclaimer - caught out by a change in the rules

A UK trade mark may be registered with a "disclaimer". A recent English High Court case<sup>5</sup> concerned the New York cigar company, General Cigar Co, which had registered the name CIFUENTES WINK in the UK, subject to a disclaimer of CIFUENTES which is a Spanish surname. The disclaimer read: "Registration of this mark shall give no right to the exclusive use of the word CIFUENTES". At the time the mark was applied for (1991) it was UK Trade Mark Registry practice (broadly) to refuse registration to surnames if evidence of use was not submitted and the name appeared more than a certain number of times in the telephone directory. Cifuentes appeared 272 times in the Madrid telephone directory. The UK Trade Mark Registry therefore required it to be disclaimed.

Subsequently the Cuban tobacco company Partagas, associated with a different branch of the Cifuentes family, applied for the word mark CIFUENTES. General Cigar opposed the application for CIFUENTES on the basis of its mark CIFUENTES WINK. If the disclaimed matter (CIFUENTES) was ignored then the marks would not be similar and the opposition would fail. General Cigar argued that disclaimers were only relevant in relation to infringement of a mark and would not affect oppositions. The Court rejected this and held that where the only point of similarity with a registered mark was the disclaimed element, the disclaimed element could not be relied on either in opposition or infringement proceedings.

This result did, however, seem rather unfair on General Cigar. Since 2004 the Trade Mark Registry's practice on surnames has changed as a result of the European Court of Justice's ruling in Nichols<sup>6</sup> in which it ruled that the criteria for assessing the distinctive character of trade marks constituted by a personal name were the same as those applicable to other categories. Rules about how many times a name appears in the telephone directory no longer

<sup>5</sup> General Cigar Co Inc v Partagas y Cia S.A. 29 July 2005 [2005] EWHC 1729 (Ch) unreported. Available on [www.bailii.org](http://www.bailii.org).

<sup>6</sup> Case C-404/02 Available on [www.curia.eu.int](http://www.curia.eu.int).

apply. Acknowledging this the Judge felt it might be appropriate to stay the proceedings to allow General Cigar to apply to have the disclaimer removed under S64(5) of the UK Trade Marks Act. We understand that an application has now been made. It will be interesting to see whether this application is successful and the effect this may have in relation to other trade marks registered with disclaimers on surnames.

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## Spanish domain name system opens up to non-Spanish applicants

The Spanish domain name registry ESNIC recently announced that the rules relating to the registration of domain names under the .es country code top level domain will change significantly from 8 November 2005.

The most important modification to the rules for .es is that applicants from outside Spain will be able to apply for any .es domain name. Previously only entities based in Spain were allowed to apply and the domain name applied for had to be an exact match of a trade mark valid in Spain or the name of the company concerned. Under the new rules .es domain names will be available on a "first come, first served" basis to all applicants. A sunrise period for holders of trade marks recognised in Spain (including Community Trade Marks) runs until 21 October 2005.

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# Copyright and designs

## Look-alikes: rebirth of doctrine of slavish imitation in the Netherlands

With effect from 1 December 2003, the Benelux Design Act was amended in order to implement the European Designs Directive<sup>7</sup>. An important effect of the new law was to re-introduce "slavish imitation" as a possible action against third parties producing look-alike products. Slavish imitation is based on Benelux unfair competition law. Prior to the new law the action for Slavish imitation had been specifically barred in relation to designs. Now, the re-introduction of the doctrine of slavish imitation provides an additional weapon against infringers which may in some cases succeed where a design right would not.

Slavish imitation occurs where an entity has copied the distinguishing features of a competing product in such a way as to cause confusion to the public and has fallen short in its obligation to do whatever is reasonably possible and necessary to prevent that confusion. The "distinguishing features" need not be protected by intellectual property (IP) rights in order for the product as a whole to be protected - the doctrine of slavish imitation covers the copying of shape, design, trade dress, etc, - that is, the overall look of a product.

Two recent decisions nicely illustrate the rebirth of this doctrine in the Netherlands and its usefulness in infringement cases. The first concerns Delft Blue miniature houses. Since 1964, two companies, Bols and Henkes, have sold Delft Blue miniature houses to the Dutch airline, KLM, to be given to business class passengers as gifts. These small houses, which resemble Amsterdam canal houses and contain gin, have become collector's items. S&T Schiphol BV, an unrelated company, began to sell six different



*Miniature houses offered by KLM*



Delft Blue miniature houses in its shops at Schiphol Airport, Amsterdam.

Bols and Henkes sought an order in The Hague Appeal Court to restrain S&T from slavishly imitating their miniature houses. The Court ruled that,<sup>8</sup> in general, this doctrine can be invoked where unnecessary confusion has been created in the market place. However, it is a condition precedent for protection that the copied product can be distinguished from other products and that its distinguishing elements have been copied by the other party. The Appeal Court ruled that this was not the case here. Henkes and Bols had failed to show which distinguishing elements had been slavishly copied. In fact, they had only shown that the miniature houses marketed by S&T were about the same size

<sup>7</sup> Council Directive 98/71/EC, 13 October 1998 on the legal protection of designs.

<sup>8</sup> Appeal Court of The Hague 21 April 2005, IER 2005/47.

and consisted of the same material, that is, Delftware. However, the size of the miniature houses and the type of material used to create them were not distinguishing features and were in any event in the public domain. Consequently, the claim was dismissed.

The other slavish imitation case concerned printers' ink bottles. Videojet Technologies BV is a supplier of industrial printing systems, printers' ink and solvents. A competitor, Clever-CPL BV, recently also started selling printer's ink and solvents. Clever uses a transparent ink bottle similar to that used by Videojet, also with a red cap and with a label which is in some ways similar to that of Videojet. Videojet brought an action against Clever in the Hague District Court, based on copyright infringement and slavish imitation.

The Court dismissed<sup>9</sup> the copyright claim since Videojet had failed to prove that it owned any copyright covering the appearance of the bottle and could only prove it had copyright in the label. The Court ruled that Clever's label did not infringe Videojet's copyright, because even though certain elements were copied, the total impression of the labels was different.

Surprisingly, however, the Court allowed the claim based on slavish imitation. It held that, even if it was permissible to copy a product that was not protected by an IP right, this was different when that copying caused unnecessary confusion to the public. Even though there were not enough similarities between the labels to constitute copyright infringement, the Court was of the opinion that there were enough similarities between the appearances of both ink bottles as a whole to cause confusion. These similarities would have been easy to avoid. Other decisive factors in this case were the fact that the bottle was unusual in the industry, the use of similar, uncommon words on the label, the fact that the bottles were not positioned next to each other in shops and the fact that Clever had actively approached customers of Videojet.

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## Precarious position of customers who commission software

The precarious position of customers who commission software without agreeing the terms on which they will use it was highlighted in a recent English High Court decision<sup>10</sup>.

Under English law, where a copyright work such as a software program is commissioned it is the creator of the program and not the commissioner who owns the copyright unless there is an agreement to the contrary. Usually the owner will be the software development company – assuming that the software is developed by its employees. In some circumstances, however, an agreement to assign the copyright to the customer may be implied.

The case involved a company specialising in the provision of accommodation to asylum seekers – Clearsprings (Management) Ltd. Clearsprings commissioned Businesslink, a small software developer, to write a web-based database system. Businesslink wrote the software on the basis of information provided by Clearsprings about its requirements and to reflect Clearsprings' confidential business operating procedures. But it also incorporated general routines it had written for previous applications and clients. Clearsprings claimed that it should have an assignment of the copyright or, at the least, an exclusive licence.

### **The circumstances in which exclusivity for the customer may be implied**

The Court found that, on the facts, the parties had made no express agreement about ownership of copyright. Was this a situation in which an agreement to assign the copyright would be implied? The Court applied the principles in the leading case in this area, *Robin Ray v Classic FM*<sup>11</sup>. Following *Robin Ray* a term implying an agreement to assign the copyright is not likely to arise unless the situation requires that, in addition to the right to use the copyright work, the commissioner should have the right to exclude the contractor from using the

<sup>9</sup> District Court of The Hague 6 September 2005, docket number 05/689.

<sup>10</sup> *Clearsprings Management Ltd v Businesslink Ltd and another* 14 July 2005 [2005] EWHC (Ch) 1487 unreported.

<sup>11</sup> *Robin Ray v Classic FM plc* [1998] FSR 622.

work and the ability to enforce the copyright against third parties.

### **The Court recognised that a software developer needs to re-use software routines**

In this case the parties had not contemplated at the time the contract arose that Clearsprings would exploit the software by licensing it to third parties. Not only were general routines developed by Businesslink for other customers included in the software but, as a software developer, Businesslink would need to use general routines written for Clearsprings for other customers in the future. This was not, therefore, a situation where exclusivity for the commissioner would be implied. The court also rejected Clearspring's argument that it needed exclusivity in the software to protect its confidential business operating procedures. An obligation of confidence on Businesslink was sufficient to achieve this.

On what terms was Clearsprings entitled to use the software? Applying the general principle in *Robin Ray* that the licence implied would be the least that was needed to give business efficacy to the contract, the Court said that Clearsprings had a perpetual, irrevocable, royalty-free, non-exclusive licence with no right to sub-licence. It was also entitled to repair, maintain and upgrade the software in accordance with the requirements of its business of providing accommodation, care and related services to asylum seekers (its current business).

### **The narrowness of the licence granted to the customer is of concern**

The Court's recognition that a software developer needs to re-use software routines and that therefore an agreement to assign should not readily be implied will be welcomed by the software industry. Seen from the customer's point of view, however, the narrowness of the licence is of concern. The licence allows Clearsprings to continue to use the system as was contemplated at the time of the contract but without much thought to the future so that Clearsprings would need to obtain Businesslink's consent if it wanted to use the software for an expanded business or for other group companies, if it wanted to outsource or if it needed to assign its

right to use the software, for example, on a sale of the business. The case acts as a clear warning to companies commissioning software to agree such matters upfront in the contract with the developer rather than to leave the issue to be implied by law.

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## Spain catches up on copyright

Spain is at last reforming its copyright laws in order to carry out a long overdue implementation of the Directive on Copyrights in the Information Society<sup>12</sup> and to bring its copyright laws up to date generally.

Although the Spanish Copyright Act has already been modified several times (the last modification was in 2003) the debate around the current reforms has highlighted a number of shortcomings, mostly to do with the extent to which existing laws protect authors in the context of digital technologies.

Shortcomings include a need to:

- Ensure protection for authors against digital copying, taking into account especially the massive numbers of high quality copies which can be made by digital technologies at low cost
- Clarify how certain interactive or "on demand" activities carried out over networks such as the internet are to be classified for the purposes of copyright law – for example whether downloading material from the internet amounts to the distribution of copies or is to be categorised as "communication to the public"
- Deal with transient copying
- Develop a new regime for private copying; in particular to decide which media (for example, CD Rom, DVD etc) should be subject to a levy to compensate authors for the likelihood that they will be used for private copying
- Introduce specific measures to address new types of infringements, for example peer to peer networks, ripping etc.

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<sup>12</sup> EU Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the Information Society.

The draft touches all these five issues and is likely to go beyond the Directive in certain respects, particularly in relation to compensation for private copying. It introduces provisions:

- Making the author's right to prevent copying technology neutral. So in future it will be clear, for example, that scanning a book or picture, the conversion to Mpeg-4 format of a film recorded in a VHS cassette, etc. are undoubtedly covered by copyright
- Introducing a new "making available to the public" right to cover most instances of the exploitation of copyrights through networks such as the Internet (for example, the access to a videogame hosted in an Internet Website, WAP Portal, etc.). This right is considered as a specific type of the "communication to the public" right
- Dealing with transient copying so that, for example, web-caching will not require the prior authorisation of the author – a point which is not clear under the existing law
- Establishing a new regime for compensation for private copying. This new regime deals with the differences between analogue media/equipment (for example, photocopiers, etc.) and digital media/equipment (for example, CD Rom, DVD, etc.). Importantly, the new Act excludes computer hard disks from the levy, a point on which there has been much lobbying by hardware manufacturers
- Introducing measures against certain new types of copyright infringements which are particularly relevant in the digital age, for example against the circumvention of technical security measures used to protect copyright works (in particular digital content) against non-authorised exploitation (for example, ripping, etc.).

So the new Act, which is likely to be enacted within the next few months, paves Spain's way to the "Information Society" and ensures the alignment of Spanish copyright laws with the laws on Copyrights of the other EU member States.

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# Patents

## UK comes into line with the European Patent Office on technical contribution

On 29 July 2005 the UK Patent Office announced an immediate change in the way it will examine patent applications for patentability. The new approach is very similar to that now used by the European Patent Office (EPO). The change follows two English High Court decisions handed down on 21 July 2005 which considered inventions excluded from patentability under Article 52.2 of the European Patent Convention (EPC).<sup>13</sup> In CFPH LLC's application<sup>14</sup> inventions relating to online betting were held to be excluded as business methods and in Halliburton<sup>15</sup> claims relating to a computer process for designing a drill bit were excluded as methods for performing mental acts.

### The difference

Formerly the UK Patent Office applied the "technical contribution" test to assess whether inventions fell outside the exclusions. This was derived from the EPO case of Vicom<sup>16</sup> and had been established by the English Court of Appeal in Merrill Lynch's application<sup>17</sup>. It involved filtering out excluded inventions as a first step by identifying what is new about the invention and then asking whether this involves a technical result. If no, it is not patentable; if yes one goes on to consider obviousness. The new test, by contrast, considers all the requirements for patentability together. Having first identified what the patent claims is new and not obvious (and susceptible of industrial application) one then goes on to decide whether that qualifies as an invention which can be patented or whether it falls into one of the excluded categories.

Will it make any real difference? In a notice issued on 19 August 2005 in which it examined a number of case studies, the Patent Office expressed the view that the result would be the same in all but a few borderline cases.

### UK Patent Office not always enthusiastic about tracking EPO reasoning

In the CFPH case the judge commented that, understandably, the UK Patent Office is not very enthusiastic about the prospect of having to track every twist and turn of the EPO's reasoning. Although the English courts have emphasised the desirability of uniformity with the EPO, the UK Patent Office is not bound to follow EPO decisions. Decisions of the Boards of Appeal of the EPO are also not binding on each other. However, the UK Patent Office is bound to follow decisions of the English Courts. Discrepancies can therefore arise in the way the provisions of the EPO are applied as in this case where the practice of the EPO had changed but the UK had not followed. Arguably this kind of discrepancy might have been avoided for the future in the field of Computer Implemented Inventions if the proposed directive on that subject had been adopted by the European Union (see our August 2005 edition). Under the proposed Directive national courts of the EU Member States would have been obliged to follow decisions of the European Court of Justice on such issues and the EPO had also indicated that it would do so.

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## Roche Bolar in the US and in Europe

In June this year the US Supreme Court's ruling in Merck KGaA v Integra Lifesciences I, Ltd gave pharmaceutical companies greater scope to use compounds patented by other entities in their

<sup>13</sup> Reflected I Section 1.2 of the English Patents Act 1977.

<sup>14</sup> CFPH LCC, Patent Applications by 21 July 2005 [2005] EWHC 1589 (Pat) unreported. Available on [www.bailii.org](http://www.bailii.org).

<sup>15</sup> Halliburton Energy Services, Inc v Smith International (North Sea) Ltd & Ors 21 July 2005 [2005] EWHC 1623 (Pat) unreported. Available on [www.bailii.org](http://www.bailii.org).

<sup>16</sup> T208/84 Vicom (EPO Board of Appeal, 15 July 1986).

<sup>17</sup> Merrill Lynch's Application [1989] RPC 561, Court of Appeal.

research. The decision related to the so called "safe harbour" or "Roche Bolar" exemption which was introduced into US law in 1984. This permits use of another's patented invention (other than a new animal drug or veterinary biological product) "solely for uses reasonably related to the development and submission of information under a Federal law which regulates the manufacture, use or sale of drugs".

Under the Federal Food, Drug and Cosmetic Act, drug companies must submit research data to the Food and Drug Administration (FDA) at two stages of a drug's development. The first is the investigational new drug (IND) application stage, which seeks permission to run "clinical trials" on humans. This is based on a submission containing a description of "preclinical tests (including tests on animals)". The second, the new drug application (NDA) stage, must be accompanied by "full reports of investigations" made to show the FDA whether or not the drug is safe and effective for its intended use. The NDA must include all the clinical studies, as well as preclinical studies related to the drug's efficacy, toxicology and pharmaceutical properties.

The dispute between Merck KGaA and Integra had its genesis in 1988, when Merck KGaA began funding research at the Scripps Research Institute by a Dr Cheresch. Dr Cheresch identified a cyclic peptide (EMD 66203) which seemed effective to inhibit angiogenesis (the process of generating new blood vessels), which in turn might halve tumour growth by "starving" cells. Merck KGaA agreed with Scripps to fund the "necessary experiments to satisfy the biological bases and regulatory (FDA) requirements for the implementation of clinical trials" using EMD 66203 or a derivative of it. Scripps' research led to the discovery of two derivatives of EMD 66203 - EMD 85189 and EMD 121974.

Following experimentation on these three compounds, in 1997, Scripps' research team chose EMD 121974 as the best candidate for clinical development.

Integra alleged that Scripps' research for Merck KGaA entailed the infringement of five of its patents. When it sued for infringement, Merck KGaA relied on the safe harbour defence. The jury found in favour of Integra (although one of the five patents was ruled invalid) and Merck KGaA appealed. The US Court of

Appeals for the Federal Circuit dismissed the appeal. It interpreted the "safe harbour" narrowly, so that only "clinical testing to supply information to the FDA" and not more general biomedical research (for example, research to find the best drug candidate) without an immediate connection to an FDA submission, would be exempt from a charge of infringement. Merck KGaA appealed again.

On 13 June 2005 the Supreme Court unanimously vacated the Federal Circuit's ruling. The Court interpreted the safe harbour more broadly than the Federal Circuit: "At least where a drugmaker has a reasonable basis for believing that a patented compound may work, through a particular biological process, to produce a particular physiological effect, and uses the compound in research that, if successful, would be appropriate to include in a submission to the FDA, that use is "reasonably related" to the development and submission of information under Federal law".

#### **European Roche Bolar**

This ruling is of particular interest given that the EU has introduced its own "Roche Bolar type" exemption pursuant to Directive 2004/27/EC. The UK intends to implement this provision into UK law by the end of October 2005. To date generic manufacturers have risked claims of patent infringement if they conduct trials in the EU to support an abridged route marketing authorisation application. When Article 10(6) of the Directive is implemented into national laws, manufacturers will be able to perform this work in the EU. It remains to be seen if the English Courts will adopt a similarly broad interpretation of the exemption as the US Supreme Court when generics carry out preparatory studies or trials (such as those to identify the best drug candidate) which cannot be said to be directly related to the marketing authorisation application.

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## CFI to hear patent action over Euro banknote technology

A dispute is making its way to the European Court of First Instance which has potentially massive costs implications for the European Central Bank (ECB).

The case concerns a European Patent which covers a method of incorporating an anti-counterfeiting feature into banknotes or similar security documents to protect against forgeries by digital scanning and copying devices. The patent is owned by a US company, Document Security Systems Inc (DSS). DSS claims that all Euro banknotes in circulation infringe this patent. It is estimated that, by the end of 2006 (the earliest time at which this case could be heard), the ECB will have printed or commissioned to be printed about 30 billion Euro banknotes.

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# Warning letters and threats

## German Supreme Court outlaws unjustified warning letters

Intellectual property right owners face damages claims if they issue warning letters in cases where there is no infringement and the claim has been brought at least negligently. This was the position taken by the Grand Senate of the German Supreme Court on 15 July 2005 in a ruling which resolves previous conflicting judgments on this point.

The Grand Senate highlighted the position of customers who do not have enough information to judge whether goods infringe. Such customers may be inclined to stop stocking the goods as soon as infringement issues are raised. By warning off a competing manufacturer's customers with exaggerated claims the right owner can, said the Grand Senate, effectively enlarge its exclusive rights beyond the true scope of the intellectual property right in question and without incurring the costs and uncertainties of litigation.

The ruling allows manufacturers who are the victims of unjustified warnings against their customers to claim damages if the owner of the intellectual property right negligently alleges an infringement where in fact there is none. This test of negligence is a stiff one for the intellectual property owner as the Courts require a very high standard of diligence in assessing the existence and scope of the intellectual property right.

The Senate recognised that rights owners may face uncertainties in judging the strength of their case and were not always in a position to know when a claim is unjustified. It emphasised, however, that they are in a privileged position because of the exclusivity granted to them, and must also bear the risks associated with the assertion of their rights.

The case arose out of a trade mark infringement action relating to three dimensional trade marks for medical devices. However, the Grand Senate

indicated that its decision applies to other intellectual property rights also.

The ruling stops tendencies in some German courts to narrow down the situations in which damages can be granted in respect of warning letters to very exceptional cases and emphasises the need for owners of German intellectual property to take care in issuing such letters.

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## Hong Kong: implied threats

A recent Hong Kong case has highlighted uncertainties about what is to be regarded as a "threat" in relation to patent proceedings. Under the Hong Kong Patent Ordinance patent owners and others who threaten to bring infringement proceedings risk, among other things, having to compensate the threatened person in damages if the threat is groundless - for example if the patent is shown to be invalid or if there is in fact no infringement.

The case<sup>18</sup> involved technology relating to vacuum cups with nano-sized material in the insulation layer. Nano Biotechnology (the patentee) traded in a vacuum cup and obtained a short term patent in Hong Kong for it. Nano World manufactured and traded in what they said was an improvement to the cup. The patentee wrote to Nano World claiming infringement of their patent and saying that they would start proceedings unless Nano World immediately ceased manufacturing and selling or otherwise dealing in nano cups. They then sent a second letter to Nano World repeating the alleged infringement and indicating that a report had been sent to Customs and Excise and to the 39th Hong Kong Brands and Products Expo Fair (Industries Expo). As a result Industries Expo made it a

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<sup>18</sup> Nano World (HK) Ltd v Nano Biotechnology Holdings Ltd - Action 2797 of 2004.

condition of the Nano World's participation in the fair that they must not display or refer to the nano cups. A further letter was sent to Nano World's main customer. Presumably in an attempt to avoid liability for making a "threat" that letter merely indicated that the patentee would take all necessary steps to protect its interests rather than making express reference to legal proceedings. Nano World brought an action against the patentee for unjustified threats and the patentee counterclaimed for infringement.

#### **Had a threat been made?**

The case was about whether an *ex parte* injunction granted in respect of the threats should be continued. Deputy Judge Fung found that there was a serious case to be tried on this issue and maintained the injunction in respect of threats against third parties but not against Nano World. In his analysis, the judge considered whether the letters to Nano World amounted to a threat. In his opinion they did because there was no without prejudice negotiation between the parties and demands were made akin to those usually made in an infringement action with a time limit of 14 days for compliance. However, this was an academic issue because proceedings had now been commenced between the patentee and Nano World and the injunction was not continued in respect of threats against Nano World itself.

Of more interest is whether the letters to Nano World's main customer or to Industries Expo also amounted to threats.

The judge specifically included in the injunction he granted the words "or by necessary implication". What does this include?

It is likely that wording such as that included in the letter to the patentee's main customer (that all further action would be taken but with no specific reference to legal proceedings) would be regarded as an implied threat. The judge also indicated that a letter simply to the effect that the patentee had a short term patent and that the two versions of the nano cups were different would not be regarded as an implied threat. The question remains, however, where the line is drawn between these two extremes. For example, would a letter putting a third party on notice of the

infringement proceedings against Nano World amount to a threat?

Unfortunately, although the judge included threats of proceedings by implication in the injunction, he did not indicate what would amount to such a threat. We are left therefore only with the test of what a reasonable man would objectively consider a threat. To the extent that this is not clear cut, as in the situation described above, the scope of the injunction is also ambiguous.

#### **Hong Kong threats provisions based on former UK law**

UK intellectual property owners may wish to note that the threats provisions in the Hong Kong Patents Ordinance<sup>19</sup> are the same as those in the UK Patents Act 1977 before the amendments brought in by the Patents Act 2004 which came into force at the beginning of January 2005 (see our June 2004 edition). The amendments were designed to make it easier for a patent holder to open discussions with possible infringers before commencing proceedings and easier to obtain information from a retailer about the source of the infringement without provoking a threats action. The aim was to encourage settlement. For example, one of the differences is that under the new law "assertions" about the patent can be made in the context of making enquiries about the source of the infringements. Careful enquiries should, therefore, be able to be made of customers without risking a threats action. Another important change relates to the circumstances in which a threat will be justified. Under the old law it was no defence to a threats action to show that the patent was infringed if the claimant could prove that it was invalid in a relevant respect. This has been modified so that now, in the UK, the defendant will have a good defence if he did not know and had no reason to suspect that the patent was invalid.

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<sup>19</sup> Section 89.

# Special focus

## The Spanish Community Trade Mark Court in Alicante

**One year on, the Court is beginning to look like an attractive forum for trade mark and designs litigation**

The Spanish Community Trade Mark Court in Alicante recently celebrated its first anniversary. It became operative on 1 September 2004 after having been established in the context of a reform of the Spanish judicial system by Law 8/2003 of 9 July 2003, which set up specialised courts for commercial matters (*Juzgados de lo Mercantil*) and determined that the Commercial Court of Alicante has exclusive competence for Community trade mark (CTM) and Community design (CD) matters at national level, with the Provincial Court of Alicante (*Audiencia Provincial*) as the competent court of appeal.

The CTM Court in Alicante has a dual function: apart from being the exclusively competent court for CTM and CD matters in Spain, it is also the "fall-back" court competent to hear CTM and CD disputes where neither party is domiciled or has an establishment in the European Union. For instance, this may be the case in disputes between two US companies. In such cases, the international jurisdiction of the Alicante CTM court is not exclusive: actions may also be brought in the courts of the member state in which the infringement occurred (except for cases of declaration of non-infringement). Such actions are, however, limited to that territory and the court cannot grant a Community-wide injunction.

The CTM court in Alicante adopted a number of important decisions in its first year of existence and showed that it has the potential to become an important forum for trade mark litigation in the Community. Initial controversies about the scope of the Court's competence have been settled, and the CTM court gave effective protection to Community trade marks and designs by granting preliminary injunctions.

### Scope of the CTM court's jurisdiction

Initially, there had been a question mark over whether the CTM Court's exclusive jurisdiction for CTM matters meant that the Court was strictly limited to questions of CTM law in its examination of a case and could not deal with related claims such as unfair competition. In a decision of 23 March 2005 in case 133/2005, the CTM court of second instance, the *Audiencia Provincial* of Alicante, settled this issue. It ruled that the CTM court's competences as commercial court and as a CTM court are not mutually exclusive but are different functions of the same organ. Accordingly, it held that CTM infringement, national trade mark infringement and unfair competition claims could be joined, overturning the decision by the first instance court to the contrary. As trade mark infringement cases very often involve unfair competition claims, this broad understanding reassures trade mark owners that the Court will consider itself fit to carry out a comprehensive assessment of the case.

### Pan-European injunction based on Community trade marks

As early as November 2004, the Spanish CTM Court (first instance) issued what was reported to be its first pan-European injunction in a CTM case for infringement of the CTM registrations Viagra and Pfizer by an entity commercialising faked Viagra products on the internet and maintaining websites containing the term Viagra. Since attempts to summon the defendant for a hearing failed, the Court issued an injunction *ex parte* and adopted broad measures of protection: the defendant had to provisionally cease all use of the terms Viagra and/or Pfizer (including in combination with other elements or words) in relation to the marketing of any products in any EU member states, in particular, on the Internet, to provisionally abstain from using the term Viagra (alone or with other elements or words) as a domain name, and to provisionally block

the use of all domain names containing the element Viagra and registered in the name of the defendant.

### **Pan-European injunction based on Community designs**

The Spanish CTM Court's first reported pan-European injunction based on unregistered as well as registered Community designs followed by a decision of 4 April 2005 concerning imitations of designer handbags. The injunction was granted by the appeal court after the first instance court had refused to grant interim protection.

For the registered CDs, the first instance court's decision was based on the plaintiff's failure to specify which of the designs of the multiple design registration had been infringed. In respect of the unregistered CD, the court held that in the absence of data (technical reports, surveys) showing that the shape of the bags caused a different overall impression compared to the bags previously on the market, the plaintiff had failed to demonstrate that the protection requirements were fulfilled, and that the burden of proof in this respect was on the plaintiff. The standard adopted in that decision represented a rather high burden for the owner of an unregistered CD in the enforcement of its rights.

When reversing the first instance decision, the Court of Appeal applied a different standard relying on the presumption of validity of unregistered CDs under Article 85(2) of the Community Design Regulation. It considered that the evidence of public disclosure provided by the applicant (catalogues, price lists, invoices) was sufficient for the presumption of validity of unregistered CDs to apply in the context of interim protection, and that the defendant had failed to demonstrate the absence of individual character. Comparing the designs in question, it concluded that the infringing goods were slavish copies of the applicant's designs and that it could therefore not be reasonably assumed that they were the result of an independent work. It also held that on the face of it, there was an infringement of the applicant's registered Community design concerning the ornaments, and relied on the presumption of validity of registered designs under Articles 17 and 85(1) Community Design Regulation. The Court

ordered the defendant to provisionally cease all fabrication, importation and/or marketing of the bags in question, and the seizure of the existing handbags, to become effective following the payment of a bond of €3,000 by the plaintiff.

In this decision, the CTM Court of Appeal showed its readiness to provide efficient protection to CD owners, in particular, to give practical effect to the presumption of validity of unregistered CDs.

### **Conclusion**

Whereas it certainly remains to be seen how the further jurisprudence of the Spanish CTM court develops, the first experiences have been very positive from a right holder's perspective. Where there were uncertainties – for example, relating to a joinder of claims or the standard of proof for injunctions – these have been sorted out in a reasonable manner by the CTM Court of Appeal. If the positive trend continues, the CTM court in Alicante will consolidate itself as an attractive forum for trade mark and design litigation.

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