



THE EUROPEAN IP BULLETIN

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SUMMARY OF CONTENTS

PAGE NO.

INTELLECTUAL PROPERTY

1. PROPOSAL FOR A DIRECTIVE ON ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

1

The European Parliament has voted in favour of a Directive to harmonise national laws on the means of enforcing intellectual property rights and to establish a framework for the exchange of information in order to help fight piracy and counterfeiting.

COPYRIGHT

2. EMI TAKES ACTION AGAINST BEATLES ALBUM REMIX

1

Record label EMI issues “cease and desist” orders to stop DJ Danger Mouse and record stores from selling the Grey Album, which uses unauthorised samples of the Beatles’ White Album.

3. MORAL RIGHTS: ANYA V WU

2

This decision shows how the moral right of an author to be identified attaches to copyright expression and not necessarily to underlying ideas. It also shows the usefulness of the Court’s power to strike out hopeless cases, and perhaps the difficulties faced by litigants in person.

4. DATABASE RIGHTS: ROYAL MAIL V I-CD PUBLISHING

3

The issues central to this case are how to create a balance between the commercial interests of a copyright holder and the public interest to be advanced through the use of a copyrighted database, and how far this balance affects the interpretation of the terms of a copyright licence.

5. EQUITABLE REMUNERATION DEFINED: SENA V NOS

4

In this case, the ECJ laid down the essential principles relating to the interpretation of Article 8(2) of Community Directive 92/100 EEC of 19 November 1992 on rental and lending rights and on certain rights related to copyright in the field of intellectual property.

PATENTS

6. ELECTRONIC FILING OF INTERNATIONAL PATENT APPLICATIONS 5

From February 2004, applicants seeking patent protection in multiple countries through the Patent Cooperation Treaty (PCT) have the possibility to electronically file applications using the PCT-SAFE (Secure Applications Filed Electronically) system. This System offers applicants using the World Intellectual Property Organization (WIPO) as a receiving office a more economic, safe and quicker procedure to obtain patent protection.

7. EUROPE REVOKES RAMBUS PATENT 5

The revocation of a European patent held by Rambus Inc. has brought a reprieve for major memory chip manufacturers in Europe, who have been sued in various member states by Rambus Inc. for infringement of its patented technology. However, the ruling does not bring much hope for them in US, where FTC has already ruled in favour of Rambus Inc. despite the objections of fraud against it. The trials of the infringement case are slated to begin in the coming summer in the US.

8. CIPA PROPOSES CODE OF PRACTICE 6

A Code of Practice for pre-action conduct in intellectual property disputes was released by the Skrein Committee to assist and guide those who are dealing with intellectual property issues.

TRADE MARKS

9. ECJ REFUSES 3-DIMENSIONAL MARK: DEUTSCHE SiSi-WERKE v OHIM 7

The case between *Deutsche SiSi-Werke v OHIM* refers to the registration of a drinks packaging as a three-dimensional mark and the need for the mark to be distinctive so as to prevent a monopoly for a form of packaging. Under trade mark law, a mark has to be distinctive in order to qualify for trade mark protection.

10. NEW REGIME FOR REGISTRATION OF .FR DOMAIN NAMES 8

Association Française pour le Nommage Internet en Coopération (AFNIC) is introducing a new regime for registration of .fr domain names. Under the new regime, applications will be considered on a "first come, first served" basis, hence abolishing the need to prove ownership of the domain name.

11. SCOTTISH & NEWCASTLE TO STOP BREWING NEWCASTLE BROWN ALE IN NEWCASTLE? 9

Rumours that Scottish & Newcastle, the brewers of Newcastle Brown Ale, are to move production of "broon" (as it is affectionately known) from its Tyne Brewery in Newcastle could have serious implications for its intellectual property assets because Scottish & Newcastle is the named producer of the Newcastle Brown Ale geographical indication.

INTELLECTUAL PROPERTY

1. PROPOSAL FOR A DIRECTIVE ON ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

On 9 March 2004, the European Parliament voted in favour of the Directive on measures and procedures to ensure the enforcement of intellectual property rights.

The Directive is the result of the launch by the European Commission, on 30 November 2000, of an action plan to combat counterfeiting and piracy in the single market. The aims of the action plan were to assess the effectiveness of the existing legislation and to propose a number of initiatives to improve the situation. It emerged from consultations held by the Commission that there were major disparities between Member States as regards the means of enforcing intellectual property rights, which often resulted in pirates and counterfeiters carrying out illicit activities in those Member States where enforcement mechanisms were applied less effectively.

As a consequence, the proposed Directive seeks to create a level playing field for the enforcement of intellectual property rights in EU countries. Its main objective is to approximate legislative systems so as to ensure a high, equivalent and homogeneous level of protection in the Internal Market.

The proposed Directive, which does not affect substantive law on intellectual property, is based on the practice of those States where the legislation has proven to be most effective. It covers infringement of all intellectual property rights.

The measures put forward by the proposed Directive include provisional measures to preserve relevant evidence such as seizure of infringing goods and material used in the production and/or distribution of such goods, injunctions aimed at prohibiting the continuation of the infringement, evidence-gathering powers for judicial authorities and powers to force offenders to compensate right holders for lost income, such as the blocking of bank accounts and financial assets.

Despite its noble intent, the proposed Directive has attracted controversy and criticism. Indeed, many fear that the proposed Directive, which is supposed to be aimed at “big” offenders and to concentrate on infringements carried out for commercial purposes or which cause significant harm, will also greatly affect small scale, non-commercial activities.

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2. EMI TAKES ACTION AGAINST BEATLES ALBUM REMIX

[BBC News](#) reported on 26 February that record label [EMI](#) asked DJ Danger Mouse and record stores to stop selling the Grey Album, which uses unauthorised samples of the Beatles’ legendary White Album.

The Grey Album was created by using the full vocal content of Jay-Z’s Black Album recorded over new beats and production made using the Beatles White Albums as the sole source material. According to DJ Danger Mouse, “all the music on the Grey Album can be traced back to

the White Album and its musical content via sampling. Every kick, snare and chord is taken from the Beatles White Album and is in their original recording somewhere”.

The Grey Album, which was originally issued as a limited-edition promotional album, was turned into an internet must-have hit by file traders.

DJ Danger Mouse, whose real name is Brian Burton, said he never intended to break copyright laws. He said he considered the album as a small underground “art project/experiment” and that all he wanted to do was prove “such radical things can really work”.

EMI has served “cease and desist” orders to DJ Danger Mouse, select record stores and eBay retailers selling the remix asking them to stop distributing the Album.

However, DJ Danger Mouse, who is complying with the order, said that he was happy for fans to copy and distribute promotional copies that had already been pressed.

More than 400 web sites ignored legal threats and made the Grey Album available for free downloading as a virtual protest against the music industry, which they thought stifled creativity and tried to manipulate the public’s access to music.

The Grey Album incident raises once more the question whether the music industry will be able to keep on controlling and suppressing artists sampling and using copyright protected works in the era of digital distribution.

3. MORAL RIGHTS: ANYA V WU

On 25 February 2003, Lewison J delivered an extempore judgment in *Anya v Wu* [2004] Ch.D.

The claimant was a materials scientist and brought a case in person against other materials scientists for infringement of his moral right of attribution under s.77 of the UK’s Copyright, Designs and Patents Act 1988. Section 77 confers on the authors of literary and other works the right to be identified whenever their works are published commercially. Under English law this right has to be asserted prior to the alleged infringement (s.78) and is sometimes called the right of ‘paternity’.

The claimant’s case appeared to be that papers published by the defendants drew on his previously published work without proper acknowledgement. Copyright in his earlier papers had been assigned to the publishers, but that of itself would not be fatal to his claim for infringement of his moral right. Moral rights are not assignable and so remain with the author even after assignment of copyrights and related economic rights.

The claimant’s case was fatally flawed. Although the moral right of attribution attaches not only to the whole of a work, but any substantial part (s. 89(1)), it attaches to the work - the expression of ideas - rather

than the underlying ideas themselves. In some cases the English courts have been prepared to find that ideas or algorithms, sufficiently developed, may form a substantial part of a copyright work, as for example in *Ibcos Computers v Barclays Mercantile Highland Finance* [1994] FSR 275. But the claimant does not appear to have alleged that the defendants' papers reproduced a substantial part of his own papers. Furthermore, he acknowledged that he was not an author of the defendants' papers; in consequence he had no direct right to be identified as one.

The defendants applied to strike out the particulars of claim as having no prospect of success and Lewison J did so.

This case shows that whilst respect for the moral right of attribution can usually be achieved by observing citation etiquette, the converse is not necessarily true. The moral right of 'paternity' is concerned with attribution of authorship and cannot ensure that credit for influential ideas is always given. The claimant, as a litigant in person, does not seem to have appreciated this.

Although the courts and opponents are often generous in assisting litigants in person, the power to strike out a hopeless case operates in the interests of all concerned.

4. DATABASE RIGHTS: ROYAL MAIL V I-CD PUBLISHING

On 13 February 2004, Honourable Lloyd J delivered his judgment in the case of *Royal Mail v i-CD Publishing* [2004] Ch.D. The case considered the issues arising from the need to balance the commercial interests of a copyright holder and the public interest to be advanced through the use of copyrighted database; and how far this balance affects the interpretation of the terms of a copyright licence.

The dispute was in relation to the use of the Postcode Address File (PAF), which [Royal Mail](#) has a statutory duty to maintain pursuant to [Postal Services Act 2000](#) (Act), and to license it on reasonable terms to anyone under [s116](#) of the Act. The PAF is a database containing about 27 million postal address records and 1.7 million postcodes. [I-CD Publishing](#) developed "UK Info", a directory on CD-ROM primarily sourced from the electoral rolls consisting of names, address and telephone numbers of UK residents and businesses. The product was marketed as "PAF validated", a process of cross-checking postal codes and addresses of recorded entries against the PAF, for conveying its accuracy to potential customers. Royal Mail sued iCD contending that i-CD's PAF validation using its database was without a license, and hence results in copyright and database rights infringement. i-CD counter argued that PAF validation was carried out by third parties who held a valid license for this purpose.

The High Court had to interpret the end-user license term which permits the use of PAF to modify 'existing mailing list databases' as a preliminary issue. Royal Mail submitted that only a database primarily compiled for mailing purposes would fall under the licensing agreement, and a list created for subsequent processing is not an 'existing mailing list'. The Court rejected this argument and upheld the contention of i-CD

that a ‘mailing list database’ means a database which includes all the names and addresses, and to construe the term otherwise would make the license totally unworkable. This interpretation achieves a balance between the commercial interests of the copyright holder, and the public interest in using the correct post codes and updated mailing lists for increasing postal efficiency and reducing the costs of postal services.

This case has highlighted the principle of achieving a balance between the private interest of a copyright holder and the public interest that can be achieved using the database which is subject matter of the license, while interpreting a copyright license. However, the Court did not provide clear-cut guidelines as to in which situation this principle shall be used. The mere requirement that a provision is un-workable doesn’t seem to be a strong test for applying this principle for interpreting the terms of a copyright license.

5. EQUITABLE REMUNERATION DEFINED: SENA V NOS

On 6 February 2004 the [ECJ](#) delivered its judgment in the case of *SENA v NOS*, ECJ Case [C-245/00](#).

This case relates to the interpretation of Article 8(2) of Community Directive [92/100/EEC](#) (Directive) on rental and lending rights, and on certain rights related to copyright in the field of Intellectual Property. Article 8(2) of the Directive recognises the right of equitable remuneration of performer and producers, and provides that a member state may lay down the conditions as to the sharing of this remuneration between them and the broadcaster when no agreement is concluded to this effect.

The dispute arose over the meaning of the term “equitable remuneration” as used in Netherlands legislation incorporating the Directive, in the context of the quantum of payments to be made by [NOS](#) (Netherlands Broadcasting Association) to performing artists and producers through *SENA* (Association for exploitation of related rights). The Netherlands court referred the following three questions to ECJ for a preliminary ruling: first, whether the term “equitable remuneration” used in Article 8(2) of the Directive must be given a community meaning? Secondly, what criteria shall be taken into consideration for determining the amount of equitable remuneration? Thirdly, if the answer to the first question is negative, does it imply that the member states are entirely free to lay down the criteria for determining equitable remuneration, or is it subject to some limitations and, if so, what are those limitations?

ECJ answered the first question in affirmative, and laid down the following principles of law in relation to the concept of “equitable remuneration” as mentioned in Article 8(2) of Directive:

- The concept of “equitable remuneration” must be interpreted uniformly in all member states, and applied by each member state in its own territory in a way to maintain the uniformity of this concept.
- A model may be developed for calculating what constitutes an “equitable remuneration” for performing artists and phonogram producers, provided that such model strikes a proper balance between

their interests and the interests of third parties involved in broadcasting of phonograms; and that such a model shall not be in contravention of any community principle.

- This model can incorporate both variable and fixed factors such as: the number of hours of programmes broadcasted; the viewing and listening densities achieved by the broadcaster; the tariffs fixed by agreement for performance rights for musical works; the tariffs applied by public broadcasters in adjacent member states; and the amounts paid by commercial stations.

PATENTS

6. ELECTRONIC FILING OF INTERNATIONAL PATENT APPLICATIONS

On 11 February WIPO launched a new fully electronic system for filing international patent applications called PCT-SAFE.

The PCT entered into force in 1978 after the adherence of 18 countries. Since then, 123 countries have joined the system. The PCT allows an applicant to file one international application in one language in all the Member States instead of doing the same filing procedure before each national patent office. Today the PCT System receives over 110,000 international applications.

Until recently, the procedure to file an international patent application was only possible on paper. Then WIPO launched PCT-EASY. PCT-EASY was an application that facilitated patent application filing giving the possibility for applicants to prepare patent application in both paper and diskette, but the application included the submission of substantive contents of the application on paper. The PCT-SAFE software now gives the users the ability to file international patent applications on-line, without the need for hardcopy filing. The PCT-SAFE software provides the following advantages: reduction on filing fees, reduced cost on mailing and printing, immediate notification of the reception of application, full search-ability of the document during the PCT procedure and, once it gets into the public domain, security of transmission on international applications and integrity of data.

Undeniably, this is an important improvement for inventors and enterprises involved in the race for knowledge based industries that will lower the cost and reduce the time to secure patent protection.

7. EUROPE REVOKES RAMBUS PATENT

On 12 February 2004 the [EPO](#) announced that its Technical Board of Appeal had revoked [Rambus'](#) European patent on a "Semiconductor Memory Device" after the conclusion of public oral proceedings.

Rambus is one of the leading world providers of chip-to-chip interface products and services. It holds both US and European patents for an access time register, which is commonly used to increase the speed of communication between processing and memory devices in computers. Rambus had sued Micron, Infineon and other companies for patent infringement of its patented technology in both the US and Europe. In Europe, Rambus' competitors approached the EPO and opposed the

patent, alleging that it lacked novelty and non-obviousness; suffered from insufficient disclosure; and had been amended in a legally unacceptable way. The first instance opposition procedure decided to maintain the patent in its amended form. However, the Technical Board of Appeal revoked the patent on appeal. Although the detailed ruling, is not yet available, the decision has given major relief to Rambus' competitors.

Despite suffering a setback in Europe, Rambus is upbeat about its patent infringement cases in the US against these companies, because of an FTC ruling given on 16 February 2004, which absolved Rambus of fraud allegations. Rambus' conduct had been subjected to FTC enquiry on the grounds of having secretly patented technologies that had been proposed and ultimately adopted in [JEDEC](#)— an industry standards setting body; so that later on Rambus could claim huge royalty fees from other memory developers. This pattern of anticompetitive acts and practices by Rambus was alleged to be in contravention of JEDEC guidelines relating to disclosure of patents pursued by its members.

The patent infringement cases filed by Rambus against its competitors in the US are slated to begin in May and September of this year, after the US Court of Appeals for the Federal Circuit ruled that a lower court had improperly allowed a jury verdict of fraud to stand against Rambus.

After Europe, the battleground has once again shifted to the US. If the Rambus patent is allowed to stand, its competitors may be liable to pay royalties that could ultimately be passed on to consumers, resulting in higher prices for memory chips. The outcome of the US case could also affect the practices of standard-setting bodies relating to the disclosure of patents pursued by members.

8. CIPA PROPOSES CODE OF PRACTICE

A [Code of Practice](#) for pre-action conduct in intellectual property disputes, available on the website of the [Chartered Institute of Patent Agents](#), was released in February by the Skrein Committee.

The Code of Practice is based on a set of IP-specific pre-action protocols that were initially drafted by a group instigated by the Law Society and chaired by Michael Skrein, in answer to the need that was felt for issue-specific pre-action protocols to form part of the Civil Procedures Rules 1999 (CPR).

However, following a decision by the judiciary not to introduce issue-specific pre-action protocols into the CPR for the time being, the Skrein Committee announced the publication of the drafts of the consultation process in the form of a Code of Practice in order to assist and guide those who are dealing with intellectual property issues.

The Code of Practice, which is non binding, represents the Committee's assessment of what is reasonable pre-action behaviour in intellectual property. It takes into account comments received during the course of the consultation process and recent changes in the law.

The Code, which relates to intellectual property disputes and should be read in conjunction with the CPR, sets out the steps which parties should follow where litigation is being considered. It aims at encouraging parties to exchange information prior to issuing proceedings to ascertain whether proceedings can be avoided and if not, to ensure that the parties understand the issues sufficiently to ensure that any litigation is dealt with proportionately and in keeping with the overriding objective.

The Code suggests that the intended claimant in an intellectual property dispute should send the intended defendant a letter of claim after coming into possession of the relevant facts complained about. The letter should include, amongst other things, the identity of the claimant and the list of remedies that the claimant seeks; and give details of any funding arrangements entered into. The defendant should in turn provide a response to the letter of claim, which should state, amongst other things, whether the claim is accepted or rejected. If the claim is accepted, it should indicate which remedies the defendant is willing to offer. If, on the other hand, the claim is rejected, it should explain the reasons for the rejection. Furthermore, it should indicate whether the defendant is considering making a counterclaim, as well as details of any funding arrangements entered into.

The Code also provides examples of alternative dispute resolution techniques such as dialogue, determination by an independent expert, mediation and arbitration.

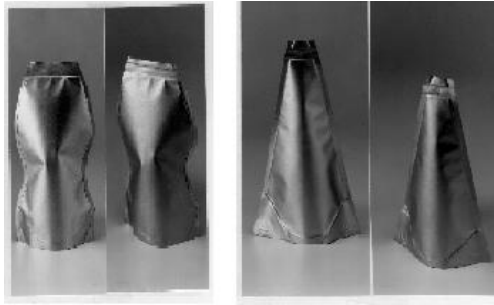
Finally, the Code of Practice provides six separate Appendices which contain additional guidelines as regards specific areas of intellectual property: Breach of Confidence, Copyright, Moral Right, Database Right and Unregistered Design Right, Passing Off, Patent and Registered Design, Registered Trade Marks and Unjustified Threats.

Michael Skrein said that the aim of the Code of Practice was to “devise a system which will be user-friendly and comprehensive. We need something which is easy to follow and effective”.

TRADE MARKS

9. ECJ REFUSES 3-DIMENSIONAL MARK: DEUTSCHE SiSi-WERKE v OHIM

On 28 January 2004, the Court of First Instance (CFI) gave its judgement in *Deutsche SiSi-Werke v OHIM*, CFI joined cases [T-146/02](#) to [T-153/02](#). The case at issue refers to the registration of a three-dimensional mark as a form of drinks packaging and the need for the mark to be distinctive so as to prevent a monopoly for a form of packaging. Under Art. 7(1)(b) of Council Regulation EC [No 40/94](#) on the Community Trade Mark, signs which are devoid of any distinctive character are unregistrable.



The applicant had sought registration, at The Office for the Harmonisation of the Internal Market (OHIM) (application numbers [000573238](#) (pictured), [000573048](#) (pictured), [000573154](#), [000573303](#), [000573360](#), [000573428](#), [000573626](#) and [000573725](#)) for three-dimensional shapes which consisted of various stand-up pouches for packaging drinks. Registration was refused on the grounds the pouches lacked distinctive character hence registration would give the applicant a monopoly on a form of packaging. On appeal to the Second Board of Appeal of OHIM (BoA), the case was dismissed. The BoA found that consumers would not perceive the stand-up pouches as an indication of commercial origin but solely as a form of packaging. The claimant then brought proceedings against the appeal decision on the grounds that, since its decision sated the necessity of avoiding a monopoly, the BoA had in fact relied on the need to preserve the availability of certain signs and, consequently, on Art. 7(1)(c) and not Art. 7(1)(b).

The CFI found that the applicant's conclusion as to the legal basis, with regard to the aim of monopoly avoidance, was incorrect. Art. 7(1)(b) was the only legal basis for the BoA's decision and on the basis of its findings, the decision was right.

The applicant had argued that the shape and features of the pouches made them distinctive, but the CFI concluded that they were minor features which the average consumer would not retain as an indication of the commercial origin of the products concerned. The CFI also said the BoA was right to mention the risk of monopoly being created in pouches for the drinks concerned, since its findings confirmed that the pouches were devoid of distinctive character for those products, reflecting the general putative interest reason underlying the absolute ground for refusal in Art. 7(1)(b).

10. NEW REGIME FOR REGISTRATION OF .FR DOMAIN NAMES

[AFNIC](#), the domain name authority managing the French country code top level domain, is introducing a new regime for registration of .fr domain names.

The new regime will no longer require the applicants to prove that they have any rights to their domain names as applications will be considered on a 'first come, first served' basis.

The new regime will be introduced in two phases starting in the second quarter of 2004, after which it will be possible for anyone who can be identified online in French public databases (e.g. companies, businesses,

trade marks owners, etc) to apply for registration of a .fr domain name without the need to produce supporting legal documentation.

The second phase will start at the beginning of 2005 where a similar provision will be extended to natural persons and to legal entities which are not identifiable from French public databases provided that the person or entity has a legal presence in France.

Whilst the introduction of this new regime is welcomed, it is expected that there will be an increase in conflicts between domain name registrants and trade mark owners. To this end, AFNIC has announced that a procedure will be available, as an alternative to litigation, for resolution of disputes between competing parties claiming rights in a .fr domain name from the commencement of the new regime.

There are concerns that cybersquatters may take advantage of the new somewhat liberalised regime to register available domain names that correspond to trade marks whose owners are slow to secure those domain names. It is therefore of utmost importance that trade mark owners register their corresponding .fr domain names at the earliest opportunity to protect their trade marks.

11. SCOTTISH & NEWCASTLE TO STOP BREWING NEWCASTLE BROWN ALE IN NEWCASTLE?

There are rumours that Scottish & Newcastle has been conducting trial runs of producing Newcastle Brown Ale in Gateshead, rather than Newcastle, where it has been brewed since 1927. However, both the Federation Brewery (where the trials are meant to have taken place) and Scottish & Newcastle have denied the rumours. The potential move follows a report, commissioned by Scottish & Newcastle from Credit Suisse First Boston, stating that the brewer would save £25 million per annum if they closed down one of its breweries, which are located in Newcastle, Edinburgh, Manchester, Tadcaster and Reading.

The issue is particularly sensitive because Newcastle Brown Ale has been awarded [protected geographical indication status](#) (“PGI”) by the European Union. The [specification](#) states that “broon” (as it is known to aficionados) must be brewed in the City of Newcastle-upon-Tyne. It also emphasises that water is taken exclusively from the area and is mixed with a yeast and salt/water blend that is unique to the Tyne Brewery. Though the water used in the new location may be from the same source as that used in the old brewery (the two cities are just over a mile apart), moving production across the River Tyne to Gateshead would mean that the beer would no longer be produced in the specified area. Therefore, fears have been expressed that this would leave Scottish & Newcastle unable to use its PGI. This also has serious potential implications for the viability of its NEWCASTLE BROWN ALE trade mark. Trade marks are liable to be revoked if no use has been made of them by their proprietors for five continuous years. If Scottish & Newcastle cannot use its PGI as the name of its beer because of the change in locations it also will not be able to use its trade mark for beverages and may lose it unless it returns production to Newcastle within five years.

As well as emphasising one potential conflict between geographical indications and trade marks, this story highlights that PGIs can have an anticompetitive effect on those who are entitled to use them, as well as on the producers of other, similar, goods. The risk of effectively losing both its PGI and its trade mark may well prevent Scottish & Newcastle from moving production to a location that would present substantial cost savings.

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