



## Hot Topics

### Pot Luck – the difficulty of proving copyright infringement in computer programs

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On 14 March 2007, the Court of Appeal in, *Nova Productions Ltd v Mazooma Games Ltd* [2007] EWCA Civ 219, upheld the decision of Mr Justice Kitchin dismissing claims of copyright infringement in the software and graphics for a pool based video game, Pocket Money. Nova Productions, the claimants, had appealed against Kitchin J's decision which, they argued, meant there was no effective protection for computer games against copying of the game where a party copied the rules of a game but not its graphics. The Court of Appeal held that not all things are covered by copyright and that most works are to some degree influenced by other works. The message from the Court is clear: copyright should not be allowed to become "an instrument of oppression" nor should it be allowed to stifle the creation of works that are actually very different.

#### BACKGROUND

Nova Productions, the company behind the development and marketing of a pool based video game called "Pocket Money", had brought two actions for infringement of copyright in Pocket Money. The first was against Mazooma Games Limited and other defendants in relation to the software for a game called Jackpot Pool. The second action was against a company called Bell Fruit Limited in relation to the software of its Trick Shot game. Although the claim related to alleged infringement in a number of areas of copyright Nova appealed only in relation to the element of artistic works (being the bitmap graphics and the frames generated and displayed to the user) and literary works (being the design notes and program, dramatic work, being the game itself and film copyright).

#### FIRST INSTANCE

At first instance, it was noted by Kitchin J that although there were similarities in the games, as would be expected from their common underlying theme, the visual appearance and method of play of each of the games was very different. He found that although some aspects of both Jackpot Pool and Trick Shot had been inspired or affected by Pocket Money there was no

reproduction of any artistic copyright work as none of the listed features that Nova claimed to have been copied had, in fact, been copied. Kitchin J noted that Nova's case was not aided by the fact that the features at issue represented ideas expressed at a very high level of generality or abstraction with no meaningful connection with the artistic nature of the graphic works relied on.

Kitchin J also rejected the software claim on the basis that any similarities were at such a level of abstraction, and were so general that they could not amount to a substantial part of the computer program. In applying the principles set out in *Navitaire Inc v easyJet Airline Co Ltd* [2006] RPC 111 nothing was found to have been copied in terms of program code or program architecture. Any similarities between the products existed in the output, not the underlying program code. The ideas that had been lifted by Mazooma and Bell Fruit did not form a substantial part of the computer program. Under Article 1(2) of the Software Directive (91/250/EEC) ideas and principles which underlay any element of a computer program are not protected by copyright.

On the issue of copyright infringement in any preparatory design materials for the video game Kitchin J also found against Nova.

#### COURT OF APPEAL

The Court of Appeal first addressed the claim for infringement of artistic copyright. It was agreed that individual frames stored in the memory of a computer are accepted as "graphic works" within s 4(1) of the Copyright, Designs and Patents Act 1988. Although as each game had different representations of a pool table pockets, balls and a cue, nothing in any of the individual screens in Trick Shot or Jackpot Pool amounted to a substantial reproduction of a corresponding screen in Pocket Money. Nova, however, argued that in addition to the individual freeze-frame graphics there was a further kind of artistic work made up of the series of graphics which showed the "in-time" movement of the cue and the power meter. By copying the cue and power meter Nova claimed that what the defendants had done was to create a dynamic "re-posing" of their game that involved extra skill and labour beyond just that involved in creating the individual frames. Although Kitchin J, at first instance, had accepted that "in time" movement of the cue and meter "must be considered as being reflected in the

series of still shots and that like must be compared with like” he found no infringement. Jacob LJ did not consider there to be any infringement either, but in his view not only was there no reproduction of a substantial part as Kitchin J had found, but there was also no foundation for Nova’s “in-time” argument.

Jacob LJ held that a series of still images “in motion”, whether created by drawing or by a computer, was not in itself anything more than a series of frames, each of which would have its own copyright and no more. A “graphic work” as defined in s 4(2) of the Copyright, Designs and Patents Act 1988, includes a painting, drawing, diagram, map, chart or plan. Each of these have a single common element, namely that they are static, non-moving. A series of drawings is a series of graphic works, not a single graphic work in itself. The law of copyright does give protection to moving images by way of copyright in films. It does not, however, give protection to a series of still images that may give the illusion of movement. By way of example Jacob LJ stated that no-one would say that the copyright in a drawing of Mickey Mouse is infringed by a drawing of Donald Duck; or a series of cartoon frames showing Mickey running over a cliff edge into space, looking down and only then falling would not be infringed by a similar set of frames depicting Donald doing the same thing.

As there was no frame-for-frame reproduction of Nova’s work its case on artistic works fell at the first hurdle. Even if it got as far as the second hurdle, the case would fall there too, as there was no reproduction of a substantial part.

Nova submitted that Kitchin J had misdirected himself on the facts as to what amounts to a “substantial part”. Nova criticised the judge’s finding of no reproduction even though one of Jackpot Pool’s designers, when looking to develop a more realistic pool game, admitted to playing Nova’s game and taking features from it that solved all the problems he had with his design. Nova’s submission was that the solution of Jackpot Pool’s problems was possible only by using a substantial part of Pocket Money. As such Nova contended that it was the combination of features that was important and the question of fact was whether the combination of features was a substantial part of the copyright work if it was reproduced in the defendants’ work. Following on from this, if the combination represented a significant part of the skill and labour that went into Nova’s game it must therefore be a substantial part of the work created by the designer. Jacob LJ rejected this argument on the grounds that under the laws of copyright protection is given to expression of ideas not to ideas themselves.

Nova also contended that at first instance Kitchin J had misdirected himself on a matter of law as to what amounts to a “substantial part”. Nova’s argument was that there is a general principle that whenever copying has been found it must follow that a substantial part has been taken. This was drawn from *Designers Guild v Russell Williams* [2001] FSR 113. Jacob LJ

did not agree that *Designers Guild* had laid down any such general principle and although he accepted that in many cases a coincidence in the copyright work and the alleged infringement of small, unimportant, details is an indication of copying he did not accept that the copying of those details alone meant that a substantial part of the copyright work had been taken. The copying of the details was a starting point for a finding of infringement not conclusive proof of it.

Nova’s case on literary copyright also failed as what was found to have inspired some aspects of Trick Shot and Jackpot Pool was just too general to amount to a substantial part of Pocket Money. Jacob LJ agreed with the Kitchin J’s summary that these were ideas which had little to do with the skill and effort expended by the programmer and did not constitute the form of expression of the literary works relied upon.

The literary appeal also failed on the more specific basis of the principles applied by Pumfrey J in *Navitaire*. Pumfrey J considered the situation where two separate computer programs produced an identical result as a result of a programmer making a program to emulate another without actually copying the source code to which he had had no access, and found that such a situation would not involve infringing the copyright in the source code. Provided none of the first program’s graphics were copied the second program would be perfectly legitimate. The analogy used by Kitchin J is helpful here: “a chef invents a new pudding. After a lot of work he gets a satisfactory result, and thereafter his puddings are always made using his written recipe, undoubtedly a literary work. Along comes a competitor who likes the pudding and resolves to make it himself. Ultimately, after much culinary labour, he succeeds in emulating the earlier result, and he records his recipe. Is the later recipe an infringement of the earlier, as the end result, the plot and purpose of both (the pudding) is the same?” The answer is no.

Finally, Jacob LJ also saw nothing in the Software Directive to support Nova’s claim that the preparatory design work of a computer program should be protected as such, even if it consisted only of ideas as to what the program should do. The Directive seeks to protect computer programs as a whole, including the preparatory design work. It does not seek to extend the fundamental boundaries of copyright law by seeking to protect ideas that are not capable of standalone copyright protection.

#### COMMENT

Following this case and *Navitaire* it appears that a claim for copyright infringement as a literary work in a computer program appears unlikely to succeed especially where the alleged infringer has not seen the source code whose copyright he is supposed to have infringed.

A claim for infringement of the copyright in the graphics of a game may have a better chance of success although this will depend on the facts of the case.

Although the protection offered by copyright is broad, claimants and their advisers should not forget that most if not every work is, to some extent, influenced or derived from other works. Copyright is specific in the scope and protects the expression of ideas and it is not intended to cover works “merely inspired by others”. Nor does it protect ideas per se. This latest case has underlined the position taken in the UK courts that copyright should be enforced as a protection and not as an instrument of oppression. As such the courts continue to oppose the extension of copyright in any manner which they feel may stifle rather than support creativity.

**Fortress Europe and Exhaustion of Rights –  
*Mastercigars Direct Limited v Hunters & Frankau  
Limited & Ors* [2007] EWCA Civ 176 (Court of Appeal,  
8 March 2007)**

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Article 7(1) of the Trade Marks Directive (First Council Directive 89/104/EEC to approximate the laws of the Member States relating to trade marks) provides for the exhaustion of trade mark rights, where the proprietor has put goods bearing the relevant trade marks on to the market within the European Economic Area (EEA), or has consented to the sale of those goods within the EEA. The European legislature has however set its face against international exhaustion. What this means is that national trade mark rights can be used to prevent the importation into Europe of goods bought outside the EEA (parallel imports), unless the trade mark proprietor has consented to their re-sale within the EEA. The Court of Appeal recently handed down an important decision for those advising trade mark owners in their attempts to combat parallel imports from outside Fortress Europe.

Previous jurisprudence from the European Court of Justice imposes a significant burden upon parallel importers in these cases. Specifically, the *Davidoff (Zino Davidoff v A & G Import* [2001] ECR I-8691) decision requires that the “unequivocal consent” of a brand owner to the importation of goods into the EEA must be demonstrated. Following this and other decisions, many assumed that “unequivocal consent” meant a positive affirmation of consent, such as an express written statement on an invoice. It now appears that trade mark rights can be exhausted by means of inaction on the part of a trade mark owner, particularly if it stands by knowing that goods purchased on the international market are in fact bound for the EEA with the intention that they be re-sold there.

**THE CASE**

The case began when HM Customs & Excise seized (pursuant to Regulation 1383/2003 concerning customs actions against goods suspected of infringing certain intellectual property rights) a consignment of Cuban cigars brought into the UK by Mastercigars Direct Limited (“Mastercigars”), a UK company whose business was to import Cuban cigars (*habanos*) into the UK for re-sale. Mastercigars had been buying cigars in Cuba, often faxing orders in advance from the UK. The exclusive rights to buy, sell and market Cuban tobacco both in Cuba and internationally have been granted by the Cuban government to Corporacion Habanos SA (“Corporacion Habanos”). Corporacion Habanos owned all of the trade marks in suit and it had appointed various exclusive overseas distributorships, including Hunters & Frankau Limited for the UK. The consignments of cigars seized by the UK Customs authorities were initially suspected of being counterfeit, but this was not proved at trial. The cigars were genuine *habanos* that had found their way into the UK from Cuba via parallel (or grey) market trade.

**A LOOK AT THE CUBAN END**

Corporacion Habanos controls every aspect of the manufacture and sale of Cuban cigars. It carries out quality control on the cigars for sale both inside Cuba and for export. It sells the cigars through approximately 230 approved but privately owned outlets in Cuba (the *casas*) and it determines prices. All Cuban cigar sales are documented using a standard form invoice (*facturas*), in triplicate. The purchaser is given two copies: one for himself and one for presenting to the Cuban Customs authorities on leaving the country. The seller retains the third. Although the seller is not required to send copies of the *facturas* to Corporacion Habanos, in general, they are supplied on request. Foreigners wishing to buy Cuban cigars to take out of Cuba can take up to 23 loose cigars, but if they wish to take more, the cigars have to be in the original packaging bearing a hologram seal. In addition, the traveller has to present one copy of the invoice to Customs. There is an informal arrangement between the sales outlets and Corporacion Habanos that no one individual can purchase more than \$25,000 worth of cigars in any one visit.

**EXHAUSTION – THE LAW**

Corporacion Habanos alleged that Mastercigars was infringing its exclusive rights as proprietor of the relevant trade marks under Article 5(1) of the Trade Mark Directive, including the right to prevent all third parties not having its consent from importing and using the marks in the course of trade in the EEA. Mastercigars relied upon Article 7 and alleged that the trade mark rights were exhausted.

In *Davidoff*, the European Court of Justice had ruled that because consent to marketing in the EEA had such serious effects - i.e. the renunciation of the trade mark owner’s

exclusive rights - the intention to renounce had to be demonstrated unequivocally. The Court of Justice rejected a submission that consent should always be express, but nevertheless held that “consent” had to be something more than:

- mere silence on the part of the proprietor; or
- the lack of a warning label on the goods themselves; or
- the lack of contractual restrictions as to re-sale.

#### THE DECISION

Lord Justice Jacob gave the leading judgment of the Court of Appeal. He began by making clear that *Davidoff* did not require a parallel importer to demonstrate unequivocal *proof* of consent. What was required in order to prove exhaustion was evidence that - on the balance of probabilities - the trade mark proprietor had consented to the marketing of the goods in the EEA, without reservation.

Had Corporacion Habanos unequivocally consented to the relevant consignments of cigars being marketed in the EEA? At first instance, Judge Fysh (after disclaiming his affinity for smoking the odd *habanos*) had decided that Mastercigars knew that Corporacion Habanos objected to the importation of Cuban cigars into the UK and the consequential disruption to its distribution channels. The conclusion drawn by the Judge was that there could be no unequivocal consent and so there was no exhaustion of rights: Corporacion Habanos was entitled to rely upon its UK trade mark rights in order to prevent the relevant consignments of cigars from being sold in the UK. The Court of Appeal rejected these findings. It held that Corporacion Habanos’ consent to the importation of the consignments of *habanos* into the EEA had been unequivocally demonstrated.

#### SMOKE FILLED ROOMS AND THE BLINDINGLY OBVIOUS

Corporacion Habanos had legal and *de facto* control over all aspects of the sale of Cuban cigars, including the sales outlets, even though they were privately owned. It arranged monthly meetings between itself, the Cuban Customs authorities and the Cuban sales outlets. Some minutes of these meetings were disclosed in the litigation and they provided an insight into the policies of Corporacion Habanos for cigar sales, both on the domestic and the international markets. The minutes, together with the specific practice of Mastercigars in faxing orders to Cuba, demonstrated that Corporacion Habanos was aware of and consented to the sales of cigars in the EEA. Other evidence demonstrated that Corporacion Habanos was aware of and consented to the sales of cigars that were going to be resold on the purchaser’s home market; for example, the requirement for the relevant paperwork to be shown to the Cuban Customs authorities and the \$25,000 personal limit on sales (a commercial quantity far exceeding that required for purely personal use).

Taking all of these matters into account, Lord Justice Jacob thought it “blindingly obvious” that the trade mark owner knew that the cigars were being taken back to Europe for sale on the grey market - and therefore consent to re-sale must have been given. The trade mark rights were exhausted.

#### CONCLUSIONS

This decision is the first by a UK court - perhaps any European court - in which a parallel importer has succeeded in demonstrating unequivocal consent, not by means of express written or oral statements, but on the basis of passive conduct by the brand owner, or “turning a blind eye”. The decision has important implications for trade mark owners, who - following *Davidoff* - were reasonably confident that parallel importers would be deterred from sourcing branded goods from outside the EEA. Now, it appears that knowingly standing by and allowing parallel trade into the EEA may in certain circumstances be taken as consent, leading to exhaustion of rights. Brand owners are therefore recommended to adopt proactive measures to combat parallel trade, if they wish to avoid an inference of consent, in the future. They should also brace themselves for further legal challenges from parallel importers, who are likely to take the Court of Appeal’s decision as a cue for further legal debate on what constitutes consent.

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## Copyright & Technology

#### WOW – Online CD retailer was caught by test purchases

In *Indepediente and others v Music Trading On-Line (HK) and others* [2007] EWHC 533 (Ch), the High Court held that online music retailer CD-Wow was in substantial breach of a settlement agreement and the relevant undertakings given to Court not to continue parallel imports of CDs and DVDs to the UK. CD-WOW's defence that alleged breaches were just human errors was rejected on the facts.

The background facts were straightforward. CD-WOW's music store had a very substantial share of the online music market in the UK. CD-WOW was buying original recordings from outside of the European Economic Area where pricing was substantially lower and selling them in the UK at a profit. The Claimants, representing the major record companies, complained that CD-Wow was infringing their copyright by selling CDs in the UK that had not been put on that market with their consent.

The original court action brought by the Claimants in 2002 for copyright infringement was settled in 2004 before trial. Undertakings not to sell products originating from outside the EEA had been given to the Court as a part of that settlement. However, the Claimants had been carrying out test purchases

which suggested that the parallel importing was continuing, so they sued for breach of the settlement agreement as a breach of contract. The Court of Appeal confirmed in January as a preliminary issue that the undertakings given to the Court could also be relied upon by the other party.

In its defence, CD-WOW initially said that it had the Claimants' consent as it had bought the products from the Claimants' Hong Kong subsidiaries and received implied consent for redistribution. No evidence of such consent was provided, and so the judge rejected the argument.

CD-WOW then argued that the successful test purchases were in fact merely inadvertent human errors of sending non-EEA products into the UK. This too was rejected on the facts by the judge, as the solicitor correspondence demonstrated that CD-WOW thought it was entitled to supply such products and that there was no breach of its undertakings. Further, the judge held that the Claimants had met the higher, criminal, burden of proof required in contempt cases.

The judge then considered what sanctions could be applied for this breach of undertaking, i.e. the wilful infringement. Considering the case law, he concluded that damages reflecting the infringement would be appropriate, but that in light of the lack of evidence, the Claimants had to meet the summary judgment burden of showing CD-WOW had no real prospect of defending the infringement claim.

The main claim of infringement was of issuing to the public copies of the work. CD-WOW argued that the issue took place when it delivered the goods to the Hong Kong postal service, ready for onward transmission to the consumer. This complied with the general principles of the sale of goods, that delivery to the carrier was deemed to be delivery to the buyer. However, according to both recent European legislation and English case law, this general rule did not apply when dealing with consumers. The judge therefore had little hesitation in finding that CD-WOW had issued the infringing product to the public when it was delivered to the UK purchaser. CD-WOW therefore had no tenable ground of defence. He ordered an enquiry as the damages suffered by the Claimants since the date of the original Settlement Agreement. He reserved making a decision on both additional damages for the flagrancy of the infringement and the punishment for the contempt of the Court's Order until that enquiry had finished.

The judge was clearly unimpressed by CD-WOW's conduct, both with regards to its improper parallel imports and its breaches of undertakings. It will be interesting to see what if any further sums will be awarded for those breaches and contempt. The case is a timely reminder to all both of the value of IP rights and that the principles of Community exhaustion apply to all IP rights, not just trade marks.

### **The Da Vinci Code and dichotomy of copyright**

In 2006, the copyright infringement case brought against the publishers of one of the best selling novels of the last few years, *The Da Vinci Code* (DVC), by the authors of the *Holy Blood and Holy Grail* (HBHG), Baigent and Leigh, in *Baigent and Leigh v Random House Group Ltd* [2006] EWHC 719, found in favour of the defendants. However, the complexity of the findings prompted an appeal to the Court of Appeal in *Baigent & Anor v The Random House Group Ltd* [2007] EWCA Civ 247, which recently upheld the High Court's ruling in refusing the claim of copyright infringement against the publishers of DVC.

The commonality of the plot between the two works is based on the theory that Jesus married Mary Magdalene and his bloodline continued, in the form of the Merovingian dynasty, guarded by a secret society, the Priory of Sion. While HBHG is a prior work of historical research, DVC is a fiction. The allegation was of non-literal copyright infringement, namely, copying of the 'Central Theme' of HBHG, constituting about 15 themes out of which 11 themes were proved to be present in DVC.

The main question was whether the 'Central Theme' of HBHG was 'the substantial part' of HBHG and whether the similarity of the themes between the two works were substantial enough to prove infringement.

The Court of Appeal proceeded on the basis of the limitations imposed on an appellate court in deciding the issue of substantiality by the House of Lords in *Designers' Guild Ltd v Russell Williams (Textiles) Ltd* [2000] 1 WLR 2416. Thus, the Court of Appeal did not go into the facts establishing similarity of the relevant material in HBHG which was found in DVC or into the proved fact that Dan Brown (the author of DVC) had access to HBHG and had used it while writing common the parts of DVC.

On the question of the 'Central Theme', Lord Justice Lloyd agreed with the trial judge's view that the claimants had failed to prove that the 'Central Theme' was the essence of the entire literary work for which the authors had expended time and skill, and held it to be 'no more than a selection of features of HBHG collated for forensic purposes rather than emerging from a fair reading of the book as a whole'. It was also held that what was taken by DVC from HBHG was 'too generalised and so highly abstract' that it did not deserve copyright protection, endorsing the trial judge's decision. The contention about *animus furandi*, the intention of copying, was also rejected by the Court of Appeal as irrelevant to the question of the substantiality of the material copied as it was not necessary to prove a guilty mind to establish liability.

The case points to the ever persistent blurring concept of originality in copyright law, and while copyright law would

continue to protect original expression, it cannot be stretched, as Lord Justice Mummery held, ‘to cloth information, facts, ideas, theories and themes with exclusive property rights and to monopolise historical research or knowledge and prevent the legitimate use of historical and biographical material or general theories’, thus emphasising the need for a wider public domain.

### English Court of Appeal Narrows the Meaning of ‘Processing’ in the Context of the Data Protection Act 1998

On 28 March 2007 the English Court of Appeal handed down a potentially far-reaching decision significantly narrowing the meaning of data processing for the purposes of the Data Protection Act 1998, (the “Act”). The majority of the Court of Appeal found that the “processing” complained of amounted to the manual selection of data, which was done by a human being and not a computer and, therefore, it fell outside the scope of the Act. Selection of information from certain electronic and manual files and the creation of a computer generated document including that data did not amount to the creation of data capable of being processed for the purposes of the Act. The case in question was *Johnson v The Medical Defence Union Ltd* [2007] EWCA Civ 262.

The appellant, Mr Johnson, is a medical consultant. Mr Johnson was claiming compensation in respect of the unfair processing of his personal data under the Act by the defendant. The defendant was The Medical Defence Union Ltd, a mutual society, which provides its members with advice and assistance, including arranging for professional indemnity insurance. The Medical Defence Union Ltd had terminated Mr Johnson’s membership following a risk assessment review in respect of Mr Johnson. The risk assessment involved a consideration of Mr Johnson’s files by a risk manager. Most of the files were manual (and none of these amounted to a relevant filing system under section 1 of the Act) and the remainder were a mixture of electronic and microfiche files. The risk manager extracted information from the files and included it in a computer generated risk assessment review form. Mr Johnson’s membership was terminated following a review of the risk assessment review form by a committee of senior clinicians. Mr Johnson was seeking compensation under section 13 of the Act for unfair processing of his personal data in breach of the first data protection principle, which had caused the termination of his membership of The Medical Defence Union Ltd.

The main issues before Rimer J during the first instance hearing included: (a) whether the risk assessment included any processing of Mr Johnson’s personal data within the meaning of the Act; (b) if so, was such processing unfair; (c) if so, had it been shown that, if the processing had been fair, the decision to terminate Mr Johnson’s membership would most likely not have been made; and (d) if the answers to all of the preceding

questions were affirmative, what compensation would Mr Johnson be entitled to?

Mr Justice Rimer held, at first instance, that the risk review had involved the processing of Mr Johnson’s personal data within the Act, but that the processing had largely been fair and had only been unfair in a minor and inconsequential respect, so the answers to the third and fourth questions did not arise (*Johnson v The Medical Defence Union Limited* [2006] EWHC 321 (Ch) Decision of 3 March 2006). If they did arise the judge believed that, on the balance of probabilities the termination decision would probably not have been made, but suggested that a relatively low level of damages (a total of £6,010.50) would have been appropriate. Mr Johnson appealed against Rimer J’s decision that the processing of his personal data had only been unfair in a minor and inconsequential way and also against Rimer J’s suggested level of damages. The Medical Defence Union Ltd cross appealed against the finding that processing of Mr Johnson’s personal data had taken place at all and against findings (c) and (d) on the basis that, in any event, no damages were recoverable.

On appeal, Buxton LJ held that Mr Johnson had failed to jump the first hurdle by finding that there was no processing within the meaning of the Act involved in the selection by the risk manager of information. The Data Protection Act 1998 was mainly concerned with the protection of personal privacy, which was of little relevance to this case. He held that the retrieval of data from an electronic database, the subsequent selection of data, and the word-processing of the data selected were all separate steps and that the appellant’s claim of unfair processing only related to the selection of the data. It followed that the cross appeal on that issue would be allowed.

Buxton LJ relied on section 1(1) of the 1998 Act which defines data as information which is being processed by equipment operating automatically, and Recital 15 of the Data Protection Directive 95/46/EC which reads: ‘Whereas the processing of such data is covered by this Directive only if it is automated (...)’. He held that because in this case the selection of data was done manually by a person using his judgment, the act of processing complained of was outside the scope of the 1998 Act.

Arden LJ, dissenting, argued that Directive 95/46/EC applies to the manual selection of personal data, which is placed on a computer after the selection. She argued that it was wrong to give precedence to Recital 15 over Article 3(1) of the Directive, which states that the Directive should apply to processing of personal data wholly or partly by automatic means.

This case is likely to go all the way to the House of Lords and it will be interesting to see whether the House of Lords will overturn the narrow interpretation of processing or refer the question about the meaning of ‘processing’ to the European

Court of Justice (which the Court of Appeal refused to do). In the meantime, it seems that if a person complains about a non-automated decision made by a human being, he or she cannot bring a claim based on the Data Protection Act 1998, even if this decision is based on data from an electronic database and subsequently further processed and recorded by a computer.

## Patents

### Let me patent my algorithms!

On 13 March 2007, the High Court of Justice handed down a decision in a case concerning two appeals lodged by Mr Pablo Cappellini and Bloomberg LP against the refusal by the Comptroller-General of their patent applications, respectively GB 2381884A and GB 2395941A.

Mr Cappellini's application was refused by the Comptroller on the basis that it comprised "methods for performing mental acts, doing business or programs for computers as such" and accordingly excluded from patentability, whereas Bloomberg LP's application was rejected by the Comptroller as the advance made by the applicant was within the definition of computer program as such and therefore non patentable. The Court decided to deliver a single judgment in connection with the said appeals as they concerned similar legal issues.

The Court, looking at Bloomberg LP's application, considered the approach adopted by the Court of Appeal in the *Aerotel v Macrossan* case in 2006. This reasoning provided four stages to determine whether the inventions could be patentable:

- First, it is fundamental to determine the width of the claimed monopoly;
- Second, the actual advantages of the invention have to be assessed;
- Third, the Court must ask whether the contribution thus identified consists of excluded subject matter as such;
- Fourth, it must check, if necessary, whether the contribution is technical.

In order to evaluate Mr Cappellini's application, the Court also looked at two other examples of subject matter which is expressly excluded from patentability according to Article 52 of the European Patent Convention ("EPC"), that is; methods for performing acts and methods of doing business. As to the first kind of method, it is generally accepted that a claim concerning a mental act can be allowed if the performance of the scheme can lead to a physical result covered by the claim itself. As to business methods, the Court considered it appropriate to adopt the approach indicated in *Aerotel* by answering the question: what is the claimed invention as a matter of substance? The Court's answer was that as a matter of substance a claim to a programmed computer is just a claim to

the program and that a program which, by running on a kind of carrier, performs a business method and adds nothing to the art that does not lie in excluded subject matter.

Mr Cappellini's application related to a novel algorithm for determining variable routes to allow two carriers to deviate, meet and transfer one or more packages. The claims in question were 1, 11, 12 and 13. Claim 1 was the broadest one and related to the creation of a database with paths, their nodes and their areas of operational flexibility and to an algorithm capable of tying said paths to construct a system for the carriage of goods. This claim was considered to be equal to a mathematical method. The other claims were more difficult to construe, for example, claim 11 was capable of producing a physical effect by providing the movement of known items such as vans, taxis and so forth over known routes and equipped with instructions to deviate and meet other carriers at points determined by algorithmic analysis, but the Court deemed it (as well as claim 12), to be a method for doing business. Lastly, claim 13 in the Court's view, was the closest to patentable subject matter and related to the processing of loads, but again, all the steps concerned were carried out by using conventional equipment and the inventive contribution lay in the time, order, and route segments concerned. Ultimately, the Court, by adhering to the Comptroller's view, considered the invention as not comprising the necessary technical effect, and was therefore excluded from patentability.

For Bloomberg LP's application the Court considered three claims, namely 1, 2 and 14. The invention concerned a method performed in software for distributing data to a user, which maps the said data to a form suitable for the user's application. In this case, the claimed advantage was supposedly an improved interoperability. According to the Court, though, the hurdle of Article 52 EPC was not surmounted by the claimed advance of the invention as it did not imply a technical effect, but just the possibility of mapping the data at the server end to a form suitable for users, and therefore the applicant's advance was considered to be a computer program as such.

Accordingly, the Court dismissed both appeals. The decision at hand will be likely to have a subsequent effect on similar cases in which the subject matter falls within the boundaries of Article 52 EPC.

### Owning Duties in Derivatives

On 15 March 2007, the Court of Appeal, in *Liffe Administration and Management v Pinkava*, upheld the decision of Kitchin J at first instance in which the futures and options trading organisation, Liffe, retained ownership of a new trading system developed by one of its employees. The system enables Liffe to trade new types of derivatives using new distributional channels in the exchange. The employee who claimed ownership of the patent for the system had been the

manager of Liffe's interest rate product management team and, subsequent to developing the new system, had been promoted.

At first instance, the judge considered the skills and experience of the employee, but did not consider whether the employee was employed actually to devise the invention. The employee appealed and the Court was asked to consider whether the rule in the section 39(a) Patents Act 1977 is an objective test and whether it requires the employee to be employed to actually devise the invention.

If the rule contained in section 39(a) of the Act is satisfied then an employer can claim ownership of an invention. That rule requires not only that (1) the employee is carrying out his/her normal duties or duties specifically assigned to him/her, but also (2) that the circumstances are such that an invention might reasonably result from the carrying out of those duties.

The Court said that the word 'an' (underlined in the previous paragraph) made a difference as the rule did not therefore require the invention to be similar to that expected or predicted, to provide a solution only to pre-identified problems or to be a contribution only to the enhancement of the employee's duties. Thus the rule included any invention that was devised and reasonably expected whilst the employee carried out his duties.

Though this was a strictly objective assessment, the judge considered the real circumstances of the case, including the fact that the employee's abilities were such as to make it more likely that an invention might result.

This is a useful clarification for employers of the ownership rules. The Court of Appeal made it clear that though the rules were more favourable to the employee than the common law that existed prior to the Act, there was no reason to go behind the wording of the rules and interpret them even more favourably. So for employers this decision confirms that employees cannot take away from their employment significant technical knowledge developed during the period of employment. In this case, it also assisted Liffe in claiming the return of confidential information carried away by its former employee.

The immediate significance to this industry was the US patents filed on the back of the invention. Whilst in the UK these types of 'business method' patents are difficult, if not impossible, to obtain and enforce, in the US no such bar exists and therefore they can attract greater value and interest for the patentee.

## Trade Marks & Domain Names

### Microsoft and Motorola: Being Proactive is the way forward in cybersquatting

Microsoft, owner of one of the most famous trade marks, has been the subject of cybersquatting in many different jurisdictions. Microsoft Corp. has announced, in its press release this month, an aggressive legal strategy to battle cybersquatting in the UK and US. It has already filed a number of lawsuits regarding trade mark infringement in many jurisdictions including five complaints in England.

On the other hand, Motorola recently lost *motorazr.com* to an Arizona based company (*Motorola, Inc. v. R3 Media, WIPO Administrative Panel Decision Case No. D2006-1393*). The World Intellectual Property Organisation (WIPO) Panel found that, although the domain name was confusingly similar to a trade mark in which Motorola had rights, the domain name had not been registered in bad faith. Motorola was unable to prove a date of first use of *motorazr* which preceded the registration of the domain name, despite being expressly invited by the Panel to provide further information. The application for registration of the mark was dated over a year after the alleged date of first use.

As an aside, the Panel noted that a formal US court hearing may have provided a more satisfactory result for Motorola, as proceedings would not have been subject to the evidentiary limitations of the WIPO Uniform Dispute Resolution Procedure (the URDP).

The *Motorazr* case highlights the limitation of the UDRP. A full blown evidentiary hearing is generally not possible due to time constraints under UDRP. Moreover, trade mark proprietors cannot hope to convince tribunals such as these that registration of the mark in itself confers a right to demand a transfer or cancellation of a domain name using the mark, as tribunals will be wary of criticism of unfair practices in favour of trade mark owners. Microsoft's strategy of pursuing claims in local courts may have a better chance in challenging domain names in more difficult cases and in also obtaining costs and damages, albeit for greater initial expense.

Finally, companies should synchronise their trade mark strategy with their domain name strategy. Any delay in obtaining domain names counterparts for registered trade marks may result in the loss of domain names and prove costly. Being proactive is the key.

### **www.who-is-diddy.com**

On 28 February 2007, the High Court in *Richard Dearlove v Sean Combs* [2007] EWHC 375 (Ch) ruled that the use of a mark on the internet can constitute use of that mark in a particular country, even when the website is foreign-operated.

In August 2005, Mr Combs, a famous US rapper, variously known as “Puffy” “Puff Daddy” and “P.Diddy”, announced that he was henceforth going to be known professionally as “Diddy”. Three months later, he was sued for passing off by Mr Dearlove, a London-based record producer who claimed that he had been using that name for years with great commercial success.

Shortly after disclosure, the parties reached an out-of-court settlement agreement, under which the defendant undertook not to use the name “Diddy” in the UK. However, he was allowed to use the name “P.Diddy” and on that basis he started re-branding his activities. The claimant, not satisfied with Mr Combs’s compliance with the settlement agreement, applied for summary judgment asserting particular breaches. The first breach concerned the use of the name on MySpace, YouTube and websites. The second was about the lyrics of Mr Combs’s album “Press Play”, which contained references to him as “Diddy”.

With regard to the first alleged breach, the Court found that the various websites did advertise and promote goods and services in the UK under the word “Diddy”, which was prohibited by the settlement agreement. According to Mr Justice Kitchin, placing a mark on the internet from a location outside the UK can still constitute use of that mark in the UK. However, he was unable to decide whether Mr Combs had any control over them.

In respect of the second complaint, after examining the lyrics of the relevant songs, Kitchin J held that only one of them constituted advertisement of goods and services in the UK under the name “Diddy”. The decisive factor was the comprehension of the lyrics by the average consumer.

This case is significant in that it provides considerable guidance on the issue of when the use of a mark on a website operated from abroad can constitute use of that mark in the UK. In the Court’s opinion, the fundamental question must be whether or not the average consumer of the goods or services in issue within the UK would regard the advertisement and site as being aimed and directed at him. The factors that should be taken into consideration include *inter alia* the nature of the goods or services, the appearance of the website, whether it is possible to buy goods or services from the website, whether or not the advertiser has in fact sold goods or services in the UK through the website or otherwise, and any other evidence of the advertiser’s intention.

### **European Court of Justice ignores time limits for “essential facts”**

On 3 April 1996, the Atlantic Richfield Co. applied to the Office for Harmonisation in the Internal Market (OHIM) to register the word ‘ARCOL’ as a Community Trade Mark for chemical substances for preserving foodstuff. On 20 October 1998, Kaul GmbH, the proprietor of an earlier mark ‘CAPOL’ opposed the application on the basis of likelihood of confusion. The opposition was rejected on 30 June 2000. On appeal, Kaul submitted a declaration from its managing director and a list of its customers, to substantiate the distinctive character of its mark. The Board of Appeal refused to consider this evidence as it was submitted for the first time in the appeal and upheld the decision of the opposition division.

On 24 May 2002 Kaul appealed to the Court of First Instance (CFI), which upheld the appeal on the basis of the breach of obligation to examine the evidence under Article 74(2) of Regulation 40/94. It held that the submissions were made ‘in due time’ within the meaning of Article 74(2). OHIM appealed to the European Court of Justice (ECJ) to set aside the judgment of the CFI.

The ECJ held that the submission of facts and evidence by parties is possible even after the expiry of time limit set under Regulation 40/94 and OHIM is not prohibited from taking account of it. But it is not a right to be able to make submissions after the expiry of the time limit, and OHIM has discretion to accept or deny the admission of such submissions, where OHIM considers them relevant to the outcome of the opposition and where the circumstances do not dictate against such matters being taken into account. Thus, late submissions can be taken into account without infringing Article 74(2) of the Regulation.

According to Article 63(2) of the Regulation, the decision of the Board of Appeal of OHIM is subject to review by the CFI, which cannot be a mere repetition of a review previously carried out by the Board of Appeal of OHIM. According to Article 62(1) of the regulation, the Board of Appeal is called upon to carry out a full examination of the merits of the opposition in terms of law as well as facts. Under Article 61(2) and 76, the Board of Appeal can, for the purpose of review, order preliminary measures including submission of evidence.

According to Article 42(3) of the Regulation, the submissions are to be made within the time limit set by OHIM whereas, according to Article 59, the submissions at the appeal are to be made within four months of bringing the appeal. But Article 59 can not be said to set a new time limit of four months in cases where the time limit has been previously set by OHIM. Therefore, the ECJ held that the CFI erred in law in stating that the submissions were made ‘in due time’ within the meaning of Article 74(2), even though they were outside the time limit set by OHIM. Hence, the CFI infringed the provisions of Articles

42(3), 59 and 74(2) since the very basis for annulling the contested decision of the Board of Appeal was a result of misinterpretation of these provisions. Therefore, the decision of the CFI was set aside.

Since the ECJ is empowered by Article 61 of the Statute of the Court of Justice, to give a judgment, the ECJ held that the Board of Appeal infringed Article 74(2) in holding that it has no power to admit late submissions, instead of exercising its discretion. Hence the contested decision of the Board of Appeal was annulled, and Kaul's appeal was upheld. The Court ordered OHIM to pay the costs.

This complex and convoluted case essentially highlights one important factor: time limits are not set in stone, and if a party can persuade the ECJ that there are relevant reasons, the Court will not only overturn the time limitations, but also hand down the "correct" judgement.

## Sports and Entertainment

### **Lonsdale brand owners' hands tied by acceptance of royalties**

On 8 March, 2007, the High Court delivered its judgment in *Loefelis SA and Leaside SA v Lonsdale Sports Ltd, Trade Mark Licensing Company Limited and Sports World International Limited* [2007] EWHC 451 (Ch). The defendants, now part of the Soccer World group of companies, are owners and dealers of the well known Lonsdale brand. Loefelis SA, a company registered in Switzerland, acquires licences for distributing and selling casual and sports wear. The second claimant, a subsidiary of Loefelis, is the company through which Loefelis exploits the trade mark licences.

By an agreement made in 2002, following 20 years of litigation involving the Lonsdale trade mark, the first and second defendants granted Loefelis an exclusive licence to deal in products bearing the Lonsdale trade mark. The licence covered all areas of the European Economic Area including Switzerland, but excluding the United Kingdom and Ireland. The agreement stated that the parties were not aware of any other competing licences or other rights in the trade mark. Loefelis appointed Leaside as its sub licensee. The licensees later discovered undisclosed parties with an interest in the trade marks. The claimants established that the defendants had also breached their exclusive licence, by continuing to compete with the claimants and by permitting other competitors, to do the same.

The claim was, inter alia, for:

- damages for misrepresentation;
- an injunction against and damages for infringement of their exclusive rights; and

- a declaration that the appointment of the second claimant as their sub- licensee was lawful.

The defendants contended that they were entitled to damages on account of breach of the sub licence agreement by the claimants. They alleged and it was accepted that Loefelis had:

- undergone a change of ownership; and
- without their consent, sub licensed the second claimants.

They further alleged that the claimants had committed various other breaches of the contract. They therefore sought a declaration that they were entitled to terminate the contract. It was proved in evidence that the claimants had, after discovering the alleged breaches, continued to demand and accept royalties from the defendants.

The Court rejected the defendants' counterclaim, holding that:

- the defendants waived their right to terminate the contract when, while fully aware of the alleged breaches, they continued to demand and accept royalties from the claimants.
- It was immaterial that the demand and acceptance of royalties was stated to be 'without prejudice' since there was no proof that Loefelis had agreed not to treat the acceptance as a waiver.
- The defendants had failed to prove some of their other claims, which, in any case, they could not complain of because of the waiver.

The Court found in favour of the claimants on the grounds that the defendants had:

- misrepresented that there were no other licensees or parties with rights in the Lonsdale trade mark leading to economic loss; and
- infringed the claimants' right to an exclusive market when they competed or permitted competition with the claimants resulting in economic loss entitling the claimants to an injunction.

This case shows that as between the contracting parties, licences involving intellectual property rights are governed by general principles of contract law. Contract law principles applied to other contractual relationships, are to be applied to contracts between licensors and licensees of intellectual property rights. The law relating to intellectual property contracts has no special features, but depends on ordinary contractual principles.

### **Italian gambling provisions at odds with rules of the EC Treaty: ECJ raises the chances of liberalisation**

In its decision of 6 March 2007 (the 'Placanica decision'), the European Court of Justice acknowledged that, in imposing strict rules, Italian law sought to implement a certain degree of control, to prevent any type of exploitation of gambling for

criminal purposes. This was in response to the reference for a preliminary ruling brought before the Court by the Tribunal of Larino and Teramo in Italy (joined case C-338/04, C-359/04 and C-360/04), on whether the effects of the Italian rules on the process of authorising gambling activities complied with the principles of freedom of establishment and freedom to provide services, as introduced respectively by Article 43 and 49 of the EC Treaty. More precisely, the Court accepted that the obligation to obtain a licence from a designated body and a subsequent authorisation from the police was considered to be a restriction on the abovementioned freedoms. Nevertheless, the Court also accepted that restrictions could be allowed as exceptional measures (Article 45 and 46 of the EC Treaty) ‘for reasons of overriding general interest’, i.e. ‘consumer protection, prevention of both fraud and incitement to squander on gaming, as well as the general need to preserve public order’.

The principle of proportionality must also play a role in considering the lawfulness of such limitations and the Court looked at whether the exceptional measures laid down by Italian legislation went beyond what is necessary for the achievement of institutional goals. On the matter of limitation in terms of the number of licences to be granted in the Italian territory, the Court submitted that it did not have sufficient facts to assess the situation, and so it left this issue for the national court to decide on the matter.

The Court did find that the requirement banning companies quoted on the regulated markets of other Member States from obtaining the necessary licences and police authorisation, as laid down under Italian law, were ‘beyond what is necessary in order to achieve the objective of preventing operators active in the betting and gaming sector from being involved in criminal or fraudulent activities’. It had been argued that the Italian preference for the identification of individuals rather than companies would benefit transparency and deter criminals. However, the Court said that there were ‘other ways of monitoring the accounts and activities of operations in the betting and gaming sector which impinge to a lesser extent on the two indicated freedoms’. As a logical consequence of these particular circumstances, if the refusal to grant the necessary licences and the police authorisations is a breach of the freedoms protected by Article 43 and 49 of the Treaty, criminal sanctions imposed on companies that failed to obtain such licences or authorisations are to be considered void.

This decision confirms the position of the consolidated case-law, namely, that the intention to open up the market of gambling services, especially as far as remote gambling is concerned across the EU. While full liberalisation remains the main ultimate goal, there are still questions to be answered on the social impact of gambling liberalisation and the fact that national markets are addressing traditionally diverse attitudes to gambling and as a result are developing at different speeds.

Despite these factors, the current market-oriented approach seems to suggest that cross-border action by EU betting and gaming companies is considered by most to be a safe bet.

## Procedure and Cross-border Measures

### **PCT applications in UK: when late declarations on priority can be accepted?**

Abaco Machines (Australasia) Pty Ltd (Abaco) had filed an application for a patent in Vietnam claiming a device for lifting panels or slabs. The application had a priority date of 7 January 2004, allowing Abaco until 7 January 2005 to file a PCT application. However, due to a clerical error the PCT deadline was first entered as 17 January 2005, and later on as 14 January 2005. As a result the preparations for filing the PCT application in Australia did not begin until 8 January 2005, a day after the expiry of one year from the original Vietnamese priority date. In order to salvage the application procedure in the number of countries, Abaco decided to file national applications. The UK application was one of them and was filed on 7 March 2005. The main issue before the hearing officer and in appeal, before Lewison J of the High Court, was whether the applicant could still maintain the priority date of 7 January 2004 in respect of the UK national application?

The relevant provision applicable to this particular situation is Section 5 (2C)(b) of Patents Act 1977. It mandates that where the applicant has asked the Comptroller to extend the period of making a declaration regarding the application in suit, the Comptroller can extend the period provided that the failure to file the application in the suit within 12 months of the earlier relevant application or later was unintentional.

The Hearing Officer refused to extend the deadline, stating that the non-filing of the application by Abaco during all this time was an intentional strategy and hence the conditions of section 5(2C)(b) were not fulfilled. Abaco appealed against the decision contending that the ambit of the “application in suit” under the section encompassed the earlier PCT application intended to be filed before the Australian patent office. This is because section 5 should be read in the context of Patent Law Treaty that has influenced its amendment. Since that non-filing was un-intentional due to error in recording the date, Abaco should be allowed to take advantage of section 5.

To begin with, the Court noted that Abaco had a strategy to file a PCT application in Australia first, designating all regions and countries and then, to enter the UK through the regional phase via a European patent application, rather than through a national application made to the UK Patent Office. It also agreed that section 5 ought to be read in the light of Patent Law Treaty. But, the Court did not agree with the expansive

meaning of the term “application in suit” as contended by Abaco. It noted that such an interpretation was not sustainable within the Patent Law Treaty as the term “application” does not include PCT applications until the PCT application is in international phase. Moreover, the scheme of PCT and its treatment by the Patents Act 1977 reflects that the PCT has to be taken as a complete code and Abaco must accept the scheme as it is. Therefore, a request for extension of time in claiming priority from an earlier PCT application under s 5 in the case of Convention applications can only be considered in the cases where the PCT application has actually been filed and entered into the national phase. It can not apply to a PCT application per se that is still in the international phase.

### Taiwan Under CD-R Scrutiny

According to the European Commission, Notice of Initiation, 2007/C 47/11 a Taiwan based CD-R manufacturer obtained a compulsory licence for essential CD-R technology owned by Philips, which lead to Philips’ patent rights and licensing strategy being undermined. Thus, Philips asked the European Commission to take action under the TRIPs Agreement.

On 30 July 2002, Gigastorage Corporation (“Gigastorage”), a Taiwan based optical disc manufacturer, obtained a compulsory licence from the Taiwan Intellectual Property Office (“TIPO”) for five patents on core issues of recordable compact disc (“CD-R”) technology held by Koninklijke Philips Electronics N.V. (“Philips”).

The licence was granted under Article 76 of the Taiwanese Patent Act, which is based on Article 31 of the TRIPs Agreement. Philips’ appeal of the decision to the Taiwanese Ministry of Economic Affairs was unsuccessful. On 15 January 2007, Philips lodged a complaint with the European Commission under Council Regulation (EC) No 3286/94.

The Regulation provides a means for the European Communities’ industry to initiate a procedure aimed at eliminating obstacles to trade in third countries. As the procedure can ultimately lead to dispute settlement procedures and commercial policy measures such as raising customs duties and the introduction of quantitative restrictions, initiation can only take place if the European Community has a right of action under international trade rules, in this case the TRIPs Agreement.

Philips said the granting of the compulsory licences by the TIPO was a violation of the Articles 28(1)(a) and 31(b), (c) and (f) of the TRIPs Agreement. The relevant articles provide as follows:

- Article 28(1) entitles the patentee to the exclusive right to make, use, offer for sale, sell or import a product and prevent third parties who do not have the patentee’s consent from

doing so. Philips alleges this exclusive right was violated by a false application of Article 31(b) and (f).

- Article 31(b) states that a compulsory licence may be granted if a party was unsuccessful in obtaining a licence from a patentee on reasonable terms and conditions within a reasonable period of time. According to Philips, the literal reading of this provision as applied by the TIPO will lead to a situation in which a patentee has to grant a licence to any party that offers reasonable terms and conditions, thereby *de facto* losing its exclusive right to the product and to determine to whom it licences that product.
- Article 31(c) requires the issuing authority to specify the scope and duration of the licence and limit these to the use for which they were authorised. According to Philips, no such specification has been made.
- Article 31(f) requires the granting authority to confine the licence to the domestic market, which according to Philips had not been done in this case.

As Gigastorage accuses Philips of tying essential to nonessential patents, the case will turn as Article 31(k), which allows the conditions of (b) and (f) to be set aside as a matter of remedy when the patentee engages in anti-competitive behaviour. A recent ruling by the US International Trade Commission, based on an opinion of the US Court of Appeals for the Federal Circuit that contains an extensive analysis of Philips’ licensing policy, provides a good perspective for Philips in defending its licensing policy as not being anti-competitive.

International intellectual property instruments such as the Berne Convention, Paris Convention and the WTO-TRIPs Agreement used to fall under the aegis of academic or scholarly work. These proceedings indicate that, due to the global nature of trade and IPRs today, we are witnessing the ever increasing incursion of esoteric international legal issues into the everyday practice of intellectual property law.

## News

### IVIR study on the implementation of the InfoSoc Directive Published

The Study “on the implementation and effect in Member States’ laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the Information Society” was commissioned by the European Commission and ‘examines the application of the Directive in the light of the development of the digital market’.

### Public consultation on WIPO Broadcasting Treaty

On 8 March 2007, WIPO issued a "Draft Non-paper on the WIPO Treaty on the Protection of Broadcasting Organisations"

and asked for submissions from members on the matters dealt within the document. The closing date for the submissions were 28 March 2007. Results of the consultation are now available. They are expected to produce strong reaction and to influence the next stages of the drafting process.

## **New Patents Rules under Consideration**

The UK Patent Office has recently launched a consultation on draft new Patent Rules, intended to replace the Patent Rules 1995. The consultation will run until 5 June 2007. The consultation aims to significantly change the rules to streamline litigation and other procedural aspects.

## **Re-naming of UK Patent office**

The UK Patent Office has been re-named the UK Intellectual Property Office in accordance with the recommendations of the recent Gowers Review. The new name came into effect on 2 April 2007. The name change was necessary to highlight the growing importance of other IP rights such as trade marks and copyright, in addition to patent rights.

## **LEGISLATION**

### **Family entertainment gaming machine – permit fees**

The Gambling Act 2005 (Family Entertainment Centre Gaming Machine) (Permits) Regulations 2007 (SI 2007 No. 454) provide rules on the fees relating to a family entertainment centre gaming machine permit, and the form of permit. The regulations come into force on 21 May 2007.

### **Prize gaming – permit fees**

The Gambling Act 2005 (Prize Gaming) (Permits) Regulations 2007 (SI 2007 No. 455) detail the fees relating to a prize gaming permit, and the form of permit. The regulations come into force on 21 May 2007.

### **Minor Amendments to the Patent Rules**

The Patent (Amendment) Rules 2007 (SI 2007 No. 677) brings certain minor changes to the current Patent Rules. The changes particularly deal with late declaration of the priority in relation to international application, confidentiality of the documents at the Patent Office, and remove the requirement of filing duplicate copies of documents with the Patent Office. The Regulations came into force on 1 April 2007.

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