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1. CREATIVE COMMONS LICENCES UPHELD BY THE DUTCH COURT

On 9 March 2006, the District Court of Amsterdam, in summary proceedings, handed down the first known court decision interpreting a Creative Commons licence. The court held, in *Adam Curry v. Audax Publishing B.V.*, Case 334492/KG 06-176 SR [2006], that using photographs contrary to the stated terms of a Creative Commons licence under which they were made available could result in a violation of Dutch law.

The Creative Commons (CC) is a non-profit organisation founded in 2001, with the aim of expanding the scope of the public domain to enable creative works to legally be made available to others. The Creative Commons project is designed to provide alternative solutions to avoid knowledge barriers and monopolies of the current intellectual property laws. The Creative Commons establishes a regime which enables creators, copyright owners and educators to have a flexible range of contractual licences to release some of their copyrighted works to the public while retaining others through a variety of licensing and contract schemes. The Creative Commons also provides a simple form of Digital Rights Management [RDF/XML metadata] that describes the licence and the work, making it easier to automatically process and locate licensed works.

Most types of Creative Commons licences require that the licensees give 'attribution' or credit to the author in the manner specified by the author or licensor. In addition, there are three extra options available for the copyright owners in entering into a Creative Commons licence:

- Non-commercial: the copyright holder allows others to copy, distribute, display, and perform their work and make derivative works but for non-commercial purposes only;
- No Derivative Works: the copyright holder allows others to copy, distribute, display, and perform only verbatim copies of their work, not derivative works based upon it;
- Share Alike: the copyright holder allow others to distribute derivative works only under a licence identical to the licence that governs the copyrighters' work.

These three options in turn create six suites of Creative Commons licences: Attribution Non-commercial No Derivatives (by-nc-nd), Attribution Non-commercial Share Alike (by-nc-sa), Attribution Non-commercial (by-nc), Attribution No Derivatives (by-nd), Attribution Share Alike (by-sa), and Attribution (by). These six licences vary in terms of the level of restrictions.

The mechanism of the Creative Commons licences suggests that work licensed under it is not necessarily available for unlimited or unconditional copying. One should pay attention to the restrictions put forward by the different types of licences. Moreover, before *Curry v Audax*, there had been very little in the way of case law.

The proceedings of *Curry v Audax* arose when the former Dutch local media guru Adam Curry posted photos of his family on the well-known online photo-sharing site www.flickr.com under a Creative Commons Attribution Non-commercial Share Alike licence (by-nc-sa) 2.0. This licence enables others to remix, tweak, and build upon the copyrighters' works non-commercially, as long as they credit the copyrighters and licence their new creations under the identical terms.

The photos posted by Curry carried the notice 'This photo is public', which is a standard feature of all flickr.com images viewable by the public, and a reference to the above-mentioned Creative Commons licence. The Dutch weekly *Weekend*, a tabloid, reproduced four of Curry's photographs in a story about Curry's children without seeking his permission in advance, although there was a notice indicating that the copyrights of these photos were owned by Adam Curry.

Curry sued Audax, the publisher of *Weekend*, for copyright infringement, breach of contract and invasion of his right of privacy. In relation to the copyright claim, Audax argued that it was misled by the notice 'This photo is public', and that the link to the Creative Commons licence was not obvious. Audax also argued that *Weekend* was informed of the existence of the Creative Commons license only much later by its legal counsel. Therefore, *Weekend* had assumed in good faith that no authorisation from Curry was required. Moreover, Curry had not incurred any damages by the publication of the photos in *Weekend*, since the photos were freely available to the public on www.flickr.com.

The District Court of Amsterdam rejected Audax's defence, holding that:

- the effect of the link to the Creative Commons licence was that the limitations in that licence applied and the photographs were not in the public domain
- Audax should have carried out due diligence before publishing the photographs
- the photos were subject to the Creative Commons Attribution Non-commercial Share Alike licence, and Audax should have followed its conditions.

The court ruled that Audax violated two sections of Curry's Creative Commons licence:

- Section 4a, which includes the obligation to provide a copy of the Creative Commons licence when distributing or publicly displaying a work; and
- Section 4c, which prohibits use of the work in a manner that is primarily for commercial purposes.

The court also ruled that *Weekend* must not use Curry's pictures again or it would face fines of 1,000 euros for each photograph used without permission. Curry was, however, awarded only a comparatively low compensation. The court thought that the monetary value of the pictures was very low, because they had already been published on the internet.

The decision of District Court of Amsterdam is important as it confirms that photographs placed on a public website under the Creative Commons licences, which offer more flexibility than traditional copyright licences, have not become part of the public domain in such a way that anybody may use, reproduce or publish these pictures in any way and for any reason or purpose.

2. LASERDISK: EUROPEAN COURT REJECTS INTERNATIONAL EXHAUSTION (AGAIN)

In its decision in *Laserdisken ApS v Kulturministeriet* (12.9.2006 Case C-479/04), the European Court of Justice confirmed that the exhaustion principle may not have international application.

The exhaustion principle has previously been applied mainly in connection with trade marks. In *Silhouette International Schmied GmbH* (Case C-355/96, 16.6.1996), the ECJ held that Member States could not, in light of the harmonising effect of the Trade Marks Directive, allow international exhaustion to subsist in national legislation. Rights holders had a valid right to divide markets and restrict the importation of their branded products to the community.

In this particular instance, Laserdisk was selling copies of cinematographic works in Denmark. Some of them were imported from outside the European Union and included special editions made for other markets and which had not been licensed to be sold in the European market. When Denmark implemented Directive 2001/29 on copyright in the information society, it amended its national copyright legislation such that Laserdisk could not lawfully continue importing products from outside the European Economic Area. Laserdisk sued the Danish Ministry of Culture and claimed that the amendments of the copyright law and the relevant provisions of the Directive were invalid on several grounds including:

- They restricted competition
- The legal regulations were contrary to the international agreements concerning copyright
- The amended law was against the principal of proportionality in connection with combating piracy; and
- The new laws restricted freedom of expression.

The Court rejected all the claims and confirmed that the Directive precluded national rules providing international exhaustions of rights. The Court also confirmed the validity of the relevant provisions of the Directive

The result of this case was not unexpected. However, previous cases on this issue have mostly concerned trade marks, and this decision confirms the applicability of the principles of international exhaustion in the area of copyright law.

3. TORTIOUS LIABILITY FOR LINKS TO MP3 FILES: FURTHER OBSTACLES TO ILLEGAL DOWNLOADS IN THE NETHERLANDS

In *Stichting Bescherming Rechten Entertainment Industrie Nederland (BREIN) V Techno Design "Internet Programming" B.V.* (Court of Appeal of Amsterdam, [2006] E.C.D.R. 21, 15 June 2006), the plaintiff, BREIN, was an organisation defending the interests of right holders in the music industry. BREIN's activities are particularly directed towards anti-piracy initiatives for the benefit, and with the joint effort of, authors, artists and producers of music, film and interactive software.

The defendant, Techno Design, was the owner of the "zoekmp3.nl" website and a number of similar sites containing deep links redirecting to URLs from which

infringing material could be downloaded. The defendant also kept a database that, through a specific search engine, provided information on the infringing material. Importantly, Techno Design was not an internet service provider and therefore the relevant legal provisions for ISPs were not applicable.

In the first instance, the District Court had found in favour of Techno Design. It rejected the claim that by linking to illegal materials Techno Design had infringed the copyright and neighbouring rights of the relevant right holders. Also, the District Court did not recognise that the owner of the website was acting tortiously.

On appeal, the organisation representing the right holders raised a number of objections which the Court discussed in the light of the 1912 Netherlands Copyright Act. The important part of the decision concerned the claim of tortious acts being committed by the defendant. The Court of Appeal indicated that, in theory, the defendant was in the position to operate a search engine tracking down mp3 files. However, elements of tortious acts were found. What emerged from the evidence was that the website owner knew that the material located through its search engine contravened copyright law.

The Court went on to point out that Techno Design gained income from advertising banners as well as from the sale of ringtones on its website. Clearly, the level of such income was directly connected to the volume of visitors of the website itself. The Court concluded that, by systematically taking advantage of the availability of unauthorised material, the defendant had acquired most of its income in breach of the principle of due care that it was required to observe.

Accordingly, Techno Design was required to cease any activity connected with the website, and pay damages as well as the costs of the litigation.

This case shows how illegal downloading is still very much a topical problem in the context of copyright enforcement. The relevance of the case is twofold. On the one hand, it demonstrates the efforts of national courts in fighting illegal music distribution over the internet is ongoing. On the other, it proves that while infringers will always try to find ways of making judicial decisions ineffective, the law is sufficiently flexible to encompass many kinds of tortious activity.

Patents

4. EXTENDING PHARMACEUTICAL MONOPOLIES

This action included consolidated cases against two patents owned by Akzo NV, Arrow Generics and Norton Healthcare, manufacturers of generic pharmaceuticals. The case in the Scottish Court of Session was heard by Scotland's principal IP judge Lord Glennie.

The patents concerned claims to the pharmaceutical product tibolone used in treating menopausal complaints, in modulating the immune system and for combating osteoporosis. Tibolone as such was well known since the 1960s.

Akzo's claimed invention concerned the ability to produce a particular form of the product with increased reliability in a greater purity. The first patent '035 (priority March 1989) claimed the product in a particular form, known as Form 1. The second patent '375 (priority October 1998) claimed the same product but in greater purities from that said to have been achieved. The commercial advantage to Akzo of this technology clearly lay in being able to produce, in tablet form, a product that would remain stable for longer.

The basis of the attack on the '035 patent was an article published in 1984 in which some of the Form 1 product had been produced by experiment. Akzo argued that its patent required large quantities of the product to be produced for pharmaceutical use whilst purity was maintained, and not just a single crystal. The Court answered however that the patent made a standard claim to the product as a pharmaceutical preparation, but that nothing indicated the conversion into a pharmaceutical was the point of the monopoly claimed. Instead, the product itself had been claimed but was found to have been made before.

The basis of the attack on the '375 patent was case law from the European Patent Office (EPO) in which a rule of general application appeared to be established that unless there was some new way of achieving greater purity then the product of greater purity did not have the requisite novelty. The Court found that conventional means, albeit tedious, could achieve the increased purity. Akzo argued that the case law of the EPO did not have to be followed as precedent by the Scottish Court. Nonetheless, the Court accepted the EPO's approach and found that despite Akzo having found another way of achieving purity more speedily, the claim to the product was not novel. An amendment put forward by Akzo to limit the claims by reference to an improved method for achieving the purity claimed was rejected. The product achieved by such means had no additional identifiable novelty and thus could not rely on the new means to protect the product itself.

The robust dealing with these two patents demonstrates both the flexibility of the law on novelty to borrow from the approach of the EPO and the determination of the Scottish Court to take a practical approach in deciding questions of IP enforcement and allowance of amendments during litigation.

Trade marks

5. CHEESES TO CHOOSE

On 15 August 2006, the decision was handed down in respect of a complaint with regard to domain name www.finecheeses.co.uk registered by the respondent.

The complainant's case was that they had been trading under the name 'The Fine Cheese Company' since 1987, and started on-line trading in 1999 when they registered their domain name www.finecheese.co.uk. The respondents, on the other hand, registered the domain name www.finecheeses.co.uk in 2004 and had other websites such as yorkshirecheese.co.uk, cheese4all.co.uk, lawsoncheeses.co.uk. All these websites were linked to the respondent's shopping site, www.cheesesdirect.co.uk, so that any customer clicking on any of the other sites were sent to this site for on-line ordering.

According to the complainant, if anyone accidentally adds an 's' to 'finecheese' then the search is directed towards the respondent's site, thus causing enough confusion to divert the traffic of customers away. Therefore, they alleged that the registration of the domain name 'finecheeses' instead of 'good cheeses', 'best cheeses' or similar adjective driven domain was an abusive registration for the purpose of exploiting their name and reputation.

An independent expert deciding on the twin issue of domain name right and abusive registration, upheld the common law right of the complainant over the trade name 'The Fine Cheese Company' as it has been trading under the same since 1987.

On the second issue of abusive registration, it was held that since the website complained of was a site that was owned by a competitor of the complainant offering very similar goods and services as that of complainant, it constituted abusive registration under paragraph 1 of the UK Dispute Resolution Policy and thus took unfair advantage of complainant's rights. It was decided that such registration was an abusive registration under paragraph 3i-B as it was 'for the purpose of' blocking a mark or name in which the complainant has rights or has acquired rights.

It is significant to note that although the term 'cheese' is a generic term and the trade name 'fine cheese' was descriptive of the products sold by both parties, the registration of domain name was allowed to remain. The decision clarifies this aspect by holding that complainant's domain name had attained secondary meaning and a goodwill in the business of cheese.

The decision is important on two counts. First, neither of the parties had any property rights in the name to raise an actionable passing off case against registration of a domain name. Secondly, it clarified that not all later domain name registrations of similar names would amount to a blocking and/or abusive registration unless such site was a competitor selling similar goods and services. Therefore, if a site is registered as finecheeses.co.uk for some charitable work, then it would not amount to abusive registration under the policy but such a use can still be held to be misleading and diluting the earlier domain name by bringing the principles of trade mark laws in the domain of domain names.

6. HORMEL FOODS CORPORATION

On 19 July 2006, the Second Board of Appeal of the Office for the Harmonisation of the Internal Market (OHIM) gave its decision in *Hormel Foods Corporation*, case C-450/2006-2.

Hormel Foods Corporation owns the trade mark for SPAM, a spicy luncheon meat. Hormel had applied to OHIM to register "spam" as a Community Trade Mark (CTM) in relation to "economic consultancy, particularly in combination with network services; providing of expertise, engineering services and computer programming; economic consulting services" in class 36.

The application was also for the registration of the CTM for "services to avoid or suppress unsolicited e-mails" and "creation and maintenance of computer software in class 38, and for technical consultancy, particularly in combination with network services; providing of expertise, engineering services and technical consulting services" in class 42. The examiner rejected Hormel's application under article 3 of First Council Directive 89/104/EEC on the grounds of descriptiveness and non-distinctiveness, stating that the mark consisted exclusively of a descriptive term used in trade which refers directly and unequivocally to characteristics of the services applied for. When applied to the services applied for, the mark would immediately be perceived as a descriptive indication of their object or their intended purpose. In addition, being primarily descriptive, the mark was devoid of any distinctive character.

In its appeal, Hormel argued that an average English speaking person would not necessarily associate 'spam' with junk email, but would instead associate it with "a kind of spicy ham" food product. That argument was rejected by the Second Board

of Appeal. The Board noted that the term SPAM is not only listed in technical dictionaries as a technical term for 'unsolicited commercial e-mail' but is also cited in general dictionaries. Thus, according to the Board, the term SPAM would be understood by professionals and those with a knowledge of computers as unambiguously indicating that the goods or services were intended to guarantee SPAM-free communication.

Also, a Google search returned more hits for "spam" junk email than for the canned meat, which satisfied OHIM that the word was also in use by the general public to refer to unsolicited mail.

The fact that the term SPAM had other meanings didn't prevent it from describing the services in question.

It would be interesting to see where Hormel goes from here as it has been trying to prevent the use of SPAM as a generic term for years, including a 2004 advertising campaign. It also failed in its bid to invalidate the SPAMBUSTER name in the UK High Court in 2005. It is not believed that Hormel has serious plans of going into the email filtering business but, for whatever reason, it wants a monopoly over the term SPAM for junk emails. Even if its CTM application had been successful, one wonders how it would have worked in practice based on a registration for services to stop spam.

7. PAMPAM AND PAMPIM CONFUSED OHIM

In *Gérard Meric v the Office for Harmonization in the Internal Market (OHIM)* [CFI T-133/05], the Court of First Instance (CFI) revisited the global appreciation test as adopted in *Puma v Sabel* (1998 RPC 199).

Gérard, the owner of the trade mark 'PAM-PIM'S BABY-PROP', brought an appeal against OHIM for rejecting the registration of its mark as a community trade mark for the product 'napkin-pants made out of paper or cellulose (disposable)'. In the decision, the CFI was required to investigate whether there was a similarity between the appellant's trade mark, 'PAM-PIM'S BABY-PROP', and an earlier Spanish registered trade mark, 'PAM-PAM', resulting in a likelihood of confusion. During this analysis, the court considered the notion that *"two marks are similar when they are at least partially identical as regards one or more visual, aural and conceptual aspects"*.

When applying this test to the case in hand, the CFI agreed that the word 'PAM-PIM'S' was dominant from BABY-PROP and it also played an important role in the visual and aural assessment of the earlier mark. BABY-PROP was not a significant feature to find similarity between the marks and hence, could be ignored. The court would, therefore, consider the visual and aural similarity between 'PAM-PIM'S' and 'PAM-PAM' only. Accordingly, from a visual point of view, the Board held that PAM-PIM'S and PAM-PAM are visually similar because they are made up of two words linked by a hyphen and the difference between the vowels 'a' and 'i', while the addition of an 's' is not sufficiently significant. From the phonetic point of view, PAM-PIM'S and PAM-PAM are also similar because they are made up of two monosyllabic words starting with the same consonant 'P' and finishing with the same consonant 'm'. At the same time, the difference between vowels 'a' and 'i' is not sufficiently distinct to differentiate the marks.

Lastly, from the conceptual point of view, PAM-PAM and the dominant part PAM-

PIM'S did not have a clear and specified semantic content since it did not have any particular meaning in Spanish, the language of the territory of the earlier mark. There were no conceptual differences in the sign concerned and both marks were found to be confusingly similar.

The similarity between trade marks was considered together with the identity of goods under these marks and the existence of the likelihood of confusion in some parts of Spain where PAM-PAM has been protected. This case applied an accepted methodology of testing distinctiveness (i.e. the global appreciation test), but its interpretation, especially in relation to the aural aspects of the mark, demonstrates that a mark would need more differentiation over a range of aspects (including visual and phonetic) so as to rebut the conclusion of "likelihood of confusion".

8. L & D v OHIM & JULIUS SÄMANN LTD: LIKELIHOOD OF CONFUSION?

On 7 September 2006, the Court of First Instance dismissed the action by L&D SA to annul the decision of the Second Board of Appeal of OHIM relating to opposition proceedings between Julius Sämann Ltd and L&D, SA (the "contested decision").

On 30 April 1996 L&D SA filed an application for Community trade marks in classes 3, 5 and 35. Sämann opposed this application, citing a likelihood of confusion with its earlier registered Community and national trade marks that, it alleged, comprised of similar visual pictures, for similar goods. The Opposition Division dismissed the opposition in its entirety. The Board of Appeal dismissed Sämann's appeal in respect of the Class 35 services, but allowed it in respect of goods in question.

The Board of Appeal pointed out that the conflicting marks both comprised of a fir tree shown with branches formed by outgrowths and indents on the sides and a very short trunk on top of a wider part serving as a base. The Board held that there was a conceptual confusion between the marks, at least in Italy, based on the acceptance of the prolonged use, well-known nature and distinctive character of Sämann's earlier mark. Furthermore, L&D's sign, which included the design of an animated character and the verbal element 'aire limpio', would not prevent that likelihood of confusion under Article 8(1) (b) of Regulation No 40/94 because L&D's sign could be perceived by the public concerned as an amusing and animated variant of Sämann's earlier mark.

The CFI held that:

1. The Board of Appeal was correct that the earlier mark had distinctive character.
2. L&D's mark was a fanciful impression of the graphic representation of a fir tree, and could have been regarded by the public as an amusing and animated variant of the earlier mark.
3. The applicant had an opportunity to present its comments on all the factors on which the contested decision was based and also on the use of the evidence relating to the use of the earlier marks. Infringement of Article 73 of Regulation No 40/94 was not established

Pursuant to the case of *Laboratorios RTB v OHIM Giorgio Beverly Hills* (T-162/01), the likelihood of confusion must be assessed globally on the basis of the perception that the relevant public has of the signs and goods or services in

question and taking into account all factors relevant to the circumstances of the case, such as their distinctive and dominant components. In this case, L&D thought they had a distinguishable mark; however, judging by the nature of the product and the relevant market, L&D's sign was too similar for goods that were too similar. Slight variations from earlier distinctive marks are generally not enough to make the latter sign sufficiently different to allow trade mark protection.

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