

NEWSLETTER

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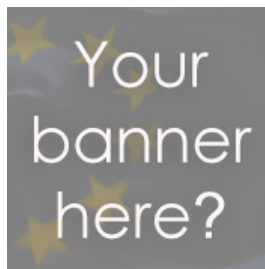
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JOB OFFERS AND ADVERTISEMENTS

The Advanced Masters Intellectual Property Law and Knowledge Management (IPKM) feature specialisation tracks on international IP litigation practice, entrepreneurship and valorization, and claim

drafting. In its common programme lawyers, economists, scientists and engineers mingle to deal with real-life problems in multidisciplinary teams.



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MONTHLY CASE LAW OVERVIEW**Copyright**

IP 10134. A-G CJEU: taste does not constitute a work Copyright. Case C-310/17: Levola v Smilde. Opinion A-G Wathelet: The court of appeal Arnhem-Leeuwarden (Dutch court) has referred two questions to the Court of Justice for preliminary ruling about the possibility to copyright the taste of a food product. A-G Wathelet considers that in view of the current state of

the art, the precise and objective identification of a taste or smell is currently impossible. Even though the identification of a taste is subjective, the possibility to with sufficient precision and objectivity identify a work and consequently the extent of its protection by copyright is imperative in order to respect the principle of legal certainty. Therefore, Wathelet opines that the taste of a food product does not constitute a "work" according to the Copyright Directive and concludes that the Copyright Directive precludes copyright protection of the taste of a product.

(Courtesy of Tobias Cohen Jehoram and Syb Terpstra,, [De Brauw Blackstone Westbroek](#))

Posting a presentation written by one of the school's pupils on the school website, which included a photograph that is freely accessible on the internet can be considered as an act of communication to a new public

[IPPT20180807, CJEU Land Nordrhein-Westfalen v Renckhoff](#)

[Copyright](#) Posting a photograph

that was published on another website, made with the same technical means, without any restrictive measures and with consent of the copyright holder falls



under the concept "communication to the public": There is an "act of communication" when such posting gives visitors to the website on which it is posted the opportunity to access the photograph on that website. There is communication to a "public" when it covers all potential users of the website on which the photograph is posted. There is a "new public" when that public was not already taken into account by the copyright holders when they authorised the initial communication to the public of their work. Case-law about hyperlinks not applicable.

Trade Mark Law

Board of Appeal is entitled to take account of additional evidence of use which is submitted after the time period

[IPPT20180228, CJEU, mobile.de v EUIPO](#)

[Trade Mark Law.](#) General Court has rightly found that the Board of Appeal is entitled to take account of additional evidence of use which is submitted after the time period set by the Board: addition to the evidence adduced within the time period set by EUIPO under Rule 40(6) of the Implementing Regulation which is submitted after that time remains possible, Rule 40(6) of the Implementing Regulation does not constitute a provision contrary to Article 76(2) of the EU Trade Mark Regulation, with the result that the Board of Appeal is not entitled to take account of additional evidence of use of the earlier mark in question. Cancellation Division cannot examine evidence of genuine use of the earlier mark in respect of the

services for which it was considered by the Board of Appeal that that evidence had not been adduced.

Adding additional label to parallel imported medical device does not constitute a trade mark infringement

IPPT20180517, CJEU, Junek v Lohman-Rauscher

Trade Mark Law. Conditions from judgements Bristol-Meyers Squibb (IPPT19960711) and Boehringer (IPPT20070426) only applicable when importer has repacked product. The mere act of putting an extra label on an unprinted portion of the original packaging is not a repackaging within the meaning of these judgments. Trademark holder cannot object against parallel import of a medical tool in authentic internal- and external packaging. Trade mark proprietor cannot object against parallel import of a medical device in authentic inside- and outside packaging which, by its content, function, size, presentation and placement, does not give rise to a risk to the guarantee of origin of the medical device bearing the mark.

The General Court was right to consider that EUIPO's bodies could not satisfy their obligation to state reasons by failing to refer to earlier judgements about PUMA's recognition

IPPT20180628, CJEU, EUIPO v Puma

Trade Mark Law. The General Court was right to consider that EUIPO's bodies could not satisfy their obligation to state reasons: Puma had raised the argument that the reputation of the earlier marks had been recognised 'in numerous Office decisions', the fact remains that the Board of Appeal failed to cite from among the 'evidence submitted by the opponent'. If the Board of Appeal itself were to reach the conclusion that it could not satisfy its obligation to state reasons, without the evidence which had been lodged in the earlier proceedings before EUIPO, it must be considered, that it would have been necessary for the Board to exercise its power to request the production of that evidence for the purposes of exercising its discretion and carrying out a full examination of the opposition.

Trade mark proprietor is entitled to oppose debranding

IPPT20180725, CJEU, Mitsubishi v Duma

Trade Mark Law. Trade mark proprietor is entitled to oppose, on the grounds of Article 5 of the Trade Marks Directive (2008) and Article 9 of the EU Trade Mark Regulation, a third party removing all the signs identical to that mark and affixing other signs, without its consent, on products placed in the customs warehouse, with a view to importing them or trading them in the EEA where they have never yet been marketed.

Evidence submitted by KitKat must be capable of establishing acquired distinctive character throughout all Member States

IPPT20180725, CJEU, KitKat

Trade Mark Law. Board of Appeal could not find that the three-dimensional Kitkat EU trade mark had acquired distinctive character through use without adjudicating on whether it had acquired such distinctive character in Belgium, Ireland, Greece and Portugal: it would be unreasonable to require (separate) proof for each individual Member State, the evidence submitted must however be capable of establishing such acquisition throughout all Member States of the EU, it is not inconceivable that the evidence provided is relevant with regard to several Member States, or even to the whole of the European Union.



Design Law

Representation of a design for which registration is sought requires to clearly identify that design

IEPT20180705, CJEU, Jägermeister v EUIPO

Design Law. Article 36(1)(c) of the Community Designs Regulation requires the representation of a design for which registration is sought to clearly identify that design.

Patent Law

CJEU on criteria for products that are "protected by a basic patent in force" in the SPC Regulation for Medicinal Products

IPPT20180725, CJEU, Teva v

Gilead

Patent Law. A product composed of several active ingredients with a combined effect is 'protected by a basic patent in force' within the meaning of Article 3(a) of the SPC Regulation for Medicinal Products where, even if the combination of active ingredients of which that product is composed is not expressly mentioned in the claims of the basic patent, if, from the point of view of a person skilled in the art and on the basis of the prior art at the filing date or priority date of the basic patent: (1) the combination of those active ingredients must necessarily, in the light of the description and drawings of that patent, fall under the invention covered by that patent, and (2) each of those active ingredients must be specifically identifiable, in the light of all the information disclosed by that patent.



Litigation

Member States are required to recognize a body collectively representing trade mark proprietors if national law allows that body to bring legal

proceedings

[IEPT20180807, CJEU, SNB-REACT v Deepak Mehta](#)

[Litigation – Collective Rights Management](#). Member States are required under article 4(c) of the EU Enforcement Directive to recognize a body collectively representing trade mark proprietors as a person entitled to seek, in its own name, the application of the remedies laid down in the EU Enforcement Directive and to bring legal proceedings, in its own name, on condition that that body is regarded by national law as having a direct interest in the defence of such rights and that that law allows it to bring legal proceedings to that end, these being matters for the referring court to verify.

ITEMS**News**

[IP 10135, IViR: “Number of Internet pirates in Europe decreases, legal media consumption rising”](#)

From the press release: “The percentage of Internet users in Europe that occasionally downloads or streams music, films, series, books or games illegally, e.g. via The Pirate Bay or PopcornTime, has decreased between 2014 and 2017. This decrease is strongest for music, films and series. Meanwhile, expenditure on legal content has increased since 2014. This follows from the Global Online Piracy Study that the Institute for Information Law (IViR) of the University of Amsterdam published today.

In six out of the seven European countries that were studied, a decrease in the number of pirates was observed: France, the Netherlands, Poland, Spain, Sweden and the United Kingdom. Note that this smaller group of pirates downloads and stream more illegal content than three years ago. Only in Germany, a slight increase in the numbers of users of illegal sources is observed, due to small increase for games.”

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