

NEWSLETTER

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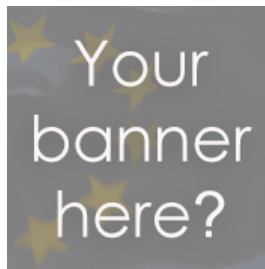
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JOB OFFERS AND ADVERTISEMENTS

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

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MONTHLY CASE LAW OVERVIEW**Copyright**

The taste of a food product is not eligible for copyright protection

[IPPT20181113, CJEU, Levola v Smilde](#)

Copyright. The taste of a food product cannot be classified as a work: the subject matter protected by copyright must be expressed in a manner which makes it identifiable with sufficient precision and objectivity. The taste of a food product cannot be pinned down with precision and objectivity. It will be

identified essentially on the basis of taste sensations and experiences which are subjective and variable, it is not possible in the current state of scientific development to achieve by technical means a precise and objective identification of taste.

Trade mark law

CJEU on genuine use of a earlier UK trade mark and Brexit

[IPPT20181129, CJEU, Alcohol Countermeasure Systems v EUIPO](#)

Trade mark law. The General Court did not err in law by finding that the proof of genuine use of the earlier mark consisting of the word sign 'ALCOLOCK' and registered in the UK in 1996 could be furnished by means of evidence establishing use of another mark consisting of the same word sign 'ALCOLOCK' registered in the UK in 2004: it follows directly from the wording of point (a) of the second subparagraph of Article 15(1) of Regulation No 207/2009 that use of the mark in a form differing from the form in which it was registered is considered use for the purpose of the first subparagraph of that article, so long as the distinctive character of the mark in the form in which it was registered is unaltered. The General Court did not err in law in not examining the two relevant periods separately: it is sufficient that a trade mark has been put to genuine use during a part of the relevant period, in the present case the two periods overlapped so the proof relating to the period of overlap could be taken into account for each of the two relevant periods. General Court should not have stayed the proceedings pending the date of the withdrawal of the UK from the EU in order to be able to annul the decision at issue on the ground that an earlier UK trade mark could no longer be used to oppose the maintenance of an EU trade mark: the General Court may not annul or alter a decision on grounds which come into existence subsequent to its adoption, EU law continues in full force and effect until the time of the actual withdrawal from the EU.

It is for neither EUIPO nor the General Court to reclassify the category chosen for a mark by the applicant

[IPPT20181025, CJEU, Enercon](#)

Trade mark law. Appeal against the General Court's decision that the Board of Appeal was fully entitled to find that the contested mark for wind energy converters was devoid of any distinctive character dismissed: General Court was fully entitled to take the view that the distinctive character of the mark had to be assessed according to the category of mark chosen in the application; a colour mark, since the appellant referred for the first time at the hearing before the General Court to content that allegedly highlighted the fact that the contested mark had been registered as a figurative mark, this evidence is inadmissible, it is for neither

EUIPO nor the General Court to reclassify the category chosen for a mark.

IP 10166. Colour or figurative mark? Distinction between these two is crucial for registration

Case C-578/17. Hartwall. Reference for a preliminary ruling. Korkein hallinto-oikeus (Finland). Opinion A-G Saugmandsgaard Øe

Trade mark law. The A-G suggests that the Court should answer the first question that Article 2 and Article 3 (1) (b) and (3) of Directive 2008/95 must be interpreted as meaning that, it is relevant for the purposes of the requirement of distinctive character if the registration of the trade mark as a figurative or as a colour mark is requested, since the specific characteristics of colour marks mean that this must be taken into account when assessing the distinctive character of a colour mark. In that regard, it must be borne in mind, first, that a colour mark rarely has ab initio distinctive character and, on the other hand, there is a general interest that the availability of colours is not unjustifiably restricted for other market participants who offer goods or services of the type for which registration has been requested.

The AG suggests that the Court should answer to the second question that Article 2 of Directive 2008/95 must be interpreted as that it opposes registration of a trade mark when it is not possible to determine what exactly is the object of the protection requested by the applicant, because of the existence of contradictions in the application. This is the case, for example, with an application for registration of a trade mark as a colour mark, while the mark is represented graphically as a figurative mark.

ITEMS

Articles and opinions

IP 10155. Matthias Lamping and Hanns Ullrich, Max Planck Institute for Innovation & Competition, The Impact of Brexit on Unitary Patent Protection and its Court

Research Paper no. 18-20: “Many in the patent law community hope to overcome the disruptive effects the withdrawal of the UK from the EU will produce on both the territorial scope of unitary patent protection and on the UPC as a court common to EU Member States. However, unitary patent protection cannot be dissociated from the general legal order of the EU’s Internal Market and extended to the UK once it has left the Union. Any such extension is incompatible with the autonomous character of EU law and its institutions, will result in a legally split unity for separate and separately regulated markets, and conflict with both the UK’s and the EU’s public interests in defining and implementing a patent policy of their own. Since the core objective of the UPC Agreement is to establish for the adjudication of unitary patent protection a common

court of EU Member States that, as such, forms part of the judicial system of the EU, continued participation in the UPC Agreement of the UK post Brexit will not be possible. It would be incompatible with the EU’s foundational principle, which is integration by virtue of the operation of an autonomous legal order based on a complete system of legal protection by national courts acting as ordinary courts of the Union and in cooperation with the Court of Justice of the EU.”

IP 10165. The reason why it is important for South Africa’s copyright law to adopt ‘fair use’

techcentral.co.za: ““Fair use” is a doctrine adopted by some countries that permits the use of copyright material like books, journals, music and art work — without requiring permission from the copyright holder. It provides a balance between the just demands of rightsholders and the need for people to use copyright material for education, research, in libraries and archives.

In the US, which entrenched the doctrine in its law in 1976, fair use has served citizens well. It has enabled the country’s creative industries to grow exponentially — so much so that the US boasts the largest and most successful filmed entertainment, music, book publishing and videogames in the world.

Despite these gains, “fair use” has its naysayers. Now the debate has come to South Africa, as the country seeks to amend its outdated copyright legislation.”

Article

IP 10164. Pre-publication: commentary Léon Dijkman on CJEU Levola v Smilde

Pre-publication Journal of Intellectual Property Law & Practice by Léon Dijkman: “Two things are particularly worth noting.

The first is the scope of the objectivity requirement for works. Does it also cover smells? There are diverging views on copyright protection for smells in the Member States and it is tempting to think that the CJEU’s decision sought to put an end to the controversy. Then again, it may well be that smell is easier to objectively identify than taste and the CJEU itself left the possibility of trade mark protection of smells open in Sieckmann (IPPT20021212, ECJ, Sieckmann). Additionally, the decision in Levola may also have ramifications for copyright in combinations of known elements and industrial designs, two cases where the determination of the work is notoriously subjective.

The second is that the decision is the latest example of the CJEU’s preference for pragmatism over dogmatism. The CJEU justified its holding by reference to the Berne Convention and the WIPO Copyright Treaty, but I doubt that their provisions contain the limitation to works it has now proclaimed. In any case, the Berne Convention was signed in 1886 and the CJEU should be lauded for interpreting it in a manner fit for the 21st century. Litigation over copyright-protected tastes

would pose serious challenges to litigants and courts and the CJEU did the right thing in closing the door on them.”

News

IP 10152. Trade mark claim for specific shade of purple filed by Prince's estate

Independent.co.uk: 'The estate of late musician Prince has reportedly filed a claim to trademark a particular shade of the colour purple. If successful film and music producers could be banned from using it.

(...)

Prince and his estate are famously protective of their copyrighted material. In 2016, Universal Music even filed a DMCA (Digital Millennium Copyright Act) takedown notice on a video of people singing the song "Purple Rain." A large group of people in Minneapolis were singing the song as tribute to the late singer just after his death.'

IP 10153. Dispute between dating apps Tinder and Bumble about who owns 'the swipe'

'In dueling lawsuits, Match, which owns Tinder, alleges that Bumble stole Tinder's intellectual property. Bumble says those claims are bogus, designed to drive down Bumble's worth and "poison Bumble in the investment market," according to Bumble's lawsuit.

The dispute between the two companies illustrates a recent shift in how the American legal system treats software patents. And, in general, it highlights the challenges of taking a patent system designed to protect inventors of machines ... and applying it to the Internet era.'

(...)

Bumble argues the patent protects the idea of "matchmaking on the Internet," and should be thrown out. Tinder, meanwhile, argues that marrying the swipe motion with a matchmaking system is a true invention, a concrete improvement to dating app interfaces.

IP 10154. Beyoncé v Feyoncé: parties moving toward settlement negotiations

Forbes.com: 'One month after a federal judge denied Beyoncé's request for an injunction in her trademark infringement lawsuit against a Texas company selling "Feyoncé" merchandise, the parties have informed the court they are moving toward settlement negotiations.

(...)

This lawsuit, which has been going on for over two years, has likely done a better job of marketing Feyoncé products than the small Texas company ever could on its own, though how additional revenue stacks up in comparison to settlement costs only the company knows.

Still, the end result — another ruling that a jury should decide whether a pun constitutes trademark infringement or is simply a clever business ploy —

could potentially inspire more budding entrepreneurs to get creative with well-established trademarks.'

IP 10156. CNBC.com: HBO responds to 'Game of Thrones' tweet Donald Trump

CNBC.com: 'HBO isn't happy that President Donald Trump used "Game of Thrones" imagery and language to promote sanctions against Iran. An image of Trump posted Friday featured a text overlay reading "Sanctions are coming." The font of the text is a near-match of the style used in HBO's mega-popular fantasy television series. The text itself appears to imitate "Winter is coming," one of the show's most popular slogans. In a statement to CNBC, HBO said, "We were not aware of this messaging and would prefer our trademark not be misappropriated for political purposes."

(...)

While HBO objected to Trump's photo, the show's themes and catchphrases have often shown up in politics. Business Insider reported that Trump's 2016 rival, former Secretary of State Hillary Clinton, compared herself to another character, Cersei Lannister, in her memoir, "What Happened."

IP 10157. Leena Contarino joins HGF Basel Office

Press release HGF: "HGF are pleased to announce further growth of the team in the Basel office with the arrival of Leena Contarino who joined the firm's Basel office as a Partner on Thursday 1st November 2018.

Leena has considerable experience in inventions related to proteins, nucleic acids, diagnostics utilising biomolecules, as well as cells, including microbes. Her expertise covers preparing and prosecuting patent applications, strategic patent portfolio review and management, intellectual property due diligence, and opinions regarding freedom-to-operate, non-infringement, and inventorship. Leena advises clients in protecting inventions mainly in the areas of DNA, RNA, peptides, and proteins, such as antibodies and enzymes.

IP 10158. Chinese copycats lose court case against Toymaker Lego

reuters.com: "Lego has won another case against imitators in China where copies of its colorful plastic toy bricks and figures have been a recurrent problem, the Danish toymaker said on Monday.

(...)

"We believe these decisions are well-founded in the facts and the law, and clearly demonstrate the continued efforts of Chinese authorities to protect intellectual property," Lego Chief Executive Niels B. Christiansen said in a statement. The Guangzhou Yuexiu District Court ruled that four companies had "infringed multiple copyrights of the LEGO Group and conducted acts of unfair competition by producing and distributing LEPIN building sets", Lego said. The court ordered that the companies immediately ceased

“producing, selling, exhibiting or in any way promoting the infringing products,” it said. Furthermore, Lego will receive around 4.5 million Chinese yuan (\$649,735) in damages.”

IP 10159. Girl Scouts of the USA sue Boy Scouts of America for trademark infringement

fortune.com: “The Girl Scouts of the USA has sued the Boy Scouts of America for trademark infringement. The dispute, filed Nov. 6 in federal court in New York, centers on the use of the word “scout” without a gender modifier. The suit argues that despite the long co-existence of the two organizations using the same term for its members and group, the Boy Scouts don’t have the right to use that word by itself when marketing itself to girls. The suit alleges that confusion among names will “marginalize the Girl Scouts Movement by causing the public to believe that GSUSA’s extraordinarily successful services are not true or official ‘Scouting’ programs, but niche services with limited utility and appeal.”

IP 10160. Report of the 48th World Congress of AIPPI at Seoul

The 48th World Congress of AIPPI took place from 22 September - 26 September in Cancun, Mexico. The Dutch Group of AIPPI adopted six resolutions:

- Conflicting patent applications (Study Question)
- Registrability of 3D trademarks (Study Question)
- Joint Liability for IP Infringement (Study Question)
- Partial designs (Study Question)
- Use of post-filing data in support of inventive step/non-obviousness
- HCCH Judgments project

The AIPPI World Congress 2019 will take place from 14 September - 18 September. Delegations of national groups will discuss about four new questions:

- Plausibility
- Customer survey evidence
- Copyright in artificially generated works
- IP damages for acts other than sales

IP 10161. China has given 18 new trademarks to Trump family in 2 months

New York Post: “China has given companies linked to US President Donald Trump and his daughter 18 new trademarks in the last two months, raising concerns about conflicts of interest in the White House on the eve of national elections.

The trademarks cover products from perfume to voting machines and will be finalized after 90 days if no one objects.

Ivanka Trump said in July she was shutting her namesake brand to focus on her role as a White House adviser.

Critics have been especially concerned that China, where the courts and bureaucracy are designed to reflect the will of the ruling Communist Party, could try

to use the Trump family’s valuable intellectual property for political leverage.

China has said it handles all trademark applications equally under the law.”

IP 10162. Jeff Koons guilty of copyright infringement according to Paris Court

Artforum.com: “More than three years after advertising creative director Franck Davidovici sued Jeff Koons for copyright infringement, a Paris court has found the American artist guilty of plagiarizing a 1985 ad campaign, *Fait d’hiver*, by the French clothing label *Naf Naf*. Both the ad and Koons’s statue, which he produced in 1988, share the same name and feature a pig with a barrel of rum hanging from its neck nuzzling a woman lying in the snow. The latter was sold to the Prada Foundation for over \$4 million in 2007.”

IP 10163. American couple will have to pay Nintendo over \$12 million

Business insider: “Nintendo of America was recently awarded a \$12.23 million dollar judgement in federal court against a married Arizona couple accused of copyright infringement. Jacob and Cristian Mathias allegedly acknowledged they operated websites that distributed free, unofficial copies of Nintendo video games along with software that emulates Nintendo consoles. The websites at the center of the lawsuit, *LoveROMs.com* and *LoveRETRO.co*, offered free games to more than 17 million visitors per month. The pair reportedly agreed to the judgement rather than face a lengthy court battle and even more potential damages owed to Nintendo.”

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