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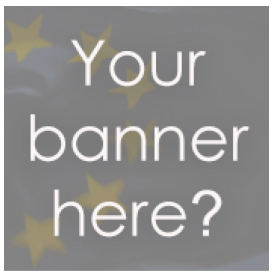

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MONTHLY CASE LAW OVERVIEW

Copyright

IP 10172. Editor in chief Dick van Engelen on copyright protection of food products

Copyright. In Levola/Smilde, the CJEU ruled that the taste of a food product cannot (yet) be protected by copyright. Hear more from our editor in chief Dick van Engelen, who is also an extraordinary Professor of Intellectual Property Litigation and Transaction Practice with Maastricht University.

Trade mark law

Cystus has not been put to genuine use despite being used on the packaging of the goods concerned
IPPT20190131, CJEU, Pandalis v EUIPO

Trade mark law. Appeal against General Court finding that "Cystus" has not been put to genuine use despite being used on the packaging of the goods concerned unfounded: the condition of genuine is not fulfilled where the mark affixed to an item does not contribute to creating an outlet for that item or to distinguishing the item from the goods of other undertakings, the General Court stated that in view of its context the use of the term 'cystus' on the packaging of the products would be perceived as descriptive of the main ingredient of those goods "Cistus" and not as identifying their commercial origin, by stating this, the General Court did not find that the mark at issue was descriptive.

IP 10182. McDonald's EU word mark BIG MAC revoked by the EUIPO

Trade mark law. Supermac's request for revocation of McDonald's EU trade mark registration for the word mark BIG MAC is upheld by the Cancellation Division of the EUIPO. According to the EUIPO, has not proven genuine use of the contested EUTM for any of the goods and services for which it is registered, since the evidence analysed does not provide sufficient details concerning the extent of use. The EUIPO finds that, other than exhibiting the sign in relation to goods which could be considered to be part of the relevant goods, the materials do not give any data for the real commercial presence of the EUTM for any of the relevant goods or services.

As a result, the application for revocation is wholly successful and the contested EUTM must be revoked in its entirety. According to Article 62(1) EUTMR, the revocation will take effect from the date of the application for revocation (11/04/2017).

Privacy

IP 10179. AG: the Court should restrict the scope of the dereferencing that Google has to carry out to the EU

Privacy. *Curia press release*: ''[…] In today's Opinion, Advocate General Maciej Szpunar begins by indicating that the provisions of EU law applicable to the present case do not expressly govern the issue of the territorial scope of de-referencing. He therefore takes the view that a distinction must be made depending on the location from which the search is performed. Thus, search requests made outside the EU should not be affected by the de-referencing of the search results. He is therefore not in favour of giving the provisions of EU law such a broad interpretation that they would have effects beyond the borders of the 28 Member States. The Advocate General thus underlines that, even though extraterritorial effects are possible in certain, clearly defined, cases affecting the internal market, such as in competition law or trademark law, by the very nature of the internet, which is worldwide and

found everywhere in the same way, that possibility is not comparable.
According to the Advocate General, the fundamental right to be forgotten must be balanced against other fundamental rights, such as the right to data protection and the right to privacy, as well as the legitimate public interest in accessing the information sought. The Advocate General continues that, if worldwide de-referencing were permitted, the EU authorities would not be able to define and determine a right to receive information, let alone balance it against the other fundamental rights to data protection and to privacy. This is all the more so since such a public interest in accessing information will necessarily vary from one third State to another depending on its geographic location. There would be a risk, if worldwide de-referencing were possible, that persons in third States would be prevented from accessing information and, in turn, that third States would prevent persons in the EU Member States from accessing information.
However, the Advocate General does not rule out the possibility that, in certain situations, a search engine operator may be required to take de-referencing actions at the worldwide level, although he takes the view that the situation at issue in the present case does not justify this.
He therefore proposes that the Court should hold that the search engine operator is not required, when acceding to a request for de-referencing, to carry out that de-referencing on all the domain names of its search engine in such a way that the links in question no longer appear, irrespective of the location from which the search on the basis of the requesting party's name is performed.
However, the Advocate General underlines that, once a right to de-referencing within the EU has been established, the search engine operator must take every measure available to it to ensure full and effective de-referencing within the EU, including by use of the 'geo-blocking' technique, in respect of an IP address deemed to be located in one of the Member States, irrespective of the domain name used by the internet user who performs the search."

IP 10180. AG: Google must accede to a request for the dereferencing of sensitive data, except for the exceptions under Directive 95/46
Privacy. Curia press release: "[...] In his Opinion delivered today, Advocate General Maciej Szpunar begins by stating that the provisions of Directive 95/46 should be interpreted in such a way as to take account of the responsibilities, powers and capabilities of a search engine. Thus, he points out that the prohibitions and restrictions laid down by Directive 95/46 cannot apply to the operator of a search engine as if it had itself placed sensitive data on the web pages concerned. Since the activity of a search engine logically takes place only after (sensitive) data have been placed online, those prohibitions and restrictions can therefore apply to a search engine only by reason of that referencing and, thus, through subsequent verification, when a request for de-referencing is made by the person concerned.
The Advocate General points out that Directive 95/46 lays down a prohibition on the processing of sensitive data. Consequently, he states that the prohibition on the operator of a search engine processing sensitive data requires that operator to accede, as a matter of course, to requests for dereferencing relating to links to web pages on which such data appear, subject to the exceptions provided for by Directive 95/46. The Advocate General takes the view that the exceptions to the prohibition on the treatment of sensitive data, laid down by Directive 95/46, apply even though some of the exceptions appear to be more theoretical than practical as regards their application to a search engine.
The question of the derogations authorised under freedom of expression and their reconciliation with the right to respect for private life is then addressed by the Advocate General. He proposes that the Court should reply that, where there is a request for de-referencing relating to sensitive data, the operator of a search engine must weigh up, on the one hand, the right to respect for private life and the right to protection of data and, on the other hand, the right of the public to access the information concerned and the right to freedom of expression of the person who provided the information.
Lastly, the Advocate General addresses the question of the request for de-referencing relating to personal data which have become incomplete, inaccurate or obsolete, such as, for example, press articles relating to a period before the conclusion of judicial proceedings. The Advocate General proposes that the Court should hold that, in such circumstances, it is necessary for the operator of a search engine to conduct a balancing exercise on a case-by-case basis between, on the one hand, the right to respect for private life and the right to protection of data under Articles 7 and 8 of the Charter of the Fundamental Rights of the European Union and, on the other hand, the right of the public to access the information concerned, while taking into account the fact that that information relates to journalism or constitutes artistic or literary expression."

ITEMS

News

IP 10174. Japan has extended its copyright protection term
Digitial Music News: "Under pressure from entertainment companies, Japan has just extended its copyright protection term. In Japan, copyright protection has now been extended from 50 years to 70 years after the author's passing."

IP 10175. Nirvana is suing Marc Jacobs for copyright infringement

Highsnobiety: "Nirvana is suing Marc Jacobs for copyright infringement in Redux Grunge Collection. The case concerns Marc Jacobs' November 2018 Redux Grunge Collection, which the band claims uses the smiley face logo created by Kurt Cobain in 1991. Additionally, the band states that the fashion brand also used Nirvana references - lyrics and memes - in the the capsule's campaign."

IP 10176. A number of artistic work from 1923, protected by US copyright, is now copyright free

Hyperallergic.com: "On January 1, a number of films, books, songs, and artistic works once protected by US copyright, and all from the year 1923, will suddenly be in the public domain. So starting today (January 1) anyone can freely read, cite, or republish.

IP 10177. Vans is suing Primark for trademark infringement

Independent.co.uk: "Vans and parent company VF Corp is suing Primark for allegedly copying the design of two of its iconic skateboard trainers. Vans claims Primark has been selling "intentional copies" of the trainers since 2017, and had thought the matter was settled last January after asking them to stop. However, Vans soon discovered that the high street retailer was still selling the products in the US.

IP 10178. China develops intellectual property rights protection

The Telegraph: "China's State Council Information Office held a press conference on 11 December, focusing on reform and opening-up and intellectual property right (IPR) development. Deputies of IPR protection were invited to the conference, sharing their own experience and stories, and introducing China's historic achievements made in IPR development to domestic and foreign journalists. China's patent development started from 1978, said Yin Xintian, former director-general of the legal affairs department at the National Intellectual Property Administration. The country had made remarkable achievements on IPR development during the past four decades of reform and opening-up, he added."

IP 10179. AG: the Court should restrict the scope of the dereferencing that Google has to carry out to the EU

Curia press release: "[…] In today's Opinion, Advocate General Maciej Szpunar begins by indicating that the provisions of EU law applicable to the present case do not expressly govern the issue of the territorial scope of de-referencing. He therefore takes the view that a distinction must be made depending on the location from which the search is performed. Thus, search requests made outside the EU should not be affected by the de-referencing of the search results. He is therefore not in favour of giving the provisions of EU law such a broad interpretation that they would have effects beyond the borders of the 28 Member States. The Advocate General thus underlines that, even though extraterritorial effects are possible in certain, clearly defined, cases affecting the internal market, such as in competition law or trademark law, by the very nature of the internet, which is worldwide and found everywhere in the same way, that possibility is not comparable."

IP 10180. AG: Google must accede to a request for the dereferencing of sensitive data, except for the exceptions under Directive 95/46

Curia press release: "[...] In his Opinion delivered today, Advocate General Maciej Szpunar begins by stating that the provisions of Directive 95/46 should be interpreted in such a way as to take account of the responsibilities, powers and capabilities of a search engine. Thus, he points out that the prohibitions and restrictions laid down by Directive 95/46 cannot apply to the operator of a search engine as if it had itself placed sensitive data on the web pages concerned. Since the activity of a search engine logically takes place only after (sensitive) data have been placed online, those prohibitions and restrictions can therefore apply to a search engine only by reason of that referencing and, thus, through subsequent verification, when a request for de-referencing is made by the person concerned."

IP 10181. Leythem Wall joins HGF in The Hague Office

Press release HGF: "HGF's expansion continues into 2019 with the arrival of Leythem Wall who joined the firm Monday 14th January 2019, in The Hague office.
Leythem has particular expertise and substantial experience in Oppositions and Appeals, regularly representing clients in Oral Proceedings before the European Patent Office (EPO) as lead counsel in a wide variety of technical areas. He has won numerous defensive and offensive oppositions, including multi-party proceedings, and successful coordination with disputes in multiple jurisdictions such as UK, Germany, US, China, Japan, Korea, and India.
Leythem also has a deep understanding of US post grant challenges (IPRs and PGRs), and how these can be most successfully combined with EPO oppositions. Leythem's specialties also include European, PCT and UK patent drafting, prosecution, third-party observations, opinions on infringement and validity, freedom-to-operate analyses and due diligence. Prior to HGF, he was a Partner in the London office of a major US IP law firm, and before then in house IP counsel for some of the world's largest multinationals. He therefore has a wealth of experience in devising global patenting strategies, including drafting and prosecuting patent applications for succeeding in both Europe and the US.

Leythem is a European and UK patent attorney specialising in the chemical, consumer products, energy, material and medical sectors. A Chartered Scientist (CSci), Chartered Chemist (CChem), and a European Chemist (EurChem), Leythem has a Masters degree (first class) in Chemistry from Oxford University. He also has postgraduate certificates in IP Law (Queen Mary, University of London), IP Litigation and Advocacy (Nottingham Law School), and a diploma in Patent Litigation in Europe (University of Strasbourg)."

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