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JOB OFFERS AND ADVERTISEMENTS



MONTHLY CASE LAW OVERVIEW

Copyright

IP10252. US Supreme Court: States cannot be sued for copyright infringement

PetaPixel: “Earlier today, the Supreme Court of the United States dealt a major blow to photographers’ copyright protections when it declared that states cannot be sued for copyright infringement because they have “sovereign immunity.”

The opinion came down as part of a writ of certiorari regarding the case of Allen v Cooper. A writ of certiorari is basically a review of a lower court’s decision, and in this case, the Supreme Court has upheld the decision by the Court of Appeals for the Fourth Circuit, which decided that states are immune from copyright infringement lawsuits. [...]

In essence, the Supreme Court agreed with the Fourth Circuit, ultimately striking down the Copyright Remedy Clarification Act (CRCA) of 1990. This 30-year-old amendment to the Copyright Act of 1976 tried to strip states of their sovereign immunity where copyright was concerned, and it was at the core of Allen’s lawsuit.”

Privacy

Trade Mark Law

CJEU sets aside finding that the sign “Fuck Ju Göhte” is contrary to accepted principles of morality

IPPT20200227, CJEU, Fack Ju Gothe

Trade Mark Law - Court was not allowed to judge that the mark ‘Fack Ju Gothe’ is contrary to the principles of morality on the basis of Article 7(1)(f) EU Trade Mark Regulation solely on the intrinsically vulgar character of that English phrase: a contrast with the principles of morality requires that the trade mark is contrary with the fundamental moral values and standards of society prevailing in that society at the time of the assessment, the examination must be based on the perception of a reasonable person with average thresholds of sensitivity and tolerance, taking into account the context in which the mark may be encountered and the particular circumstances, such as legislation and administrative practices, public opinion and the way in which the relevant public has reacted in the past to that sign or similar signs, the fact that it is that mark itself which is to be examined does not mean that, in the course of that examination, contextual elements capable of shedding light on how the relevant public perceives that mark – like the fact that the word sign ‘Fack Ju Göhte’ corresponds to a successful comedy produced by the appellant, the fact title does not appear to have caused controversy, the fact that access to it by young people had been authorised and that the Goethe Institute uses it for educational purposes – could be disregarded, freedom of expression is also relevant in trade mark law. EUIPO has failed to demonstrate to the requisite legal standard that the mark is contrary to the principles of morality: the contextual factors consistently indicate that the title of the comedies was not perceived as morally unacceptable by the German-speaking public at large, no concrete evidence has been put forward plausibly to explain why the public perceive the word sign as going against the fundamental moral values and standards of society when it is used as a trade mark.

The General Court was not entitled to reject an opposition brought under Article 8(5) of the Union Trade Mark Regulation on the ground that there was no evidence of a reduction in the ‘attractiveness’ of the earlier marks

IPPT20200304, CJEU, Burlington v Burlington Arcade

Trade Mark Law - The General Court erred in law by rejecting an opposition brought under Article 8(5) of the Union Trade Mark Regulation on the ground that there was no evidence of a reduction in the ‘attractiveness’ of the earlier marks: the article ensures protection for (i) detriment to the distinctive character of the earlier trade mark, (ii) detriment to the repute of that mark and (iii) unfair advantage taken of the distinctive character or the repute of that mark, with the ambiguous reference by the General Court to a possible reduction in the ‘attractiveness’ of the earlier trade marks cannot confirm beyond all doubt that it did in fact verified the existence of one of those three infringements. The General Court erred in law by determining that any precise statement

of the goods which may be sold in the various shops comprising a shopping arcade precluded any association between those shops and the goods of the mark applied for: in Praktiker (IPPT20050707), it was held that the applicant should be required to specify the goods or types of goods to which those services relate, the present case does not concern the protection of trade marks registered at the date of that judgement's delivery like the trade marks in casu, it cannot be inferred from the judgement in Praktiker that ground of opposition ex article 8(1)(b) of the Union Trade Mark Regulation may be rejected from the outset, simply by invoking the absence of any precise statement of the goods to which the retail services covered by the earlier trade mark may relate.

Competition Law

CJEU clarifies criteria governing whether settlement agreements between holder of a pharmaceutical patent and generic manufacturers are contrary to EU competition law

IPPT20200130, CJEU, Generics v Competition and Markets Authority

Competition Law. Article 101 TFEU. To assess whether a manufacturer of generic medicines that is not present in the market is a potential competitor of a manufacturer of originator medicines when the agreement at issue has the effect of temporarily keeping an undertaking outside a market first it must be determined whether the manufacturer of generic medicines had taken sufficient preparatory steps to enable it to enter the market concerned within such a period of time as would impose competitive pressure on the manufacturer of originator medicines, secondly it must be determined that the market entry of such a manufacturer of generic medicines does not meet barriers to entry that are insurmountable, existence of a patent as such cannot be regarded as an insurmountable barrier, because validity can be challenged. The finding that a manufacturer of generic medicines has a firm intention and an inherent ability to enter the market without there being insurmountable barriers can be confirmed by additional factors: an agreement between undertakings operating at same level in production chain, some of which had no presence in the market concerned, constitutes a strong indication that a competitive relationship existed between them, intention by manufacturer of originator medicines and acted upon to make transfers of value to manufacturer of generic medicines in exchange of postponement of latter's market entry, even though the former claims the latter is infringing one or more of its process patents, the greater the transfer of value, the stronger the indication. A settlement agreement, with regard to pending court proceedings between a manufacturer of originator medicines and a manufacturer of generic medicines, who are potential competitors, concerning whether the process patent held by that manufacturer of originator medicines is valid and

whether a generic version of that medicine infringes that patent has as its object the prevention, restriction or distortion of competition: when it is clear from the analysis of the settlement agreement concerned that the transfers of value cannot have any explanation other than the commercial interest of both parties not to engage in competition on the merits, such transfers of value may involve indirect transfers resulting from profits to be obtained from a distribution contract concluded with the manufacturer of originator medicines enabling the generic manufacturer to sell a possibly defined quota of generic medicines manufactured by the manufacturer of originator medicines. A "restriction by object" cannot be rebutted by the fact that the agreement does not exceed the period of validity of the patent the fact that there is uncertainty about the validity of the patent. There is no "restriction by object" when the settlement agreement concerned is accompanied by proven pro-competitive effects capable of giving rise to a reasonable doubt that it causes a sufficient degree of harm to competition. If a settlement agreement is to be demonstrated to have appreciable potential or real effects on competition and therefore has to be characterized as a "restriction by effect", that does not presuppose a finding that, in the absence of that agreement, either the manufacturer of generic medicines who is a party to that agreement would probably have been successful in the proceedings relating to the process patent at issue, or the parties to that agreement would probably have concluded a less restrictive settlement agreement. Article 102 TFEU. To define the product market in a situation where a manufacturer of originator medicines covered by a process patent, the validity of which is disputed, impedes, on the basis of that process patent, the market entry of generic versions of that medicine not only the originator version of that medicine need to be taken into account, but also its generic versions, even if the latter would not be able to enter legally the market before the expiry of that process patent, if the manufacturers concerned of generic medicines are in a position to present themselves within a short period on the market concerned with sufficient strength to constitute a serious counterbalance to the manufacturer of originator medicines already on that market, which it is for the referring court to determine. Dominant undertaking that is the holder of a process patent for the production of an active ingredient that is in the public domain, which leads it to conclude, either as a precautionary measure, or following the bringing of court proceedings challenging the validity of that patent, a set of settlement agreements which have, at the least, the effect of keeping temporarily outside the market potential competitors who manufacture generic medicines using that active ingredient, constitutes an abuse of a dominant position within the meaning of Article 102 TFEU, provided that that strategy has the capacity to restrict competition and, in particular, to have exclusionary effects, going beyond the specific anticompetitive effects of each of the

settlement agreements that are part of that strategy, which it is for the referring court to determine.

ITEMS

News

IP10247. 'Stairway to heaven' copyright dispute won by Led Zeppelin. NBCNews - "Led Zeppelin prevailed in a long-running copyright dispute after the 9th U.S. Circuit Court of Appeals upheld a jury verdict saying the rock band's 1971 megahit "Stairway to Heaven" did not illegally borrow from Spirit's 1968 track "Taurus." "The trial and appeal process has been a long climb up the 'Stairway to Heaven,'" read the judges' opinion, which was filed Monday and affirmed "that Led Zeppelin's 'Stairway to Heaven' did not infringe Spirit's 'Taurus.'" The copyright battle dates to 2014, when the estate of Spirit guitarist Randy Wolfe sued Led Zeppelin, alleging copyright infringement. [...] A jury ruled against the estate two years later, after which attorneys for the estate sought a new trial. In 2018, a three-judge panel of the 9th Circuit Court ruled in favor of the estate. In response, Led Zeppelin's attorneys sought a rehearing before the full 9th Circuit, which heard the case in September."

IP10248. Nick Manley joins HGF as a Partner

Press release: "HGF are pleased to announce further expansion with the arrival of Nick Manley who joins the HGF Manchester office as a Partner on March 17th, 2020.

Nick advises clients of all types, including start-up companies, universities, SMEs and large multinational organisations. Nick has particular experience in the engineering and automotive sectors, and of oil and gas exploration devices, medical devices, radiation treatment devices and optics and is also involved in the protection of CIIs, including vehicle navigation devices, wireless communications and image manipulation.

Nick has extensive experience at the European Patent Office, including its Examining and Opposition Divisions and the Boards of Appeal. Nick also has litigation experience in the United Kingdom, Germany and The Netherlands.

In addition to being a Chartered Patent Attorney and European Patent Attorney, Nick is a registered trade mark attorney and holds a Higher Courts Litigation Certificate.

HGF's strategic plans to increase the Partnership follows a year of growth including the merger of HGF & Patronus IP which extended its reach across Germany and Austria in Munich, Heidelberg, Salzburg and the opening of a second office in Ireland in Dublin, taking the total to 22 offices throughout the UK and Europe. The firm continues to see tremendous growth and success and has recently been named by The Financial Times as one of Europe's leading Patent Law firms 2019."

IP10249. IPKat: "German constitutional court upholds complaint against UPC Agreement and implementing act"

Léon Dijkman, IPKat: "This morning, the German constitutional court issued a 86-page decision in which it upholds the constitutional complaint against the German ratification of the Agreement on a Unified Patent Court [decision here]. According to the Court, the German act by which it was to accede to the UPC Agreement, violates the German populace's democratic rights under Article 38 Basic Law, because it was not passed with the parliamentary majority required by Article 23 Basic Law. [...]"

IP10250. Bundesverfassungsgericht: Act of Approval to the Agreement on a Unified Patent Court is void

Press release Bundesverfassungsgericht: "The Act of Approval to the Agreement on a Unified Patent Court ("the Act of Approval") to confer sovereign powers on the Unified Patent Court is void. In its outcome, it amends the Constitution in substantive terms, though it has not been approved by the Bundestag with the required two-thirds majority. This is what the Second Senate of the Federal Constitutional Court decided on a constitutional complaint in an order published today. In its reasoning, the Senate stated that, in order to safeguard their right to influence the process of European integration by democratic means, this, in principle, also entails the right of citizens that sovereign powers be conferred only in the ways provided for by the Basic Law. An act of approval to an international treaty that has been adopted in violation thereof cannot provide democratic legitimization for the exercise of public authority by the EU or any other international institution supplementary to or otherwise closely tied to the EU.

Facts of the case:

The purpose of the Act of Approval is to establish the preconditions for the ratification of the Agreement on a Unified Patent Court of 19 February 2013 ("the Agreement"). As an international treaty, the Agreement is part of a regulatory package on patents at the core of which lies the introduction of a European patent with unitary effect at EU level by way of enhanced cooperation. The "European patent with unitary effect" provides unitary protection in all participating Member States. The Agreement provides for the establishment of a Unified Patent Court as a court common to most Member States for disputes concerning European patents and European patents with unitary effect. In relation to European patents and European patents with unitary effect, exclusive competence for an extensive catalogue of disputes is to be conferred on the European Patent Court. This catalogue comprises primarily actions for patent infringements, disputes on the validity of patents and certain actions against decisions of the European Patent Office. The draft of the challenged Act of Approval was adopted unanimously by the Bundestag in the third reading but only by about 35 members of the Bundestag present. Neither was the presence of the

required quorum determined, nor did the President of the Bundestag declare that the Act of Approval had been adopted by a qualified majority.”

IP10251. Israel has allowed use of generic version of patent-protected drug in Israel to treat COVID-19

New York Times: “Israel approved the licensing of a generic version of an HIV drug to treat patients infected with the coronavirus on Thursday, despite doubts about its effectiveness in trials.

The anti-viral drug Kaletra, produced by AbbVie Inc, could be a possible treatment for COVID-19, Israel's Health Ministry said after issuing a preliminary permit. While AbbVie's patent for Kaletra in Israel ends in 2024, the patent in some other countries, such as India, has expired.

It was the first time the country's attorney general has allowed the use of a generic version of a patent-protected drug in Israel, where there are 529 confirmed coronavirus cases. [...]”



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