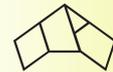


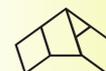
IP Report

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1. German Federal Supreme Court: Confirmation of the Court's strict stance on Supplementary Protective Certificates (SPCs), Decision of October 14, 2008 (Case X ZB 4/08 - doxorubicin-sulfate)

The German Federal Supreme Court has maintained and strengthened its restrictive interpretation of the scope of pharmaceutical products being eligible for patent life-time extension under Regulation 1768/92/EEC.

The present case concerned an appeal to the decision of the German Federal Patent Court to refuse an SPC application for a liposomal formulation of doxorubicin-sulfate. The Court reasoned that the applicant's market authorization for said formulation had not been the first authorization, pursuant to Article 3 d) of Regulation 1768/92/EEC. Article 3 d) stipulates that the applicant's authorization has to be the first market authorization as a "medicinal product".

A "medicinal product" is defined in the Regulation as any substance or combination of substances presented for treating or preventing disease in human or animal beings. In a series of decisions, the European Court of Justice (ECJ) ruled that a "medicinal product" is the active pharmaceutical ingredient itself, or a combination of active ingredients, regardless of any indication, use in human or animal therapy, formulation, or the presence of a different salt or prodrug form. For doxorubicin, there had been an earlier market authorization for the active ingredient in its hydrochloride salt form.

In the appeal proceedings, the applicant argued that doxorubicin-sulfate had improved potency, better pharmacological properties and reduced toxicity in comparison to doxorubicin-hydrochloride and, thus, constitutes a new product. However, despite these advantages, the Federal Supreme Court dismissed the appeal and ruled that doxorubicin-sulfate cannot be considered as a new medicinal product since the active ingredient ("doxorubicine") is the same.

This decision is the latest of a series of decisions demonstrating that the German Federal Supreme Court is in agreement with the European Court of Justice in

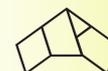
its very restrictive interpretation of Regulation 1768/92/EEC. A request for referral to the ECJ was denied since the Federal Supreme Court saw no need for clarification of the points of law in question. Consequently, it has to be expected that in future cases applicants will not be able to rely on any type of secondary arguments such as improved activity, reduced toxicity, new dosage forms, new applications and the like to overcome the objection that an earlier market authorization had already been issued for the same active ingredient.

Reported by Markus Coehn

2. German Federal Supreme Court: Landmark decision as first step in harmonizing the German position on disclosure and novelty with the EPO (Decision of December 16, 2008 – Case X ZR 89/07 – Olanzapin).

The decision of the German Federal Patent Court to revoke the patent covering Eli Lilly's patent on Olanzapin (see IP Report 2007/III) on the basis of lack of novelty was reversed in a spectacular and ground-breaking decision of the Federal Supreme Court.

For many years, German patent courts have developed a very broad concept of disclosure which contradicts the more "photographic" approach of the European Patent Office. In particular, in the chemical field, the decision "Fluoran" barred applicants from validly claiming so-called selection inventions from a general chemical formula. According to this decision, each and every compound falling under a general formula is disclosed to the public, provided that the skilled person is actually capable of preparing the compound concerned. At least in this respect, the German case law is the diametrical opposite of the position of the EPO and most other European countries.



These disparities and the relative isolation of the German position within Europe were highlighted at a conference of European patent judges in Venice last summer. Thus, it was not entirely surprising that the Federal Supreme Court took the opportunity of the present case to amend its position.

Two aspects of the decision are particularly noteworthy:

1. Interpretation of a prior art document

In a first aspect, the Federal Supreme Court addressed the rather “broad” concept of disclosure which contradicts the more “photographic” approach of the EPO. A good example of what is to be understood by this “broader” concept of disclosure can be found in the reported decision in which the Federal Supreme Court had to decide on a decision of the first instance having revoked the patent-in-suit due to a lack of novelty. In this first instance decision, it was reasoned that a prior art document discloses the not explicitly mentioned compound Olanzapin, since the skilled person could readily derive it by extrapolating the explicit disclosure in light of the experimental results reported in said prior art document. The basis for such a type of reasoning is the Federal Supreme Court’s decision „Elektrische Steckverbindung“ /“Electric plug-in connection” stipulating that the disclosure of a prior art document, when interpreted as a whole and in its technical context, is not limited to the literal wording but also encompasses information that is readily apparent to the skilled person upon careful study of the document. This concept of reading a disclosure “as a whole” and “in its technical context” has sometimes – as in the present case – been used as leverage to broaden the disclosure in order to also include, at least partially, equivalents and/or the result of further considerations of the skilled person on the basis of his/her knowledge of the general technical background.

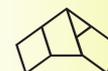
In an effort to harmonize with the case law of the EPO, the Federal Supreme Court has now put an end to such practices. The Senate has clarified that, in the context of the above-cited decision “Electric plug-in connection”, the skilled person, on the basis of his/her background

knowledge, will only “read into” a document the additional information which is essentially required to carry out the claimed teaching. The Court further stressed that this does not extend to equivalents or any technical information going beyond of what is strictly necessary to carry out the invention.

2. Disclosure of general chemical formula

The Federal Supreme Court has also taken the opportunity to substantially alter its jurisprudence with respect to the disclosure of general chemical formulae. According to the Federal Supreme Court’s decision “Fluoran”, each and every compound falling under a general chemical formula is disclosed to the public, provided that the skilled person is actually capable of preparing the compound concerned. In the reported decision, the Federal Supreme Court stated that it will no longer adhere to this decision and that a general formula in principle does not disclose the individual compounds falling in its scope. According to the decision, a general chemical formula may disclose an individual compound falling under its scope only if the skilled person “reads” that compound “into” the general formula according to the (now very restrictive) principles of the above-discussed decision /“Electric plug-in connection”. As an example, the Court mentions a general formula “into” which the skilled person “reads” an individual compound as the common embodiment of said formula which is readily apparent to the skilled person as at least also “meant” when reading the general formula. As further guidance on how to interpret the disclosure of chemical formulae, the Federal Supreme Court states that it sees its (new) jurisprudence “essentially in accord” with the case law of the EPO in this respect.

Both of the above-discussed aspects demonstrate the intention of the Federal Supreme Court to harmonize its position with the EPO with respect to novelty . However, it remains to be seen to what extent the Federal Supreme Court is willing to follow the EPO’s lead. It is noteworthy that substantial discrepancies remain, for example with respect to the interpretation of the disclosure of numerical ranges where, according to German practice, each and every value within a numerical



range is considered to be disclosed. However, at least for chemical formulae, it is to be expected that the EPO's practice will be applied in Germany. As one consequence, selection inventions on basis of general chemical formulae should now be patentable in Germany. Patent practitioners should also note that these new principles of disclosure will most likely be also applied in other aspects of German patent law such as support of amendments in the original disclosure or when claiming priority.

A commentary on this decision will be published in GRUR by attorneys of this law firm. An English translation of both the decision and the commentary can be provided upon request.

Reported by
Dr. Wolfgang Bublak and Markus Coehn



3. German Federal Patent Court on the admissibility of a nullity action while a further nullity procedure is still pending on appeal with the German Federal Supreme Court (Decision of February 13, 2008 – Case 4 Ni 58/06 (EU) – “Crash sensor”)

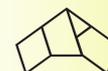
A nullity plaintiff whose nullity action was rejected in the first instance and who discovers novelty destroying prior art (only) in the appeal instance, will find himself in the uncomfortable situation that the attacked patent is not patentable in view of this prior art, but that a respective decision of the German Federal Supreme Court will still take several years, due to the usual duration of the appeal proceedings according to the current practice. Furthermore, this means that the attacked patent stays in force and is also fully enforceable during this period. This applies all the more, since a stay of a (parallel) infringement procedure or a stay of

the enforceability of a first instance infringement injunction is very exceptional, according to the permanent practice of the German infringement courts. In the described scenario, the (generally low) likelihood of such stay is even more reduced, since a first instance validity decision exists with which the attacked patent was fully upheld. Therefore, the question arises whether the nullity plaintiff can arrange for the filing of a second nullity action which is based on the discovered novelty destroying prior art and which will thus typically be decided in first instance within one to one and a half years.

Generally, a second nullity action is admissible even if first nullity proceedings are pending on appeal. However, exceptionally, such second nullity action is deemed to be inadmissible if the second nullity plaintiff acts as a “straw man” of the first nullity plaintiff and is not able to show an own interest in the requested invalidation of the patent in dispute.

In the present case, relating to a patent on a method for triggering a crash sensor within an automotive security system, such own interest of the second nullity plaintiff was at the centre of the discussion: in fact, the second nullity plaintiff was a formerly affiliated company of the first nullity plaintiff. Further, the same natural persons were acting for both nullity plaintiffs in both proceedings. Finally, the pleadings of both nullity plaintiffs were essentially identical. Therefore, the patentee argued that the second nullity action was filed by a “straw man” of the first nullity plaintiff, and that the second nullity action would thus be inadmissible. Legally, the patentee raised the objection of *lis alibi pendens*, i.e. the objection that this suit is pending elsewhere.

The Federal Patent Court did not follow this argumentation of the patentee and revoked the patent in dispute in the second nullity proceedings on the basis of the newly discovered prior art reference for the following reasons: the second nullity action was admissible, since – in general – everybody has the right to bring a nullity action against an existing patent. Inadmissibility could only be imaginable if the second nullity plaintiff would in fact be a “straw man” of the first nullity plaintiff, i.e. act on behalf of the first nullity



plaintiff without an own interest in the requested invalidation of the attacked patent. More specifically, the Federal Patent Court pointed out that an own (justified) interest would exist, at least, in a case in which the patentee has expressly made the allegation that the second nullity plaintiff itself is liable for infringement of the attacked patent. Such situation was assumed by the Federal Patent Court, since the patentee had expressly stated in one of his briefs in the second nullity procedure that the second nullity plaintiff would be liable for patent infringement and that a patent infringement action will soon be filed against him.

In view of this reasoning, the present decision is fully in line with earlier similar decisions, in particular of the Federal Supreme Court, also assuming the required own interest if the patentee had asserted infringement claims against the second nullity plaintiff. As a result, the old rule may be addressed and highlighted as a general recommendation along the proverb "a shut mouth catches no flies". However, without knowing the details of the decided case, it cannot be judged whether it was meaningful or even necessary for the patentee to make the infringement allegation in writing in the second nullity proceedings. In any event, it should be expected that – similarly – a formal warning letter for patent infringement outside the nullity procedure can equally be sufficient to create the required own interest of the second nullity plaintiff, wherein it is at least doubtful whether a simple patent notice letter without expressly asserting infringement would be found to have the same consequence. Finally, it should be noted that the significance of the present decision may diminish in the future, since the German Federal Supreme Court established a second senate on January 1, 2009 which is specialized in and competent for nullity appeal proceedings. Thus, there is at least some hope that the existing backlog of cases will quickly be reduced and, likewise, the average duration of nullity appeal proceedings.

Reported by Dr. Tilman Müller-Stoy

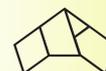


4. European Patent Office: Postponement of oral proceedings – Notice from the EPO dated December 18, 2008, OJ EPO 2009, 68 - Technical Board of Appeal 3.5.01, Case T 1102/03 of May 28, 2008 – Online trading system/CITY-BANK.

In the first two decades of operation of the EPO, coping with the dates for oral proceedings was not a problem for the parties to the proceedings. The examiners' clerk or the registry of the Board of Appeal agreed a suitable date with the parties before the parties were summoned. In 2000 a much more rigid system was introduced (see the notice in OJ EPO 2000, 456). Since then, the dates for oral proceedings have been fixed without contacting the parties before, and appointed oral proceedings have not been postponed at the request of a party unless the party concerned advanced serious reasons justifying the fixing of a new date. A list of reasons is contained in the above notice, giving examples which may be considered by the EPO as justifying a postponement. Experience showed that Examining and Opposition Divisions adhered rather strictly to this list, in other words, if the party was able to substantiate a reason contained in the list, oral proceedings were postponed, if another reason was given, as a rule the date was maintained.

Quite often the users of the European patent system complained about the restricted possibilities of having oral proceedings postponed. The rather narrow approach often applied by Examining and Opposition Divisions may be illustrated by a recent case in which the Opposition Division appointed oral proceedings for two related cases in two consecutive weeks. The representative of the proprietor requested to appoint oral proceedings on two consecutive days in either of the weeks, because the party from the USA wanted to be present and was interested in keeping the necessary business trip as short as possible.

The request was refused on an EPO form without indicating any reason. Only a further enquiry brought to light a reason which was that the Division wanted to treat the cases independently from each other. This was certainly not a good reason for the US party and whether it was a good reason for the EPO may be doubted.



In any case, a party whose reasoned request for postponement is rejected deserves a reasoned reaction.

Eventually the interested circles repeating their wishes were successful and the EPO made a few concessions without changing the system in general, with the exception that in ex parte proceedings the Examining Division may contact the party in advance in order to arrange for a date. In the new notice published in the January issue of the Official Journal, the exemplary list of serious reasons which may justify a postponement was somewhat broadened. It now includes

- oral proceedings for the preceding or following day at the same place,
or for the two preceding or two following days at a different place,
- business trips which have been firmly booked before the summons,
- holidays scheduled, but still not booked, which cannot be rescheduled, e.g. because of school holidays.

The EPO will continue to summon parties for oral proceedings on Fridays and Mondays. However, circumstances permitting, the EPO promises to be flexible where it has been requested that the starting time be postponed in order to enable the party to travel on the same day. The passage in the previous notice that every request for fixing another date should contain a statement why another representative cannot substitute the representative prevented from attending has been deleted.

Nothing has changed in respect of the important question whether postponement is justified if a duly represented party itself or a person foreseen to assist in the oral proceedings is prevented from being present at the date fixed for oral proceedings. There are some decisions concluding that illness of a party or of the inventor is not a sufficient reason for postponement. In such a situation, the requester should be able to establish that the presence of the respective person may have a decisive impact on the outcome of the case.

The revised notice applies only to first instance proceedings. For the Boards of Appeal, the notice in OJ EPO 2007, special edition 3, H.1, continues to apply with

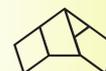
the effect that the parties cannot formally rely on the revised criteria for postponement to be applied by Examining and Opposition Divisions. However, it has to be mentioned that the Boards of Appeal have, for the most part, decided on requests for postponements in a more flexible way, considering all circumstances of the individual case without slavishly sticking to the examples given in the notices.

Case T 1102/03 shows that this approach may, in an individual case, also turn out to entail a negative result for the requestor. In that case, oral proceedings had been fixed for two days in the week before Christmas. In reply, the proprietor's representative requested that the oral proceedings be postponed because he had firmly booked a Christmas vacation of approximately one month in Switzerland before receiving the summons, and no colleague in his office could take over the case.

The Board informed the parties that it considered the organisational burden of postponing the oral proceedings to be greater than the requesting representative's burden of postponing or interrupting a holiday booked to a destination within Europe. Nevertheless, the Board was prepared to postpone the oral proceedings to a date in April if all the parties agreed. Whereas the proprietor's representative agreed to the alternative date, several opponents did not agree and, therefore, the Board maintained the original date for the oral proceedings.

In the oral proceedings, the proprietor was represented by another representative from the same law firm who repeated the request for postponement. Since the request was not allowed, he raised an objection under Rule 106 in conjunction with Articles 112a and 113 (1) EPC, submitting that the proprietor's right to be heard was violated. The representative had relied on the notice in OJ EPO 2000 to advise the proprietor that a postponement would be possible.

According to the proprietor, the Board's approach not to follow the notice but to require the respondents' explicit consent to a postponement was unusual and effectively infringed the proprietor's right to a careful preparation. By the time the Board had confirmed the initial date for



oral proceedings, only a short period was left for preparing a submission within due time.

In its reasons for refusal of the request for postponing the oral proceedings, the Board points to Article 15(2) of the Rules of Procedure of the Boards of Appeal according to which a change of date for oral proceedings may exceptionally be allowed at the Board's discretion. Examples of circumstances that can be taken into account when exercising this discretion were given in the notice in OJ EPO 2000 (confirmed by the notice in OJ EPO 2007). The notice mentioned pre-booked holidays as an exemplary reason for requesting a change of the date for oral proceedings. On the other hand, the notice referred to organisational problems and procedural economy as important criteria to be considered in exercising the discretion when a decision on postponement had to be taken. In the Board's view, however, while holidays were a possible valid basis for a request, it was not necessarily a sufficient reason for postponement. All circumstances of the case and all the criteria referred to in the notice had to be taken into account. The case presented circumstances (eleven parties and an extended Board of Appeal involved, one of the largest available rooms necessary for two days) which entailed a special organisational burden. It would have been difficult to make substitute arrangements within a reasonable period.

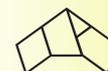
The Board concluded that the effort of postponing the oral proceedings until a date might have been found that would have suited the numerous parties, the members of the extended Board and the facility management of the European Patent Office would have outweighed the effort of postponing or interrupting one representative's holiday booked to a destination within Europe. A strict standard had to be applied, because all parties had to be treated equally and a liberal approach might have given rise to a series of postponements. As long as a request for postponement of oral proceedings had not been granted, the requesting party could not simply assume that its request would be granted. The party had to consider the possibility of a refusal of the request and had to prepare the case accordingly to minimise the risk of time pressure.

The decision shows that a reason listed in the EPO's notice which may justify a postponement is only one of the possible factors to be considered when taking the discretionary decision on the request for postponement. Such a reason cannot be a guarantee that the request will actually be allowed.

Whereas the proprietor raised an objection under Rule 106 in conjunction with Article 112a EPC in the oral proceedings, a corresponding petition for review on the ground of a substantial procedural violation of the party's right to be heard pursuant to Art 112a (2) c) EPC has not been filed.

Reported by Dr. Rudolf Teschemacher





5. Düsseldorf Appeal Court rules on the requirements for a stay of patent infringement proceedings in case of a parallel opposition or nullity action based on public prior use (Decision of September 11, 2008 – Case 2 U 10/07 – Stay of patent infringement proceedings).

A request to stay infringement proceedings on the basis of an alleged public prior use has no chances of success if it is not completely supported by readily available evidence (in particular documents) but depends fully or partly on witness testimony.

In the decided case, the defendants were sentenced in first instance for an infringement of a European patent concerning a roof light. The factual basis as well as the question of infringement was undisputed between the parties. The defendants solely argued that the European patent in suit will be declared null and void in the parallel pending nullity action, because the claimed teaching was anticipated by a public prior use. Since there is no counterclaim for invalidity in German patent litigation, the defendants requested a stay of the infringement proceedings which is common practice in such cases. Since the District Court rejected the request, the defendants appealed this decision, still trying to achieve a stay of the proceedings. The Court of Appeals dismissed the appeal.

Generally, in order to successfully file a request to stay infringement proceedings, under German law, the defendant has to meet comparably high requirements. In the German two-track system the questions of infringement and validity are decided by different independent courts. Therefore, in infringement proceedings, a defendant pleading that the granted patent in suit be nullified will only be heard if the defendant (or a third party) has actually filed a parallel opposition or nullity action. Further, the infringement court will only stay the infringement proceedings if a predominant likelihood of invalidity can be assumed. Such likelihood has been established, for example, in a case in which a first instance revocation of the patent had already occurred. If a first instance decision revoking the patent is not yet available, a request for a stay of the infringement proceedings is

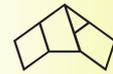
rarely successful, since most infringement courts then essentially require that a clear-cut case of novelty destroying written prior art is presented which had not been considered during examination. Accordingly, arguing lack of inventive step is generally not successful.

With the present decision, the Düsseldorf Appeal Court confirmed this strict approach of the German infringement courts with respect to an alleged case of public prior use: if the evidence for the public prior use is based fully or partly on witness testimony, the required high degree of likelihood cannot be assumed. The infringement court is not able to foresee whether and what the witness will credibly testify, since the witness will only be heard and examined in the parallel nullity procedure. However, the Court indicated that it might consider the case differently if the alleged public prior use is based on “liquid” evidence, in particular readily available documents, such as written novelty destroying prior art.

In summary, the present case is fully in line with the established practice of the German infringement courts concerning requests for a stay of infringement proceedings. It emphasizes again the presumption of validity of an examined and granted patent, and that a stay of the infringement proceedings will remain an extraordinary measure, in particular if it is based on an alleged public prior use requiring evidence by witness testimony.

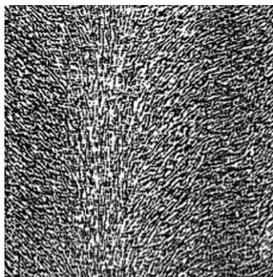
Reported by Jörg Wahl





6. European Court of Justice – Inherent and acquired distinctiveness – Glass surface (Order of the Court [Sixth Chamber] of October 18, 2008 – Case C-513/07 P – AGC Flat Glass Europe SA v. OHIM)

The issue of whether the representation of a glass surface to be applied inter alia to shower dividers (see illustration below) is registrable as a Community trade mark, as being inherently distinctive or with acquired distinctiveness, has reached the ECJ a second time, and again the application failed.



In the first round, involving CTM 811 281, the applicant Glaverbel (now AGC Flat Glass Europe) insisted on inherent distinctiveness, even after the CFI had annulled a Board decision for infringement of the right of defense because the Board had invoked reasons for refusing a claim of acquired distinctiveness to which the applicant was not given an opportunity to reply (Judgment of October 9, 2002, Case T-36/01, *Glaverbel v. OHIM*). The ECJ rejected Glaverbel's appeal as manifestly unfounded (Order of June 24, 2004, Case C-445/02 P, *Glaverbel SA v. OHIM*).

The new CTM application, 3 183 068, filed on 27 May 2003, i.e. even before the ECJ Order, being practically indistinguishable from the first one, was similarly refused by the Examiner and by the Board (Decision of March 1, 2006, Case R 986/2004-4). The CFI confirmed (Judgment of September 12, 2007, Case T-141/06, *Glaverbel v OHIM*). The CFI decision, rather straightforward in most respects, had solicited some comment because some observers understood it to hold that in order to obtain protection on the basis of acquired distinctiveness (Article 7 (3) CTMR), the applicant had to demonstrate acquired distinctiveness in every single Member State. In any event, the appeal to the ECJ was based, inter alia, on an erro-

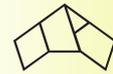
neous interpretation of Article 7 (3) CTMR. Thus, the outcome was expected to throw some light on this issue.

In its Order of October 17, 2008, in Case C-513/07 P, the Court dismissed the appeal without reaching the issue, finding that the appellant had not presented any evidence with regard to ultimate consumers as part of the relevant public, and stated (at para. 40) "that there is no need to examine the second limb of the single plea in law, alleging an incorrect assessment of the territory to be considered".

Thus, the issue of where acquired distinctiveness must be shown in cases of inherently non-distinctive marks is still open. It seems generally accepted that marks which are descriptive in a particular language must have acquired distinctiveness in the territory where that language is spoken (or at least understood). The logic of this approach would require a non-distinctive mark to show acquired distinctiveness in (all of) the territories where distinctiveness is absent, which may in fact be everywhere in the Community. However, since the public interest underlying Article 7 (1) (c) CTMR – the "descriptiveness" rejection – is different from the interest underlying Article 7 (1) (b) CTMR – the "lack of distinctiveness" rejection, the first being in the interest of competitors, the second inextricably linked to the function of indicating commercial origin, the results need not necessarily be the same in both cases.

It seems reasonable that a mark should be accepted for registration where an applicant can show acquired distinctiveness in a substantial part of the Community – like in three of the five major markets of the Community (Central Europe, Northern Europe, Eastern Europe, Western Europe, Southern Europe). Hopefully, OHIM and the courts will follow this approach soon. If not, the promise of Community-wide protection for inherently non-distinctive marks would be far from reality.

Reported by
Dr. Alexander von Mühlendahl



7. European Court of Justice: Proof of reputation and detriment to reputation – “serious likelihood” of detriment means a non-hypothetical risk (Order of December 12, 2008 [Eighth Chamber] – Case 197/07 P – Aktieselskabet of. November 21, 2001 v. OHIM – TDK KK)

The first dilution case to reach the ECJ from OHIM was decided surprisingly by Order of the court, i.e. without a hearing and without an opinion by the Advocate General, a curious similarity with the first opposition case to reach the ECJ which was also decided by Order (in 2004).

TDK had based an opposition on a large number of “TDK” word marks and its well-known logo,



registered in cl. 9, against an application of “TDK” filed for goods in cl. 25.

The opposition succeeded on the basis of Article 8 (5) CTMR, the anti-dilution provision in European trade mark law. OHIM’s opposition division and its Board of Appeal found that TDK had established both reputation and detriment. An appeal against that decision remained unsuccessful (Judgment of the CFI of 6 February 2007, Case T-477/04) and now the ECJ rejected the further appeal (which is available only on points of law).

The ECJ order may have found its position alongside similar orders, as a further example of the difficulty of successfully attacking CFI decisions, and not merited any particular attention. The decision, however, remains noteworthy as the first anti-dilution appeal having reached the Court.

In addition, the decision is remarkable because it seems to clarify a difficulty arising from the ECJ’s Intel judgment, rendered merely two weeks earlier, by a different Chamber (the First Chamber) – (Judgment of 27 November 2008 in Case C-252/07, Intel Corp. v. CPM United Kingdom Ltd – see IP Report 2008-V). In the Intel judgment, the ECJ had concluded that in order to show detriment to the distinctiveness of the earlier mark with a

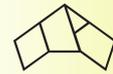
reputation, the claimant must prove a “change in the economic behaviour” of the customers of the proprietor of the earlier mark, or a “serious likelihood” of such change. The notion of “change of economic behaviour” as a condition for finding detriment to distinctiveness is a novel concept, and we have little if any indication of what a plaintiff has to show. As regards the “serious likelihood” however, the TDK Order throws some light on this. The Court has the following to say:

“22 With regard to the appellant’s argument concerning the standard of proof required of the existence of unfair advantage taken of the repute of the earlier mark, it must be noted that it is not necessary to demonstrate actual and present injury to an earlier mark; it is sufficient that evidence be produced enabling it to be concluded prima facie that there is a risk, which is not hypothetical, of unfair advantage or detriment in the future (see, by analogy, concerning the provisions of Article 4(4)(a) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1), Case C 252/07 Intel Corporation [2008] ECR I-0000, paragraph 38).”

A claimant will therefore have to show a “risk” of future detriment which is not merely hypothetical. That is certainly somewhat more palatable than an unidentified “serious likelihood”.

Anti-dilution litigation in Europe will continue to be difficult and complex, with the relevant criteria being developed on a case-by-case basis, but the heavy burden signalled by the “serious likelihood” criterion on Intel seems now to have become substantially lighter.

Reported by
Dr Alexander von Mühlendahl



8. European Court of Justice: Likelihood of confusion – “Obelix” v. “Mobilix” – Judgment (First Chamber) of December 18, 2008 – (Case C-16/06P – Les Éditions Albert René Sàrl v. OHIM)

Les Éditions Albert Réne (represented by our law firm) are proprietors of the intellectual property rights relating to the famous “Asterix and Obelix” series of cartoon books and films. Similarly they are proprietors of numerous national and Community trade marks consisting of “Asterix”, “Obelix” and names of other figures in the series, whose fame in Europe exceeds that of many well-known Disney characters.

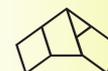
Les Éditions Albert Réne have been incapable of preventing the registration of similar marks on two occasions. The first one involved an opposition based on “Asterix” against a figurative mark “O-Starix”, judged by the Court of First Instance to be dissimilar (Judgment of the CFI of October 22, 2003, Case T-311/01). The second one was an opposition based on “Obelix”, registered as a CTM for goods and services in many classes, against “Mobilix” for partially identical and partially similar goods and services. OHIM’s Opposition Division had rejected the opposition, but was reversed on appeal, the Board of Appeal considering that the marks were similar and that, at least for some of the goods and services, there was likelihood of confusion. Les Éditions Albert Réne appealed, seeking refusal of the opposed mark also for the remaining goods and services, because the Board had not properly evaluated all the aspects of the case, notably the high degree of distinctiveness and fame of the “Obelix” mark. Surprisingly, the CFI confirmed the Board’s decision (the other party not having made an appearance), and in so doing went beyond the (uncontested) Board’s finding that the conflicting marks were similar, concluding instead that the marks were absolutely dissimilar.

The ECJ, in its judgment of December 18, 2008, taken some two years after the appeal had been filed and more than one year after the Opinion of the Advocate General, confirmed, rejecting all the legal grounds raised in the appeal in a lengthy decision.

The argument that the CFI was not entitled to conclude that the marks were dissimilar, because the Board had held the marks to be similar, and that this had not been contested before the CFI, was rejected by the ECJ, as was the argument that the CFI had committed legal as well as factual errors in the comparison of the goods and services. The ECJ also refused to entertain any argument directed against the so-called “neutralisation” or “counteraction” theory (according to which any existing visual or phonetic similarity may be “neutralized” by a conceptual difference) by considering the corresponding findings of the CFI to be factual in nature.

The ECJ judgment is a further demonstration of the extreme difficulties faced by parties having lost before the CFI. The refusal to review findings by applying the theory that they are “factual” contrasts sharply with the approaches in national jurisdictions, where at least the principles or rules used to determine trade mark conflicts are considered to be “legal” in nature and thus subject to review, as are the ultimate conclusions, such as a finding of (or absence of) likelihood confusion.

Reported by
Dr. Alexander von Mühlendahl



9. European Court of Justice: Use of a mark for goods given away for free together with unrelated goods is not “genuine use” (Judgment [First Chamber] of 15 January 2009 in Case C-495/07 – Silberquelle GmbH v. Maselli-Strickmode GmbH)

Silberquelle requested cancellation on grounds of non-use of Maselli’s Austrian WELLNESS mark, registered for non-alcoholic beverages. Maselli did actually apply the mark to such goods and distributed them, but as free gifts (“Zugaben”) together with its principal goods, clothing. The question therefore was whether the use of the mark for beverages given away free was “genuine”. The case reached the Austrian Oberster Patent- und Markensenat, which is competent to review Austrian Patent Office decisions, which referred the following question to the ECJ:

Are Articles 10(1) and 12(1) of the [Directive] to be interpreted as meaning that a trade mark is being put to genuine use if it is used for goods (here: alcohol-free drinks) which the proprietor of the trade mark gives, free of charge, to purchasers of his other goods (here: textiles) after conclusion of the purchase contract?

The Court’s answer is given in the following five paragraphs:

“17 It is settled case-law that ‘genuine use’ within the meaning of the Directive must be understood to denote actual use, consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of goods or services to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the goods or services from others which have another origin (Case C-40/01 *Ansul* [2003] ECR I-2439, paragraphs 35 and 36, and Case C-442/07 *Verein Radetzky-Orden* [2008] ECR I-0000, paragraph 13).

18 It follows from that concept of ‘genuine use’ that the protection that the mark confers and the consequences of registering it in terms of enforceability vis-à-vis third parties cannot continue to operate if the mark loses its commercial *raison d’être*, which is to create or preserve an outlet for the goods or services that bear

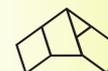
the sign of which it is composed, as distinct from the goods or services of other undertakings (*Ansul*, paragraph 37, and *Verein Radetzky-Orden*, paragraph 14).

19 As the Commission submitted in its observations to the Court and as the Advocate General stated in points 45 and 55 of his Opinion, it is essential, in the light of the number of marks that are registered and the conflicts that are likely to arise between them, to maintain the rights conferred by a mark for a given class of goods or services only where that mark has been used on the market for goods or services belonging to that class.

20 For the reasons set out in points 48 and 56 of that Opinion, that condition is not fulfilled where promotional items are handed out as a reward for the purchase of other goods and to encourage the sale of the latter.

21 In such a situation, those items are not at all distributed with the aim of penetrating the market for goods in the same class. Under those circumstances, affixing the mark to those items does not contribute to creating an outlet for those items or to distinguishing, in the interest of the customer, those items from the goods of other undertakings.”

The main argument, which repeats those presented by Advocate General Ruiz-Jarabo Colomer in his conclusions of 18 November 2008, is that the goods are not marketed with the aim of “market penetration”. This is a somewhat surprising argument as under previous case law the “market penetration” was not one of the points of relevance, the focus rather having been on the participation in the stream of commerce and trade, even if only (quantitatively) marginally. If one does apply a “market penetration” analysis, it would seem that whether the goods are given as a “Zugabe” (literally: “added gift”) or sold, they are part of the market for mineral water. Obviously, the “gratuitousness” of the water bottles does not mean that they are actually “free”, as a simple analysis of the underlying transaction shows. Maselli is not in the business of a free distributor of free mineral water. The cost of the mineral water, which as distributed is likely to fulfil real needs of real customers, is part of the cost of the business it is operating.



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The Silberquelle judgment cannot satisfy. It puts into jeopardy – more so: invalidates – all marks that have in the past been used for promotional items which are not sold separately, but are either give-aways (“Zugaben”), or are distributed for advertising purposes, or as a part of doing business. Be it an automobile company that affixes its mark to pens or pencils, a bank that hands out calendars, or a hotel that provides its guests with soap and shampoo, they are all unable to maintain trademark rights for such goods, which will allow third parties to appropriate such marks for their own benefit.

Reported by
Dr. Alexander von Mühlendahl



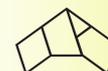
10. German Federal Supreme Court decides on “Adwordising” (Cases I ZR 125/07 – bananabay, I ZR 139/07 – PCB-POOL and I ZR 30/07 – Beta Layout GmbH).

After years of uncertainty whether the use of a competitor’s trademark or company name as an Adword constitutes a trademark infringing act, the question was brought to the Federal Supreme Court in three separate cases. Given that the claims in the first case were based on registered trademark rights and that the core question of the case was whether use of a trademark as an Adword had to be considered as use “as a trademark”, the Court stayed proceedings and forwarded the case to the European Court of Justice (ECJ) for preliminary ruling. However, in the other two proceedings the German Federal Supreme Court rendered decisions on the merits.

Today companies have endless possibilities to make internet users find their internet sites. Since the general operating principle of internet search engines is using the most popular designations referred to by internet users searching for certain products and/or services, – be it on the website of the company itself or for reference purposes on (commercial) search engines’ websites – it is crucial for most companies to be found quickly and directly in the internet. In this respect, companies do not only make use of descriptive words for the goods and services provided, but also of third parties’ – mostly competitor’s – trademarks and company names. Apparently, these competitors try to prevent use by third parties of their trademarks and company names .

The starting point of the discussion on the subject was the Supreme Court decision “Impuls” in 2006 (see IP-Report 2006-VI). There, the Court held that use of a third party’s trademark as a meta-tag can amount to trademark infringement. However, the question remained whether this was also true for use of a trademark for other forms of contextual internet advertising, e.g., use as an Adword or keyword.

The Supreme Court’s decisions were preceded by years of inconsistent decisions with respect to that question. Whereas some courts held that the principles con-



cerning meta-tags, as stipulated in the ‘Impuls’ decision, equally apply for use of a trademark as an Adword or keyword, other courts differentiated in a more sophisticated manner whether the results were recognizable as advertisements or not.

The three cases at hand have in common that the use of the Adword did not have any impact on the general search results of the search engine, but on the advertisements appearing in a separate box next to the search results under the headline “sponsored links”. The advertisements themselves did not refer to the trademarks or the trademark owners, but strictly to the third party’s undertaking.

The claimant in the first case is the owner of the trademark “bananabay”. Claimant and defendant both offered adult entertainment articles. The defendant used the designation “bananabay” as an Adword. Given that the opposing products and the opposing signs were identical, the core question to decide on trademark infringement was whether use of a trademark as an Adword constitutes use of the sign “as a trademark”, i.e., use of the sign to distinguish the products originating from one company from those originating from another company.

The German Federal Supreme Court stayed the proceedings and referred the case to the ECJ for a preliminary ruling, because the claimant’s claims were based on its registered German trademark rights. Consequently, the question whether use of a trademark as an Adword has to be considered as use of the sign “as a trademark” – and, therefore, constitutes a case of trademark infringement –, has to be considered in light of the harmonized European Trademark Law, namely Article 5 Trademark Directive.

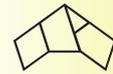
In the second case, the claimant based its claims on the registered trademark “PCB-POOL”. Claimant and defendant both sold printed circuit boards. The defendant had used the sign “PCB” – which is commonly known among IT experts as an abbreviation for “printed circuit board” – as an Adword. Thus, the defendant’s advertisements also appeared in the separate box of the search engine (“sponsored links”) when internet users searched for the designation “PCB-

POOL” instead of merely “PCB”. The Court held that use of a descriptive designation as an Adword is admissible and not an act of trademark infringement. Given that the Court denied an act of trademark infringement because the designation in question was descriptive, the question whether use as an Adword has to be considered as use “as a trademark” was not decisive. Consequently, the Court did not address the ECJ in this case.

In the third case (the claimant of the second and the third case being identical), the claimant asserted claims related to its company name “Beta Layout GmbH”. The defendant used the designation “Beta Layout” as an Adword. The Supreme Court held that use of a company name as an Adword does not constitute an act of trademark infringement, because there was no likelihood of confusion amongst the relevant public. Internet users are not deemed to think that advertisements appearing under the headline “sponsored links” in a separate box originate from the claimant or demonstrate any business relationship between claimant and defendant. The law on rights deriving from a company name is not harmonized in the EU. Thus, a preliminary ruling of the ECJ did not come into consideration in this case.

In Germany, as a rule, the principles concerning use of a trademark, on the one hand, and use of a company name, on the other hand, are rather similar. Thus, it appears to be likely that the Federal Supreme Court, in general, intends to deny use of a trademark as an Adword to be a trademark infringement if (1) the advertisement itself does not refer to the trademark and/or its holder, and if (2) the advertisement appears clearly separate from the general search results. If the ECJ will decide differently from the Supreme Court’s case law, the Court probably will have to reconsider its position on company names. If the ECJ finds use of a trademark as an Adword to be an infringing act, it will be interesting to follow later decisions of German District and/or Appeal Courts on both trademarks and company names.

Reported by Philippe Kutschke



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11. German Federal Supreme Court denies claims of “METRO” against public transport companies in Berlin, Hamburg and Munich for using the designation “METROBUS” (Judgments of February 5, 2009, Case I ZR 167/07 – HVV Metrobus, I ZR 174/06 – BVG Metrobus and I ZR 186/06 – MVG Metrobus).

The claimant, belonging to the well-known Düsseldorf based Metro group of companies, is owner of the German and Community trademark registrations “METRO” and “METRORAPID”, particularly registered for services in the field of transport facilities and travel arrangements. Furthermore, the claimant exercised the rights of Metro AG in its company name.

The three defendants run the public transport in the three cities: Berlin (Berlin public transport, abbr.: BVG), Hamburg (Hamburg public transport, abbr.: HVV) and Munich (Munich public transport, abbr.: MVG) and use the denotation “METROBUS” for particular bus lines connecting underground stations to the other public transport systems. The three public transport companies have registered the denotation “METRO-BUS” in connection with an abbreviation referring to their respective company (e.g., “BVB Metrobus”, “HVV Metrobus” and “MVG Metrobus”) with the German Patent and Trademark Office.

The claimant challenged both, the defendants’ use of the denotation “METROBUS” as such and in connection with the respective combinations of letters “BVG”, “HVV” or “MVG” referring to the respective public transport company name as an infringement of his trademark rights.

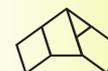
Bringing the proceedings to an end after some five years, the Federal Supreme Court denied any claims of the claimant as regards the defendants’ use of the denotation “METROBUS” in connection with transport services in the field of public transport. Insofar, the court ruled in line with the courts of lower instances (i.e., the Berlin, Hamburg and Munich Appeal Courts) that there does not exist any likelihood of confusion between the claimant’s signs with the compound “METRO” and the denotation

“METROBUS” used in the field of public transport. This ruling was based on the – convincing – grounds that the relevant public does not divide the denotation “METROBUS” into its compounds “METRO” and “BUS”, thus making no association between the denotation “METROBUS” for a bus line, on the one hand, and the Metro group of companies on the other hand. For this reason, the court also denied any claims based on “METRO” as a trademark and a company name having a reputation in Germany in relation to the use of “METROBUS” in the service sector of the public transport.

However, as far as the defendants have registered their trademarks for goods and services which do not relate to transport services (e.g., calendars or magazines), the Federal Supreme Court upheld the decisions made in Metro’s favour or – as far as the court of lower instances denied such claims – overruled their decisions and remanded the cases for the purpose of further clarification to the Berlin, Hamburg and Munich Appeal Courts, respectively. Thus, the ruling could allay Metro’s concerns that the public transport companies might use expressions like “Metrocard” for goods such as tickets.

Reported by Verena Wintergerst, LL.M.





12. Cologne Appeal Court again denies infringement of trademark rights concerning TUC-salty crackers (Case U 143/04 – TUC Salzgebäck II [TUC salty crackers II]).

On December 12, 2008, the Cologne Appeal Court had to decide, for a second time, whether the distribution of the contested design of salty crackers amounts to an infringement of the rights conferred by the registered trademark right. The case had been remanded to the Cologne Appeal Court after the German Federal Supreme Court had lifted an earlier ruling.

The plaintiff produces and distributes salty crackers and holds a figurative mark including the shape of a perforated cracker with a generally rectangular shape and the word element “TUC” (cf. illustration [1]), inter alia registered for bakery products. The defendant also produces and distributes perforated crackers that have a general rectangular shape (cf. illustration [2]). Different from the sign-in-suit, the allegedly infringing product does not have sharp edges that provide the snack with the impression of an octagonal shape, but rounded edges.

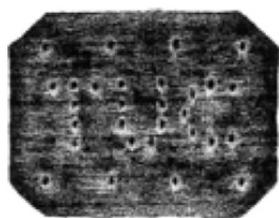


Illustration 1

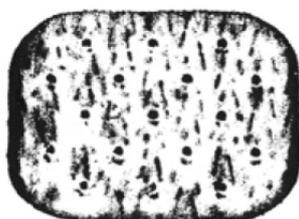


Illustration 1

(Origin of the above pictures: BGH GRUR 2008, 505 – TUC Salzcracker

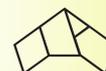
Whereas the first instance had decided in the plaintiffs favour, the second instance completely rejected the complaint, holding that the sign-in-suit had merely a low degree of distinctiveness and the signs to be compared were dissimilar in their

distinctive and dominant elements. After an appeal of law to the Federal Supreme Court by the plaintiff, the Court remanded the case to the Appeal Court of Cologne. The Federal Supreme Court argued that the Appeal Court’s findings had to be reconsidered concerning (1) use of the shape of the infringing products “as a trademark”, i.e. to distinguish the products deriving from one undertaking from those deriving from another undertaking, (2) the degree of distinctiveness of the sign-in-suit and (3) the assessment of likelihood of confusion between the marks at issue.

In its most recent decision, the Appeal Court did not clearly decide whether or not the infringing product’s shape will be perceived by the relevant public “as a trademark”. The Court denied likelihood of confusion for lack of similarity between the signs to be compared. Thus, it held that the question of the specific function of the shape of the infringing product was not decisive.

However, the Court stated that the result of the market survey submitted by the plaintiff does not allow for any conclusions on the public’s perception of the infringing product’s shape. The plaintiff’s market survey was focussed on assessing the degree of distinctiveness of the sign-in-suit – and therefore implicitly on the relevant public’s perception of the shape “as a trademark”. In the Court’s opinion the signs to be compared were dissimilar in their dominant and distinctive elements (shape of the salty crackers, number of punched holes). To the extent that the shapes to be compared are similar (rectangular shape, perforation, golden brown colour), these elements are commonly used for salty crackers and are therefore not distinctive. Consequently, the Court set those elements aside when it compared the signs.

Further, the Court held that the results of the market survey do not clearly demonstrate that the relevant public’s perception of the shape of the sign-in-suit is not definitely based on those elements of the sign-in-suit that are decisive in the Court’s opinion. Contrarily, the Court found it to be more likely that the relevant public’s perception was derived from the non-distinctive elements. It therefore remains doubtful that the relevant public’s percep-



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tion of the sign-in-suit can be transferred to the infringing products.

The Court assessed the degree of distinctiveness of the sign-in-suit to be inherently low, however, it could be increased to an average degree, at the most, through intensive use. The Court criticized that the market survey only considered people that actually eat/buy salty crackers instead of adequately taking into account the average consumer, arguing that the sign-in-suit's list of goods is not limited to salty crackers, but also includes sweets. Given that the Court held the signs to be compared as being dissimilar in respect of their distinctive elements (s.a.), it came to the conclusion that there was no likelihood of confusion. Consequently, the Court, again, completely denied the plaintiff's claims.

The Court did not allow an appeal of law to the Federal Supreme Court because it found that the legal aspects of the case had been adequately answered with the Federal Supreme Court's earlier decision.

The Court's assessment on the distinctiveness of the sign-in-suit is doubtful. It remains unclear why it considered the sign-in-suit's intrinsic distinctiveness to be low, although the sign includes a word element that per se is at least distinctive to an average degree. Furthermore, the Court's assumption that the degree of distinctiveness of the sign-in-suit has to be considered in the light of the general public's perception because the mark is registered for a broad variety of snacks and sweets does not comply with the principles set up in the European case law. This is because the distinctiveness of a trademark always has to be considered in respect of the specific goods. Thus, the Court could have come to the conclusion that the distinctiveness of the sign-in-suit may be average for other snacks than salty crackers, but – in the light of the result of the market survey and the other circumstances of the case, e.g. the marketing expenses of the plaintiff for the sign-in-suit – distinctiveness increased for salty crackers.

Reported by Philippe Kutschke



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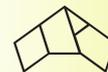
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