Welcome to our IAG September Newsletter

Dear ABA-IPL Members;

Welcome to the 4th edition of the International Associates Action Group Newsletter. Special thanks to Brent Jacobs and Susan McGahan for editing all submissions. We are still looking for contributors so please get in touch with me at david@gearhartlaw.com If interested in becoming an editor or just want to get involved in our Action group please do let myself or Cristina Guerra know. See you next Month!

Yours,
David Postolski

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PERMANENT INJUNCTION GRANTED DESPITE PATENTEE NOT HAVING A PRODUCT THAT PRACTICED THE CLAIMS OF THE PATENT

by Michael Crichton, Partner at the Ottawa office of Gowling Lafleur Henderson LLP, and Kiernan A. Murphy, Associate at the Ottawa office of Gowling Lafleur Henderson LLP

On May 22, 2014, the Federal Court of Canada issued an injunction curtailing Janssen Inc.’s marketing of its drug ustekinumab (STELARA®) in ongoing patent litigation with AbbVie Corporation and related companies. The Court had previously found that certain claims of the patent in issue were both valid and infringed. This most recent decision addressed whether AbbVie was entitled to an injunction and, if so, under what terms and conditions, if any. The remaining bifurcated issues as to damages or profits are scheduled to be heard in September 2015.

Background of the case

The Court, at the outset, distinguished this case from most other patent cases on the basis that, while AbbVie sells a product in Canada which competes with Janssen’s STELARA product, AbbVie’s product does not fall within the scope of the patent claims at issue. In fact, no one, other than Janssen, sells a product in Canada that comes within those claims. The Court also acknowledged the apparent medical need for STELARA, as at least a portion of psoriasis sufferers in Canada require it for the effective treatment of their condition.

In these unique circumstances, the Court felt compelled to balance AbbVie’s rights to the exclusive use of its claimed invention with a medical need by some members of the Canadian public to have continued access to the infringing drug that Janssen was desirous of continuing to sell.

Permanent injunctions usually follow findings of infringement and validity in Canadian patent cases

Reciting well-established patent jurisprudence, the Court confirmed that a permanent injunction will normally follow once the Court has found that a patent is valid and has been infringed. An injunction will be refused “only in very rare circumstances”. The Court added that the three-part test for interlocutory injunctions does not apply for final or permanent injunctions. Rather, to obtain a final or permanent injunction, a party need only establish its legal rights, and the Court need only assess the appropriateness of an injunction. Irreparable harm and balance of convenience, per se, are thus not relevant, though they may inform the determination as to the appropriateness of an injunction.

The Court did however note the rare situation of the Unilever case where a final injunction was not ordered due to a unique set of facts, including that: the patent had less than two years of life left; the patentee did not sell a product that came within the scope of the patent, although it sold a competitive product; and, the defendant’s product was made by people with disabilities, who were otherwise unemployable (and particularly vulnerable given the economic recession at the time of the decision).

The unique injunction crafted by the Court
In determining the appropriateness of a permanent injunction, the Court considered the following: (a) what are the plaintiffs requesting? (b) what is the defendant proposing? (c) what interests are the plaintiffs seeking to protect? (d) what interests is the defendant seeking to protect? and (e) what interests does the public have?

The Court noted, among other things, that the injunction requested by the patentee, AbbVie, comprised certain significant exceptions, such as the continued use of STELARA by existing patients and the use by new patients in particular circumstances. The Court also highlighted its finding that, for some patients in Canada, there is no alternative to STELARA in the effective treatment of their psoriasis. This case was therefore unlike numerous other patent actions where the subject matter of the patent is directed to something that is readily replaced by, or substituted with, another equivalent or otherwise suitable product. In such cases (e.g., a watch or bicycle), the public may lose its ability to acquire or use one such product, but it can readily access a reasonable alternative. The Court therefore found it necessary to keep in mind the needs of the public at large.

Ultimately, the Court granted an injunction, which it designed to curtail the marketing of STELARA while ensuring that medical information on the product continued to be available. Unlike a traditional injunction, which would have more fully prevented Janssen from continuing to deal in STELARA, this injunction notably permits physicians to continue prescribing STELARA to patients already receiving that drug and to new patients, provided that their own physicians have determined that STELARA is necessary for treatment of their psoriasis. In addition, Janssen will be required to pay a royalty to AbbVie for any continuing sales.

The Court rejected certain terms requested by AbbVie, namely, that:

- physicians certify the need for STELARA. Such rigour is overly restrictive and too skeptical of the integrity of doctors. The Court did however enjoin Janssen from influencing doctors;
- Janssen notify provincial drug formularies about the injunction and its terms, thus potentially impacting the provision of and funding for STELARA. Rather, the Court left Janssen to do so if required by law, and AbbVie to provide information as may be necessary;
- Janssen be ordered to comply only with lawful requests from Health Canada. The Court found that Health Canada would not knowingly make an unlawful or frivolous request; and
- Janssen issue a letter to physicians advising of the patent at issue and the outcome of the proceeding. AbbVie could do so itself if it so desired.

The Court also prohibited Janssen from conducting phase IV trials, unless required by law to do so. To do otherwise, the Court held, would undermine the terms of the injunction, as such trials would require Janssen to recruit new patients.

Finally, the Court declined to stay the injunction for a period of time. The Court held that a party seeking a stay must provide some evidence as to hardship and found no such evidence on the record. To the contrary, the Court noted that Janssen became aware of the risk of an injunction shortly after launching its STELARA product and
Impact on future patent cases

This decision of the Federal Court of Canada illustrates the flexibility of the Court to tailor an equitable remedy, such as an injunction, to the particular facts of a case. In addition, the decision demonstrates that the Court will uphold the long-standing and general practice to grant permanent injunctions in favour of a successful patentee unless there are exceptional circumstances, such as a particular public interest in the invention as was found in this case. Where consumers or the public at large may replace or substitute an infringing product for a reasonable alternative product, the Court will be more inclined to grant a permanent injunction, particularly where, as in this case, the patentee has a competing product even if such product is outside the scope of the claims at issue.

It remains to be seen what particular impact this decision will have on other patent litigants in Canada who are seeking permanent injunctions in cases where there may be arguments against the granting of such injunctions. For example, the Federal Court of Canada has yet to adjudicate any patent trials involving non-practicing entities (NPEs) or patent assertion entities as plaintiffs. In the United States, since the U.S. Supreme Court’s decision in eBay, NPEs are frequently denied permanent injunctions. In eBay, the Supreme Court reasoned that where an NPE’s threat of an injunction is employed simply for undue leverage in negotiations, legal damages may well be sufficient to compensate for the infringement and an injunction may not serve the public interest.

Accordingly, it is anticipated that future decisions in Canada that consider the appropriateness of permanent injunctions will strive to strike a balance between the general practice of granting permanent injunctions in favour of a successful patentee with carefully considering whether there are any exceptional circumstances that run counter to the granting of a permanent injunction. Important considerations for the Court may include whether the infringing product may be substituted with a reasonable alternative, and whether, based on the particular interests of the parties and the public at large, damages alone may be sufficient compensation. For example, where an NPE uses the threat of an injunction for undue leverage, does not have a competing product or other particular interest in the market, is only interested in obtaining licensing revenues, and would enjoy a greater financial benefit with ongoing and/or future royalties, there may be an argument that damages alone are adequate; however, such an argument would need to be balanced against the general practice of granting permanent injunctions, particularly where an infringing product may be substituted with a reasonable alternative.
Enrollment with Brazilian National Directory against Trademark Counterfeiting

The Brazilian Patent and Trademark Office (PTO) recently launched the National Directory against Trademark Counterfeiting (“Directory”) in cooperation with the Brazilian National Council against Piracy (CNCP in the Portuguese acronym). The legal ground for creation of this Directory was CNCP’s Resolution No. 1 of December 2, 2013. The Directory is an information system for tackling trademark counterfeiting. Its most important features are:

(a) a “pilot project” that is being implemented on an experimental base;
(b) the Brazilian PTO’s trademark database concerning registered marks will be automatically inserted into the Directory (including information regarding agents or attorneys of record with the Brazilian PTO);
(c) the information in the Directory will be accessible only by enforcement authorities and not treated as confidential;
(d) use of the Directory is recommended where the trademark owner wishes to empower a different agent or attorney for enforcing the mark in Brazil (meaning that this agent is not the same agent or attorney of record listed in the Brazilian PTO) or if the trademark owner wishes to furnish additional information about its original products and branded merchandise;
(e) a specific Power of Attorney will be required (and it will not replace or revoke the Power of Attorney for the current agent or attorney of record with the Brazilian PTO);
(f) a specific form must be filled in and sent with the Power of Attorney and additional documents (if any) by e-mail to the Brazilian PTO in order for the mark and relevant information to be inserted in the Directory (filling and submission of new forms will be required to change or update the information on the Directory); and
(e) no official fees will be charged for recording the information in the Directory until after June of 2014.

After June 2014, performance of the system will be assessed by the Brazilian PTO and changes (including applicable fees) may be introduced (occasional changes may even require resubmission of the form, relevant information and documentation). This Directory will allow the enforcement authorities in the possession of any apprehended counterfeits to communicated to the agent or attorney registered with the Directory (the default option for communication will be the agent or attorney of record with the Brazilian PTO) and take any appropriate action.
Ricardo Pinho
Guerraip.com
This article considers whether the Bitcoin system, or any other network based cryptocurrency for that matter, is eligible subject matter for patenting (is a “manner of manufacture”) under current Australian patent law. Patenting the Bitcoin system is an entirely hypothetical consideration as a research paper describing the functionality of the system was published without a patent application ever being lodged. The Bitcoin software is also open source.

Bitcoin is a peer-to-peer payment system relying on a public ledger (the block chain) to record all financial transactions. The transactions are based on cryptographic proof making them computationally impractical to reverse, and thus the transactions are trusted in the same way as transactions processed by a financial institution are trusted (or even more so). Systems or nodes processing the transactions and securing the network (miners) are rewarded with new bitcoins in accordance with the Bitcoin protocol.

The patent-eligibility of computer implemented inventions remains contentious in Australia and other jurisdictions. Two cases are on appeal to the Full Bench of the Federal Court in Australia that should confirm whether it is sufficient for mere implementation by a computer to confer patentable subject matter eligibility on a business method or scheme.

The Commissioner of Patents is appealing the RPL Central case that found that there is no requirement under Australian law that computer implementation be substantial or central to the invention. In the Research Affiliates case, the patent applicant is appealing an opposite finding that a computer-implemented invention that could readily have been carried out manually is not patent eligible.

Common ground between the two cases is that a method or system is patent eligible if the computer involvement is not merely incidental, but use of a computer is a virtual necessity to implement the invention. Integral to Bitcoin is the cryptographic verification to confirm a transaction using specialized software and computer hardware. The difficulty of verifying transactions by finding a “valid block” is automatically increased by the network to ensure that the average time to find a valid block remains equal to about 10 minutes. In the early days of Bitcoin, new blocks could be found using an ordinary computer CPU. With more people mining for profit, the difficulty of finding new blocks increased to the point where specialized hardware is required to be cost effective. As a result, computer and network implementation is integral for ensuring the functionality and integrity of the Bitcoin system. Hence, under current Australian law, it is clearly patent eligible subject matter.

Indeed, Australian patent application 2012216666 for a computer-implemented invention related to bitcoins entitled “Gaming System, Gaming Device and Method for Utilizing Bitcoins” was granted on 5 June 2014 without any objection by the Patent Examiner to the nature of the subject matter.

The Full Bench of the Federal Court may confirm that any computer implementation of a business method provides the necessary technical “hook” to transform otherwise ineligible subject matter into patentable subject matter. In that case, many other “computer-implemented” inventions may also proceed to grant in Australia, even if the process or method could have been carried out manually with a pen and piece of paper.

References:

RPL Central Pty Ltd v Commissioner of Patents [2013] FCA 871 (RPL)
Research Affiliates LLC v Commissioner of Patents [2013] FCA 71
https://bitcoin.org/en/faq
Incredibly a supermarket of Bauru (SP) was ordered to pay copyright damages for replaying, without authority, a radio program as ambient sound at the supermarket. The decision of the Fourth Chamber of the Superior Court of Justice (STJ) is favorable to the Central Bureau of Collection and Distribution (ECAD).

The previous instances of such use was ruled unfounded by the ECAS because there was no intent to profit and hence no basis for a royalty payment as the supermarket just installed a sound environment for the comfort of the customers.

At STJ, Minister Luis Felipe Salomão, responsible for the disposition of the case, explained that the new Brazilian Copyright Act removed the need for establishing an aim to profit from playing music, since the expression "aimed at direct profit or indirect" was deleted in the new Act.

According to the Supreme Court Precedent 63, copyright infringement can be found "due by radio relay music in commercial shops" regardless of intent to profit from the replay. The minister cited case law to clarify that radio and television in motel rooms and hotels, places of collective frequency, should also receive the same treatment.

Minister Salomão, also ruled, that according to the doctrine, now playing program broadcast by the radio station without authorization will violate the rights of the author, even if it has already given its consent to the radio, because it is further reproduction.

This news refers to the process: REsp 1152820

From now on public places need to pay attention to these rules when replaying music or radio programs or any other copyrighted work to avoid copyright violation.
THE EUROPEAN RESPONSE TO "USE IT OR LOSE IT"?

GENERAL COURT FINDS MINIMUM STANDARDS FOR GENUINE USE OF A TRADEMARK:
Although many decisions show a more relaxed approach on evidence proving genuine use of a Community Trademark (or a national trademark in the European Union), in cases T495/12 to T497/12, decided on June 5, 2014, the General Court identifies the minimum standards.

1 - Parties and background of the dispute

The plaintiff, European Drinks SA, (Romania), hereinafter "European Drinks", challenges the decision of the Board of Appeal favorable to SC Alexandrion Group Romania Srl, (Romania), hereinafter "Alexandrion". In particular, Alexandrion is the intervener in the proceeding before the General Court brought by European Drinks against the defendant, the Office for Harmonisation in the Internal Market (OHIM).


The marks in respect of which registration was sought are the figurative signs reproduced below seeking protection in international classes 33, 35 and 39:

On February 17, 2010, European Drinks filed three notices of opposition under Article 41 of Regulation No 207/2009 challenging registration of the marks applied for on the grounds of likelihood of confusion with an earlier national trademark pursuant to Article 8(1)(b) of Regulation No 207/2009.

The oppositions were based on the following earlier national figurative mark:

(National trademark, registered on 31 August 1995 in Romania and duly renewed under number 34847, in particular for the goods and services in Classes 33 and 35.) Along with the notice of opposition, European Drinks submitted evidence to demonstrate genuine use of the earlier national mark in Romania, namely, six invoices from the period from 2 February to 24 April 2009, a photograph and a copy of a promotional text. No additional evidence, despite the request, was shown. The Opposition Division rejected the oppositions in their entirety and so did the Board of Appeal on the grounds of lack of genuine use and insufficient evidence proving use of the national trademark.
The preliminary rule of law mentioned by the General Court is the recital No.10 of the preamble to Regulation No 207/2009, namely, that there is no justification for protecting an earlier trade mark, except where it is actually used.

Such a principle is substantially identical to "USE IT OR LOSE IT", extensively known in the United States trademark law.

In particular, the Court finds that "there is genuine use of a trade mark where the mark is used in accordance with its essential function, which is to guarantee the identity of the origin of the goods or services for which it is registered, in order to create or preserve an outlet for those goods or services; genuine use does not include token use for the sole purpose of preserving the rights conferred by the mark (see, by analogy, Case C40/01 Ansul [2003] ECR I2439, paragraph 43). Moreover, the condition relating to genuine use of the trade mark requires that the mark, as protected on the relevant territory, be used publicly and outwardly (VITAFRUIT, paragraph 39, and COLORIS, paragraph 21)."

In addition, it is said, "as to the extent of the use of the earlier trade mark, account must be taken, in particular, of the commercial volume of the overall use, as well as of the length of the period during which the mark was used and the frequency of use (VITAFRUIT, paragraph 41, and Case T334/01 MFE Marienfelde v OHIM — Vétoquinol (HIPOVITON) [2004] ECR II2787, paragraph 35)."

In fact, "the more limited the volume of sales of items bearing the mark, the more necessary will it be for the party opposing new registration to produce additional evidence to dispel possible doubts as to the genuineness of the use of the mark in question (HIPOVITON, paragraph 37, and VOGUE, paragraph 31)."

Also, genuine use of a trade mark cannot be proved by means of probabilities or suppositions, but must be demonstrated by solid and objective evidence of effective and sufficient use of the trade mark on the market concerned (Case T356/02 Vitakraft-Werke Wührmann v OHIM — Krafft (VITAKRAFT) [2004] ECR II3445, paragraph 28, and COLORIS, paragraph 24).

In this particular case, the evidence submitted bearing an incontestable date was the following:

copies of six invoices, written in Romanian, issued by a company, Scandic Distilleries SA, and addressed to the same wholesaler established in Romania, SC TGIE, for the period from 2 February to 24 April 2009, each relating, inter alia, to 432 products for which no description is provided but which are associated with the wording 'V. DRACULA'.

Then, the Court states that in these circumstances, "although those invoices may be taken into account, the duration and the frequency of the use adduced does not support the conclusion that the products bearing the name of the earlier mark were marketed continuously over the relevant period (see, by analogy, VITAFRUIT, paragraph 48, and judgment of 16 September 2013 Case T200/10 Avery Dennison v OHIM — Dennison-Hesperia (avery denison)), not published in the ECR, paragraph 50). Therefore, the Board of Appeal rightly found in paragraph 24 of each of the contested decisions that the period of use that had been established barely represented genuine use."

Geographically, these figures also fail to fulfill the requirements for genuine use. As a matter of fact, the Court did actually take into account the average sales of the products nationwide comparing the numbers with the samples submitted.
In response, the plaintiff alleges that the six invoices were to be regarded as samples while the Court finds that “the fact that they were issued on dates that were close together and the fact that they relate to a period that is particularly short and particularly close to the publication of the applicant’s Community mark applications could not entirely exclude the possibility of a purely token use of the earlier mark.”

In that regard, the Court maintains that that evidence, considered as a whole, does not provide sufficient indications of the place, time, extent and nature of use of the earlier mark.

As a consequence, the documents which European Drinks submitted to OHIM are not sufficient to demonstrate the genuine nature of the use of the earlier national mark.

On those grounds, the General Court dismisses the actions and orders European Drinks SA to pay the costs.

3 - Conclusion

The previous decisions of the General Court, lenient to the evaluation of evidence submitted as proof of genuine use, are being narrowed to a “use it or lose it” kind of approach. In fact, contrary to common practice, it is recommended that practitioners be as conservative as possible and submit massive circumstantial evidence broader than just samples. Competition and litigation over trademarks in the EU is drastically increasing. As a result, legislators and courts might rule more and more in favor of actual trademark users instead of owners of earlier rights defending, however, dead trees.

Vincenzo Melilli LL.M.

**CJEUStrengthens Design Protection in Fashion Sector - June 2014**

The CJEU has published its decision in Case C-345/13, Karen Millen Fashions Ltd v Dunnes Stores, Dunnes Stores (Limerick) Ltd.

European Community design law provides that a design (whether registered or not) is to be protected at the EU level to the extent that it is new (not made available to the public previously) and has individual character (the overall impression it produces on the informed user differs from that produced by any design which has been made available to the public previously).

In 2005, Karen Millen Fashions designed and placed on sale in Ireland a particular striped shirt (in a blue and a stone brown version) and a black knit top. Examples of those garments were purchased by representatives of Dunnes Stores, an Irish retail chain, from one of Karen Millen’s Irish outlets. Dunnes subsequently had copies of the garments manufactured outside Ireland and put them on sale in its Irish stores in late 2006. In January 2007, Karen Millen Fashions commenced proceedings in the Irish courts, seeking to have Dunnes restrained from using its unregistered designs, and damages for the unauthorized use of the designs at issue.

Dunnes argued that there was no “individual character” in the designs at issue, so Karen Millen Fashions was not the holder of an unregistered Community design, especially where a new design was merely an amalgam of specific features or parts of earlier designs. The Supreme Court (Ireland), referred the case to the CJEU on how to assess individual character in a design, and whether a right holder needs to prove such individual character.

Today in its press release, the CJEU stated:

(i) that the individual character of a design for the purposes of protection under the regulation must be assessed by reference to one or more specific, individualized, defined and identified designs from among all the designs which have been made available to the public previously. Consequently, that assessment cannot be conducted by reference to a combination of features taken in isolation and drawn from a number of earlier designs.

(ii) in infringement actions, the regulation introduced establishes a presumption of validity of unregistered Community designs so that, in such actions, the right holder of an unregistered Community design is not required to prove that it has individual character. The right holder need only indicate what constitutes the individual character of that design, that is to say, indicates what, in his view, are the element or elements of the design concerned which give it its individual character. The defendant may nevertheless contest the validity of the design at issue.
The European Court has followed the earlier opinion of the Advocate General and this decision will strengthen the position for designers in the fashion sector; it appears to be a good day for all fashion designers and indeed design rights holders. The Irish Court will now have its say.

This update was prepared by Lee Curtis, Partner of HGF, UK

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**No Copyright Authorization Required to View Internet Links - June 2014**

The CJEU has ruled that on-screen and cached copies are "temporary copies", so viewing them does not require permission from copyright holders.

In April 2013, the UK Supreme Court referred questions to the CJEU regarding temporary copies, and the application of copyright law to the technical processes involved in viewing copyright material on the internet and the interpretation of Article 5(1) Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society. The case, *Public Relations Consultants Association Limited (PRCA) v The Newspaper Licensing Agency Limited and Others (NLA) [2013] UKSC 18*, is referred to as “Meltwater”. The Meltwater group offers a paid for media monitoring service (used by the PRCA), using automated software programs to create an index of words appearing on newspaper websites. Meltwater’s customers provide them with search terms of interest to them, and Meltwater produces a monitoring report of newspaper articles listing the results of a search for those search terms. Meltwater agreed to take a license from the publishers of the newspapers to provide their service on terms which have been settled by the Copyright Tribunal. The parties also agreed that Meltwater’s customers required a license to receive the service via e-mail, as an email copy is not temporary. It is stored on the recipient’s hard drive until the end-user chooses to delete it. However, NLA took the view that Meltwater and its customers required permission from the copyright holders of the newspapers to provide their service, even where a user of the service would only be making on screen and “cached” copies on the computer’s hard drive. The UK High Court also took this view, which PRCA appealed to the UK Supreme Court.

The real question on appeal was whether Meltwater’s customers would need a license to receive its service if the monitoring report were made available only on Meltwater’s website. If a customer downloads the report from the website, he makes a copy that will infringe the newspaper’s copyright unless he is licensed. But what if he merely views the material on the website? Where a webpage is viewed by an end-user on his computer, without being downloaded, the technical processes involved will require temporary copies to be made on screen and in the internet “cache” on the hard disk of the computer. The end-user’s objective is to view the material. He does not make a copy unless he downloads or prints the image. The copies temporarily retained on the screen or in the cache are merely an incidental consequence of using a computer to view the material.

Given the appeal’s transnational dimension and potential implications for internet users across the EU, the Court referred the matter to the CJEU for a preliminary ruling. The question which it referred centered on whether the requirements of article 5.1 of the Directive, that acts of reproduction should be “(i) temporary (ii) transient or incidental and (iii) an integral and essential part of the technological process,” were satisfied, given that copies may remain in the user’s hard drive cache after the browsing session that generated them has ended, and a screen copy will remain on screen until the browsing session is terminated by the user.

**Temporary:**

The Court was clear that the on-screen copies are deleted when the internet user moves away from the website viewed. Secondly, that cached copies were normally automatically replaced by other content after a certain time, which depends on the capacity of the cache and on the extent and frequency of internet usage by the internet user concerned. It follows that those copies are temporary in nature.

**Transient or incidental:**

The Court stated that an act will be held to be ‘transient’, in the light of the technological process used, if its duration is limited to what is necessary for that process to work properly. It was stated that an act of reproduction can be regarded as ‘incidental’ if it neither exists independently of, nor has a purpose independent of, the technological process of which it forms part. In the case of on-screen copies, these are automatically deleted by the computer at the moment when the internet user moves away from the website concerned and, therefore, at the moment when he terminates the technological process used for viewing that site. It was clarified that automatic deletion does not preclude such a deletion from being preceded by human intervention. In conclusion, it was held that the period during which the on-screen copies remain in existence is limited to what is necessary for the proper functioning of the technological process used for viewing the website concerned. Consequently, those copies must be regarded as ‘transient’.

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Regarding cached copies, although they are not deleted at the time when the internet user terminates the technological process used for viewing the website concerned, since they are retained in the cache for the purposes of a possible subsequent viewing of that site, it is not necessary that such copies be categorized as ‘transient’ once it has been established that they are incidental in nature in the light of the technological process used. Cached copies neither exist independently of, nor have a purpose independent of, the technological process at issue in the main proceedings and must, for that reason, be regarded as ‘incidental’.

**Integral and Essential:**
The Court pointed out that the on-screen copies and the cached copies are created and deleted by the technological process used for viewing websites, with the result that they are made entirely in the context of that process, so must be regarded as being an integral part of the technological process at issue in the main proceedings.

With regards to whether the copies were essential, it was agreed that cached copies greatly facilitate browsing on the internet, since without those copies, the internet would be unable to cope with current volumes of data transmitted online. Without the creation of such copies, the process used for viewing websites would be considerably less efficient and would not be able to function properly. Concerning the on-screen copies, the technology for the viewing of websites on computers requires such copies to be made if it is to function correctly and efficiently. Consequently, the on-screen copies and the cached copies must be regarded as being an integral and essential part of the technological process at issue in the main proceedings.

**Conclusion:**
It was concluded by the Court that on-screen copies and the cached copies made by an end-user in the course of viewing a website satisfy the conditions that those copies are temporary, transient or incidental in nature and constitute an integral and essential part of a technological process, and that they may therefore be made without the authorization of the copyright holders. And, although the copies make it possible, in principle, for internet users to access works displayed on websites without the authorization of the copyright holders, the copies do not unreasonably prejudice the legitimate interests of those rights holders.

Therefore, the action of clicking on a link in order to view a web page is not an infringement of copyright.

**This update was prepared by Martyn Fish: mfish@hgf-law.com Partner of HGF Law, UK**

**Dosage Regimen Patent Found Obvious – May 2014**
Mylan was successful in challenging the validity of a dosage regimen patent.

In the case, *Generics (UK) Ltd (t/a Mylan) v Richter Gedeon Végyészeti Gyár RT [2014] EWHC 1666 (Pat) (22 May 2014)*, Mylan brought a claim for a declaration that Richter’s European Patent (UK) no. 1 448 207 B1 entitled "Dosage Regimen and Pharmaceutical Composition for Emergency Contraception" ("the Patent") was invalid and should be revoked. The Patent concerned a dosage regimen for use of levonorgestrel as a method of emergency contraception. The regimen for which the Patent was claimed was for use of a single dose of levonorgestrel of 1.5 mg taken within 72 hours of sexual intercourse. The previous dosage regimen required two doses of 750 μg taken 12 hours apart. The grounds of invalidity relied on were (1) obviousness, and (2) insufficiency.

For its obviousness case, Mylan relied upon common general knowledge ("CGK") and the publication in late 2000 of a report discussing interim results of a Dr. von Hertzen's research for the WHO regarding the effectiveness of a regimen involving a single dose of 1.5 mg of levonorgestrel, as compared (in particular) with the two-dose regimen which was in widespread use. The report was by Professor Stephen R. Killick, the Editor-in-Chief of Gynaecology Forum, in a special issue of that journal to report the highlights of the XVI FIGO World Congress of Gynecology and Obstetrics in September 2000 in Washington DC, USA ("the Killick article"). In the article, Professor Killick reported on a presentation by three speakers who had been involved in extensive studies organized by the WHO and had summarized the work of the previous 10 years. At three places in the article, Professor Killick referred in error to the research study being in relation to a regimen involving a single dose of 1.5 g of levonorgestrel (rather than 1.5 mg). It was considered that this would have been appreciated to be an obvious mistake by a clinician skilled in the art relating to emergency contraception and that such a clinician would have made further inquiries as to the true dosage.
The Killick article included a table comparing the results to the date of the presentation from blind trials of three emergency contraception treatments: two doses of levonorgestrel, a single, larger dose of levonorgestrel and a single dose of mifepristone. In reference to the table, it was stated that “The suggested summary from the floor was that a single dose of 1.5 g levonorgestrel was the preferred oral method because there was no difference between groups in the most recent WHO study, but Dr. Glasier advised great caution with this assumption as the trial was still incomplete. The last few subjects could alter the data and it was wrong to try to guess which group was which, however tempting this might be.”

Judge Sales applied the 4-step Pozzoli test for obviousness. He considered that the additional research work (finalizing the study which was already well advanced as reported at the time of the presentation in September 2000) and additional information (confirmation of the preliminary findings presented in September 2000) were “not of the character or extent that one could reasonably describe them as a significant additional contribution to human knowledge such that one would expect them to attract protection in the form of a patent monopoly of exploitation”.

“The possibility of using the single dose regimen involving levonorgestrel for emergency contraception had already been substantively revealed and attested by the extant research findings reported in September 2000 as an obvious likely way forward in the field of emergency contraception, notwithstanding the caveat regarding the need to finish the study mentioned at the end of the Killick article.

For these reasons it was judged that the challenge to the validity of the Patent on the ground of obviousness should succeed and the Patent found invalid. The insufficiency challenge did not need to be considered. This update was prepared by Martyn Fish: mfish@hgf-law.com Partner of HGF Law, UK

**European Commission New Intellectual Property Enforcement Action Plan**

Violations of intellectual property rights (IPRs) continue to increase throughout Europe. The Organization for Economic Cooperation and Development (OECD) estimates that the annual loss from IPR infringements to the world economy is around €200 billion. It is therefore essential for the European Union to increasingly focus on effective implementation of enforcement legislations to curb such large scale infringements and improve the world economy.

Here is the good news! On Tuesday, July 1, 2014, the European Commission is set to adopt a package for dealing with online piracy and counterfeiting comprising two non-legislative measures/tools: (1) an EU Action Plan to address infringements of intellectual property rights and (2) a Strategy for the protection and enforcement of EU intellectual property rights in third-world countries.

Firstly, the EU Action Plan. This Plan “will set out ten specific actions providing for new enforcement policy tools to address in particular commercial scale IP-infringing activity. (...) These new tools include the so-called ‘follow the money’ approach seeking to deprive commercial scale infringers of their revenue flows”. This anti-piracy strategy approach, which includes the participation of different entities, such as advertisers, payment processors (e.g. VISA, PayPal and others), creative industries, has already been well received by industry partners and appears to be an effective way of dealing with, among others, allegedly infringing sites engaging in illegal activity. More precisely, “it is a way of indirectly curtailing pirate sites by squeezing the way they are funded. The rationale is that by cutting the source of revenue for pirate sites, the opportunity for website owners to profit from such sites is greatly reduced and as a consequence, without advertising revenue or payment processing services, such sites quickly become commercially unviable” (Mike Weatherley, ‘Follow The Money’: Financial Options To Assist In The Battle Against Online IP Piracy, Discussion Paper, p. 2.). Progress is being reported in the United States and recently in the United Kingdom by the Police Intellectual Property Crime Unit (PIPCU) as detailed in the discussion paper.

Secondly, the Strategy. It “will review the Commission's approach on IPRs towards third countries in the light of current challenges in the international IP environment. Its aim will be to enhance cooperation between authorities, including customs authorities, in the EU and third countries in the fight against the trade of IP-infringing goods (...”). Indeed, these countries are the one where IPR violations predominantly occur. Effective enforcement measures of IPR rights are definitely an essential tool to attract, among others, foreign investment, technology transfer and know-how, to protect local IP right-holders, and to assess the value of the industries primary based on intellectual property rights.

Although these tools are non-legislative measures, it’s a good (and hopefully big) step in the implementation of enforcement legislations.

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Non traditional trademarks

Last June 10, 2014 the Brazilian PTO has decided to reject the below trademark application to consider that the form presented is inseparable of the technical effect unregistered under the Article 124, XXI of the Brazilian Industrial Property Law.
The article says that:

**Signs Not Registrable as Marks**

**Article 124** - The following are not registrable as marks:
XXI - necessary, common or usual shapes of a product or of its packaging, or, furthermore, shapes that cannot be disassociated from a technical effect;

Other similar case published last July 07, 2014 of non-traditional trademarks was also rejected because the trademark is constituted by colors and its denominations without distinct shape so it is considered not registrable under our national law.
Such decision was based on the same article described above but with other incise as shown below:
VIII - colours and their names, except when arranged or combined in an unusual and distinctive manner;

Both decisions were made based in our law but independent if we agree or not with such basis the important message is that the examiners from the Brazilian PTO are very strict by its laws and are not very friendly a novelty of the marked or other jurisdictions.
It is quite difficult to get positive decision in this kind of trademark.
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From a Belgian Point of View, Another Episode In The Cloud TV Recorders Area: M7 Group v. Right Brain Interface

Innovation continues to outpace the law. Since the last six years, the convergence of cloud-based products/services with the consumption and distribution of entertainment content is producing a large number of conflicts and legal uncertainty in the television industry. Indeed, the scope and bounds of copyright law remain ill-equipped to tackle this rapid pace of technological advancement. The question remains: are we not in presence of a “loophole” in the law?

Following the recent U.S. Supreme Court decision in favor of the TV content owners (American Broadcasting Companies, Inc., et al., Petitioners v. Aereo, Inc., 573 U.S. ___ (2014)) concluding that “Aereo performs petitioners’ copyrighted works publicly” infringing this exclusive right by selling its subscribers a technologically complex service that allows them to watch TV programs over the Internet, a Belgian Court recently ruled that Bhaalu, an internet-based digital video recorder set-top box, was not subjected to copyright provisions (Voorz. Rechtbank van Koophandel Antwerpen, afdeling Hasselt, July 2, 2014, IEFbe 927: link to full judgment, only in Dutch; hereafter “The Decision”).

Right Brain Interface is a young technology company that developed a "Collaborative Video Recorder" (CVR), i.e. an internet-based digital video recorder that stores recording/TV content, in which the hardware operates in the cloud and on the client boxes of the community members who use this hardware. This system brings Right Brain Interface on the market under the name "Bhaalu". The content is available for 90 days and can only be access, most likely through a geo-blocking, in Belgium, Germany, and the Netherlands. More precisely, as explained on the company’s website, the CVR developed enables “members of the Bhaalu community to share video recording hardware without transferring content and software rights. The CVR Bhaalu delivers a natural, personalized, social television viewing experience, finally integrating the Internet with television”. The (TV) programs can only be recorded if the user is authorized to view them and had subscribed to a provider of cable broadband (e.g., TV Vlaanderen, Belgacom, Telenet, ...).

M7 Group is the European provider of satellite services for consumers and business customers that operates, among others, in Belgium, under the brand “TV Vlaanderen”. Launched in 2006, this satellite platform, targeting the Flemish speaking inhabitants of Belgium, brought the case against Right Brain Interface for unfair trade practices (Article 95 Belgian Law on market practices and the protection of consumers) on the basis that Bhaalu equipment only/mainly used the TV signal of M7 Group for third parties who are not customers of the TV signal (see The Decision, paragraph 5). This use is contrary to article 22(2) of its terms and conditions. According to M7 Group, Right Brain is also guilty of unfair competition (parasitic misappropriation) as it decreases the signal from M7 Group, without paying for any technical costs, thereby obtaining an unfair competitive advantage and distorting competition (see The Decision, paragraph 5).

According to Bhaalu, they simply provided a device allowing users to playback recordings of TV broadcaster via the regular television provider and not a television service. They also claim that the exception of private copying provided by the Belgian Copyright Act could be invoked. In this Act, private use is defined as the use within, and reserved to, the family circle. One may argue that since the content is stored on the cloud and can be access from a laptop, tablet or mobile device, it’s hard to believe that this circle still exists.
In the Flanders region of Belgium, a Flemish decree (that has the same legal force as law) on broadcasting and television foresees a protection for the integrity of television signals of the broadcasters. TV Vlaanderen argued that, besides the Copyright Act, Bhaalu is also violating this decree. Indeed, in order to maintain the quality of an electric signal, cable lengths should not exceed the driving capability of digital signal sources, as cable capacitance and attenuation will degrade signal rise time and amplitude; and therefore to obtain the consent of channels before offering any new TV function.

The Court followed Right Brain Interface in its presentation of the operation of the system of Bhaalu and stated that M7 Group didn’t prove that Right Brain received a satellite signal from the air and made it available to Bhaalu users. According to the Court, the product and services developed by Right Brain have an innovative and “high-tech” character (see The Decision, paragraph 16). Finally, the Court declared that M7 Group didn’t demonstrate that the shared use of its signals with Bhaalu users, who have subscribed to a different TV provider, will cause any damage (see The Decision, paragraph 18).

In the U.S., the 6 to 3 decision handed a major victory to the broadcast networks in the Aereo case. As a reminder, Aereo was selling a service that allows its subscribers to watch television programs over the Internet at about the same time as the programs are broadcast over the air.

The main legal question at stake was whether Bhaalu should be have been considered as a device (as decided by the Court) or as a television service. The legal uncertainty in this area is certainly one of the key reasons why these new services and business models have not exploded yet. New technologies will always continue to challenge the existing legal framework and create more litigation. If these offerings start to become more multi-territory, because of the territorial nature of copyright law, risks are growing that new issues will arise very soon. Except in the U.S., existing precedents around the world are still subject to appeal. The outcome of future legal disputes and the TV industry will depend on these new rulings. Although the Court stated that Bhaalu may continue to use its services in Flanders, another separate case brought by other various Flemish broadcasters is still pending, also accusing Bhaalu of violating copyright by using their signal. Stay tuned!

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