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EU update

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A B S T R A C T

This is the latest edition of the Bristows column on developments in EU law relating to IP, IT and telecommunications. This news article summarises recent developments that are considered important for practitioners, students and academics in a wide range of information technology, e-commerce, telecommunications and intellectual property areas. It cannot be exhaustive but intends to address the important points. This is a hard copy reference guide, but links to outside web sites are included where possible. No responsibility is assumed for the accuracy of information contained in these links.

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1. Copyright and trade marks

1.1. *CJEU hands down ruling on parody exception – Case C-201/13* Deckmyn

The CJEU has ruled on the treatment of parody under copyright law (Case C-201/13 *Deckmyn*), which clarifies what a parody is and how the exception should be applied.

The CJEU clarified that parody should comprise of two elements: firstly, it should “evoke” the existing work but “be noticeably different from it”, and secondly it should “constitute an expression of humour or mockery”.

The CJEU also indicated that in applying the parody exception, national Courts must strike a “fair balance” between the rights of the copyright owner and the right of freedom of expression of the parodist.

In the *Deckmyn* case, the parodist's message was alleged to be discriminatory on the basis of “race, colour and ethnic origin”. In its Judgment, the CJEU indicated that national Courts should take into account the “legitimate interest” of the rights holder in ensuring that the parodied work is not associated with a discriminatory message, when striking this “fair balance”.

Ultimately, whether a rights holder will be successful in overcoming the parody exception on the grounds that it conveys a discriminatory message will come down to an objective assessment by the national Court of whether the parody has a discriminatory meaning.

It also seems likely that rights holders can now assert that a parody falls outside the scope of the exception because it conveys a message that falls within any of the grounds of discrimination listed under the Charter (namely: sex, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation).

This judgment is timely given the UK's recent introduction of a new parody exception to implement the provisions of the Information Society Directive. The UK has chosen to frame the parody exception as a new category of fair dealing (although this is not required under the Information Society Directive) on the basis that this would best achieve the underlying policy objectives whilst minimising potential harm to rights holders.

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The CJEU's approach in *Deckmyn* of striking a "fair balance" between the original author and parodist perhaps leaves the door open for the UK courts to combine any fair dealing considerations within the "fair balance" analysis laid down by the CJEU in light of its recent implementation of a parody exception into UK law. If that is the case, it remains to be seen whether further references to the CJEU will be necessary for clarification of other factors that should be weighed in the "fair balance".

1.2. *Digitisation of works by libraries and public archives – Case C-117/13* Technische Universität Darmstadt

The CJEU has ruled on the scope of the copyright exception allowing public libraries and other education institutions to reproduce or make available copyright works for the purpose of their users' research or private study. Digitisation of content can provide a means of preserving the content of tangible materials by putting less strain on fragile originals and can enhance public libraries' ability to promote research and private study.

The CJEU made clear that the exception can be overridden by contractual terms, for instance, in a concluded licensing agreement in respect of the work in question that sets out the conditions in which that establishment may use that work. The fact that the CJEU considered that contractual terms can override the scope of the Art 5(3)(n) exception is note-worthy, given that this is not the position in respect of many of the other exceptions to copyright infringement, where contractual terms that seek to prevent the operation of the exception are deemed null and void.

The CJEU also indicated that the printing and storing of copies of a book by end users is not covered by the Art. 5(3)(n) exception (although they may fall under other exceptions relating to paper copies or copies on any medium provided it was for personal, non-commercial uses where rights holders receive fair compensation for).

2. Patents

2.1. *Preparations for the UPC continue*

There have been further developments in the practical and legal aspects of getting the Unified Patent Court up and running. The UPC Preparatory Committee approved a list of potential candidate judges in July 2014 and has begun notifying those who expressed an interest as to whether they met the criteria. It is as yet unknown when the formal application process will begin or what target date for appointment of judges is planned. A new roadmap published by the UPC Preparatory Committee, which announces the latest timeline, is available on the Preparatory Committee website:

(http://www.unified-patent-court.org/images/documents/roadmap-201409.pdf).

On the legal side, Denmark has notified the Commission that it will bring its separate (but equivalent) jurisdiction legislation into line with the amended Brussels I Regulation (1215/2012 amended by Regulation 542/2014). These amendments are necessary to incorporate the UPC into the existing EU jurisdictional framework. Meanwhile the Federal Ministry of Transport, Innovation and Technology in Austria has indicated that it intends to establish a local division of the UPC, which is likely to be set up in Vienna.

2.2. *The Court allows disclosure despite impact on trial timetable* (Vringo v ZTE *(Unreported, 9 September 2014))*

Vringo Infrastructure Inc ("Vringo") sued ZTE (UK) Limited and ZTE Corporation ("ZTE") in the UK for infringement of six patents relating to mobile phones and telecommunication systems. The trial has been scheduled for October 2014. One of Vringo's claims is for contributory infringement in relation to multimedia handover technology contained within a ZTE mobile handset. On 9 September 2014 the Patents Court (Birss J) allowed Vringo's application for disclosure in the context of this claim.

Vringo asserted that although the ZTE handsets have the patented function switched off, it would be open to ZTE to switch it on later, thereby making the multimedia handover function available to consumers. ZTE denied that its product could be reconfigured to support the function notwithstanding that it is a stated feature within the relevant standard. Vringo sought disclosure to obtain clarity as to how that could be the case.

The disclosure application had been made only 6 weeks before the trial was due to commence and there was an issue as to whether Vringo had properly pleaded its Section 60(2) claim. Ultimately, the Court decided that the contributory infringement claim could be heard separately and the remainder of the action, which includes other infringement claims and ZTE's challenge to the validity of the Patent, should be allowed to proceed as scheduled.

2.3. *Changes to the Patents Rules 2007*

The Patents (Amendment) (No. 2) Rules 2014 came into force on 1 October 2014. The 2014 Rules amend the Patents Rules 2007 in a number of ways. Rules 19(4)(a), 36(1)&(2), 39(2), 44(5)(a) and 93(5) are all affected by the amendments and a new rule 44A is introduced. The changes relate to the expansion of the Patents Opinions Service and payment of renewal fees following restoration of a European patent (UK). For the opinions service, the changes update the Rules to take account of Section 16 of the Intellectual Property Act 2014 which expanded the matters covered by the service. There will also be updates to the Manual of Patent Practice to provide additional guidance.

3. Competition

3.1. *Commissioner Almunia notes challenges to competition in digital*

On 12 September 2014, Joaquín Almunia presented to the 41st Annual Conference on International Antitrust Law and Policy on the challenges facing competition in the EU in the energy and digital industries.

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