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EU update

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ABSTRACT

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This is the regular 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 websites 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. Copyright

1.1.1. European Commission refocuses the Digital Agenda for Europe for 2013–14

The Digital Agenda, launched in May 2010 as part of the Europe 2020 strategy, was built on 101 actions/targets in seven priority areas. Although work continues on these 101 actions/targets, the European Commission has now refocused the Digital Agenda for 2013–14 on the following seven priority areas to better stimulate the digital economy:

- Digital Single Market;
- Interoperability & Standards;
- Trust & Security;
- Fast and ultra-fast Internet access;
- Research and innovation;
- Enhancing digital literacy, skills and inclusion;
- ICT-enabled benefits for EU society.

Further information about each area can be found here: <http://ec.europa.eu/digital-agenda/en/news/digital-do-list-new-digital-priorities-2013-2014>.

1.1.2. New copyright exceptions to be introduced by UK Government

Following the Hargreaves Review of Intellectual Property and Growth in May 2011, the UK Government has published its response to the December 2011 consultation on copyright exceptions and to a new system of official notices to clarify copyright law.

The government aims to bring a number of new provisions into force in October 2013 by means of statutory instruments on areas including the following:

- Private copying;
- Parody, caricature and pastiche;
- Quotation and news reporting;
- Data analytics for non-commercial research;
- Research and private study.

A copy of the Government response can be found at: www.ipso.gov.uk/response-2011-copyright-final.pdf.

1.1.3. Copyright implications of 'linking' and 'framing': preliminary reference sent to CJEU

The question of whether a website operator infringes copyright by providing a link to another website containing the copyright work (also known as hyperlinking), or 'framing' through to that work is unclear.

The legality of linking and framing has been litigated before the US, Canadian, French and Dutch courts. It was also considered by the UK Government during the ongoing passage of the Enterprise and Regulatory Reform Bill, although it decided to await the Supreme Court's decision in *Newspaper Licensing v Meltwater*, which will be heard in February 2013.

The Svea Court of Appeal in Sweden has made a request for a preliminary ruling to the CJEU on a number of key points relating to linking and framing, the answers to which are likely to be of widespread significance and interest to practitioners and industry alike.

The referred questions can be found here: <http://curia.europa.eu/juris/liste.jsf?num=C-466/12> (Case C-466/12 Svensson and Others).

1.2. Trade marks

1.2.1. CJEU rules on the meaning of genuine use in the EU in the context of Article 15(1) of the Community trade mark Regulation (2007/2009/EC)

In trade mark opposition proceedings that challenge registration of a mark on the basis of an earlier Community trade mark (CTM), the opponent may be asked by the applicant to prove that it has put the earlier mark "to genuine use in the Community". A CTM is also vulnerable to revocation on the grounds of lack of genuine use.

The CJEU's ruling in *Leno Merken BV v Hagelkruis Beheer BV*, Case C-149/11 has reiterated that the geographical location of use is only one of the factors that a national court should take into account when assessing whether that use is genuine in the Community. Use only in a single member state will not necessarily prevent there from being genuine use in the Community, however such localized use might not be sufficient even if it accords with principles of determining genuine use for that member state as territorial borders should be disregarded. A CTM is put to genuine use when it is used in accordance with its essential function and for the purpose of maintaining or creating market share within the EU for the goods or services covered by it.

This judgment confirms that it is for national courts (and presumably OHIM) to consider all of the factors relevant to determining if a trade mark genuinely has been used in the Community. If the trade mark has not been used in a way sufficient to satisfy the Community requirements then, the CJEU confirms, it can be converted into a national trade mark (or marks). Even trade mark owners who are using their Community trade marks should, therefore, give additional thought to whether such use will suffice to defend against a non-use attack and take steps to use their marks in accordance with the factors considered important by the courts.

CJEU judgment: <http://curia.europa.eu/juris/liste.jsf?num=C-149/11>.

2. Patents

2.1. Unitary Patents and the Unified Patent Court

For over a decade, the EU has had as one its priorities the creation of a single patent for the EU, together with a pan-European Patent Court for litigating such patents. In their

latest incarnation these have been known as the Unitary Patent and Unified Patent Court (UPC). Progress was for many years glacial, but following a decision in Spring 2011 to allow the process to go ahead without Spain and Italy (who had blocked the dossier due to their concerns over the language regime being proposed) the process has moved forward rapidly. Following major developments in November and December 2012, it now seems inevitable that the EU's ambitions will be fulfilled and the Unitary Patent and UPC will become a reality within two to three years.

The significance for industry of the changes which will follow is considerable. The underlying concept is to create a "Unitary" Patent system for the EU. This means making available a single indivisible patent for the EU, plus a Court in which to litigate them. That Court – the UPC – however, will also deal with conventional European patents. Most important of all is that the UPC will have exclusive jurisdiction over existing European patents. This has been controversial because, in effect, it imposes a retrospective change in the litigation system. It means European patents applied for from the mid-1990s onwards will become subject to the UPC regime. When the system comes into effect – probably in about two years' time – over half a million patents will suddenly be capable of being enforced in a brand new Court with pan-European jurisdiction. Hence industry urgently needs to understand the options newly available to them, and, just as importantly, their commercial rivals. In this update we examine the basics of the regime which is being put in place.

2.1.1. How will the new Unitary Patent system work?

For the immediate future, the ability to apply for a Unitary Patent is of much less significance than the litigation changes. In brief, however, instead of having to obtain a "basket" of patents from the EPO (the European Patent Office) as is presently the case, patentees will be able to designate a much wider geographic area – initially at least 12 states and in due course up to 25, as more of the participating states ratify the agreement setting up the new regime.

The cost for obtaining the Unitary Patent (and more importantly the renewal fees) is yet to be fixed, but is estimated to be equal to the cost of designating five or six countries under the existing EP regime. A major part of the saving will be through reduced translation costs. The long term popularity of the Unitary Patent system will plainly depend on its cost, because many patent owners obtain satisfactory protection by having European patents designating only the major countries such as UK and Germany. The Unitary Patent will never be cheaper than an EP designating just two or three countries, and so for many patentees may never be of interest.

2.1.2. How will the new UPC litigation system work?

As highlighted above, the Court will have jurisdiction over new Unitary Patents *plus* existing European patents because the agreement gives the UPC exclusive jurisdiction. In the case of existing (and new) European patents there are lengthy (though many argue not lengthy enough) transitional and opt out provisions. In brief, the owners of European patents may exclude their patents from the UPC system for at least 7 years, and continue to use the national court systems during that period. In the long run, however, all patents applied for

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