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&  
Security ReviewEU update<sup>☆</sup>

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## A B S T R A C T

## Keywords:

EU law  
Intellectual property  
Information technology law  
Telecommunications law

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. The CJEU sheds light on the concept of 'due cause'

The CJEU has issued its preliminary ruling in the case *Leidseplein Beheer BV and de Vries v Red Bull GmbH and Red Bull Nederland BV* C-65/12 following a reference from The Netherlands' Supreme Court.

The Dutch proceedings were brought by Red Bull alleging infringement of its trade mark RED BULL KRATING-DAENG by Mr de Vries through his use of the sign "The Bulldog" on the packaging of energy drinks. It was common ground that Mr de Vries had used that sign as a trade name for hotel, restaurant and café services involving the sale of drinks since 1975, which was before Red Bull filed its mark.

The question for the CJEU was whether Article 5(2) of the Trade Mark Directive, which provides enhanced protection for trade marks that enjoy a reputation, should be interpreted to mean that there can be 'due cause' where a sign that is identical or similar to a trade mark with a reputation was already being used in good faith by the defendant before that trade mark was filed.

The CJEU held that the proprietor of a mark with a reputation may be obliged to tolerate a third party's use of a sign similar to that mark in relation to an identical product if that sign was being used in good faith before the mark was filed. Factors which national courts must consider in determining whether those conditions are met are: (i) how the sign has been accepted by, and what its reputation is with, the relevant public; (ii) the degree of proximity between the goods and services for which the sign was originally used and the product for which the mark was registered; and (iii) the economic and commercial significance of the use for that product of the sign which is similar to that mark.

The ruling provides useful clarification on the factors to be taken into account in considering 'due cause' when dealing with marks with a reputation, although it remains to be seen how the national court will apply the guidance to the particular factual matrix at issue. It is particularly interesting to note that both the reputation of the sign as well as more objective factors relating to the marketplace are to be considered.

A copy of the CJEU's decision can be found at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=14750>

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<http://dx.doi.org/10.1016/j.clsr.2014.04.001>  
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1&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=546797.

### 1.2. CJEU clarifies whether linking is a communication to the public

In its recent ruling of Svensson (C-466/12) the CJEU considered whether provision of a link constitutes a “communication to the public” for the purposes of copyright infringement.

The CJEU clarified that it is permissible to link to “freely accessible” content without the rights holder’s authorisation. However, where a link circumvents access restrictions put in place by the rights holder, or even just communicates the material to a wider audience than contemplated by the rights holder, this may infringe copyright. This is because the communication is to a “new public”, the ‘public’ which the right holder did not take into account when the work was initially communicated.

As regards framing, the CJEU made clear that there is no distinction to be drawn between linking to freely accessible content and framing it for the purposes of the communication to the public right. In addition, the CJEU stated that framing to freely accessible content is permissible even where done in a manner that gives the impression that the content originates from Website A, when in reality, it comes from Website B.

However, the Court gave no clear guidance on how “freely accessible” should be interpreted. For example, a pay-wall would clearly prevent content from being freely accessible, but it is not clear whether website terms and conditions are relevant when assessing whether content is “freely accessible”, and if so, would linking to content in breach of those terms require the rights holder’s authorisation? In practice terms and conditions are often accessed via a discrete link on the home page. In such a case it is questionable whether those contractual terms are relevant to the interpretation of “freely accessible” content.

The assessment of a ‘new public’ by reference to the rights holder’s idea of the ‘public’ at the time of first communication also suggests that once a link to infringing content has been created, there is potential for the infringing link to be copied and circulated on multiple occasions and each party that circulates an infringing link could be liable. The extent to which knowledge is a requirement for infringement by communication to the public is not clear. Under English law, primary acts of infringement are strict liability offences. However, previous CJEU cases suggest that to some extent, knowledge is a material consideration when considering infringement of the communication to the public right.

Depending on the nature of the content and the link, there may also be a statutory hosting defence potentially available, although site operators would need to respond expeditiously to any take-down notices to retain the benefit of the defence. However, the commercial reality is that most website operators often choose to take a pragmatic view by removing links to infringing content upon receipt of a take-down request.

A copy of the CJEU’s decision can be found at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=147847&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=139751>.

## 2. Patents

### 2.1. Unified Patent Court update – new rules and a new Training Centre

The UPC Preparatory Committee have issued the 16th draft Rules of Procedure (“Rules”) of the Unified Patent Court as of 31 January 2014. There are not a large number of changes to the previous set of draft Rules; however one of particular note relates to injunctions.

Comments submitted on the previous draft Rules expressed an interest by some for including e-bay type provisions in relation to preliminary or final injunctions. What has come out of the comments and consultation is a somewhat more English style of balance of convenience and urgency regime which has been included for preliminary injunctions. Whilst the merits will still be more important, the Court shall have to weigh up the balance of harm to the parties (rule 211.3) and have regard to “any unreasonable delay” (rule 211.4). No eBay type provisions, however, either for preliminary injunctions or final injunctions have been included in the 16th draft.

The next step in the process is to hold a formal public consultation sometime during the Summer of 2014. – See more at: <http://www.bristows.com/articles/16th-draft-upc-rules-the-highlights>

While the Rules are being further progressed, the pre-selection of potential UPC judges from the 1300 applications thus far received is also ongoing. In anticipation of the new judges being selected, there is of course the issue of training to consider.

On 13 March 2014 an inauguration ceremony was held to officially open in Budapest a dedicated Training Centre for the UPC. The Centre will act as the coordinating office for the training of UPC judges. Paul van Beukering, Chairman of the UPC Preparatory Committee, identified judicial training as an absolute priority and essential for the success of the UPC. The EPO is offering its expertise and knowledge from its long experience in training patent specialists, as is OHIM offering its help and noted that it is increasingly working with the EPO training academy on the issue of judicial training.

Apart from training in the UPC Agreement and Rules of Procedure, some legally qualified judges will require training in patent law and litigation and language training. Technically qualified judges will be trained in civil procedure and judicial skills and behaviour. Extensive use of internships and e-learning (particularly for languages) is expected. The need for a uniform approach across all Local and Regional Divisions is recognised, and training will include use of consistent terminology and drafting style. – See more at: <http://www.bristowsupc.com/latest-news/#newsid84>

### 2.2. Court of Appeal stays appeal proceedings pending outcome of applications to EPO for central amendment

In *Samsung v Apple* [2014] EWCA Civ 250, the Court of Appeal granted Samsung’s application to adjourn the hearing of its appeal of the decision that two of its UK (EP) patents were

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