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ABSTRACT

This is the latest edition of Baker & McKenzie's column on developments in EU law relating to IP, IT and telecommunications. This 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.

1. Intellectual property

1.1. *ECJ rules on pog designs*

In *PepsiCo, Inc v Grupo Promer (Case C-281/10 P)*, the European Court of Justice (ECJ) upheld the decision of the General Court of the European Union (General Court) which ruled that, based on the overall impression, Pepsi's contested design was not sufficiently different from the prior design of Grupo Promer. The contested designs in this case were of "pogs," "rappers" or "tazos", which are flat circular shaped plates used for games. The ECJ held that the General Court correctly utilised the concept of the "informed user" in comparing the two designs. According to the ECJ, the informed user should be understood as "referring, not to a user of average attention, but to a particularly observant one, either because of his personal experience or his extensive knowledge of the sector in question".

Judgment: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0281:EN:HTML

2. Copyright and trade marks

2.1. *ECJ rules on the use of foreign satellite decoders*

The European Court of Justice (ECJ) in *Football Association Premier League v QC Leisure (Joined Cases C-403/08 and C-429/08)* has ruled that Member States may not introduce legislation that makes it unlawful to import, sell and use foreign decoding devices that allow access to encrypted satellite broadcasts from another Member State. This rule applies regardless of whether the foreign satellite decoders were procured using false information or their use is in violation of the contractual terms of the seller of the decoding devices. Further, the ECJ held that clauses in a licence agreement that prohibit the supply of decoding boxes outside of the broadcaster's territory constitutes a restriction on competition under Article 101 of the Treaty of the European Union. The ECJ also ruled that the acts of reproduction within the memory of the decoding device do not require the authorisation of the copyright holders.

Judgment: http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?lang=en&num=79888995C19080403&doc=T&ouvert=T&seance=ARRET&where=()

2.2. *ECJ rules on the use of trade marks in keyword advertising*

The European Court of Justice (ECJ) has ruled in *Interflora v Marks & Spencer* that a proprietor of a trade mark can prevent a competitor from using the trade mark as a keyword on an internet referencing service if such use adversely effects the functions of the trade mark (i.e., indicating origin, advertising and investment functions). Furthermore, the ECJ held

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that the trade mark holder can prevent the use of the trade mark as an advertising keyword if it results in free-riding, dilution or tarnishment of the registered mark. However, according to the ECJ, the trade mark can be used as a keyword by competitors to offer "an alternative to the goods or services of the proprietor of that mark", which are not mere imitations.

Judgment: http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?lang=en&num=79889077C19090323&doc=T&ouvert=T&seance=ARRET&where=()

3. Patents

3.1. *European Council presents amendments to the Draft Agreement on a Unified Patent Court*

On 2 September 2011 the European Council presented the proposed amendments to the Draft Agreement on a Unified Patent Court and draft Statute (Draft Agreement). The amendments were made in response to comments by the European Court of Justice (ECJ) and other stakeholders. The amended Draft Agreement clarifies that the Unified Patent Court will be a court common to the Contracting Member States and not an international court. Like any national court, the Unified Patent Court may directly request the ECJ for preliminary rulings in accordance with Article 267 of the Treaty of the European Union. In order to protect the rights of individuals, in cases of infringement of European law by the Unified Patent Court, an appeal may be filed against the Member State involved, which may be held extra-contractually liable.

Revised Draft Agreement: http://register.consilium.europa.eu/pdf/en/11/st13/st13751.en11.pdf

4. Data Protection/privacy

4.1. *Article 29 Data Protection Working Party to issue an opinion on the self-regulatory code on online behavioural advertising*

The Article 29 Data Protection Working Party (Working Party) has announced that it will issue a formal opinion on the self-regulatory code of conduct on Online Behavioural Advertising proposed by IAB Europe and EASA by the end of 2011. The proposed code of conduct grants users the opportunity to object to the collection of their data. Even at this early stage, the Working Party has emphasised that "only statements or actions, not mere silence or inaction, constitute valid consent" to the collection and processing of the personal data of online users. The Working Party wants to make sure that the proposed code of conduct complies with the new cookie requirements as stated in Article 5(3) of the e-Privacy Directive.

Press release: http://ec.europa.eu/justice/data-protection/article-29/press-material/press-release/art29_press_material/20110914_press_release_oba_industry_final_en.pdf

5. Competition

5.1. *European Commission issues proposed amendments to dual-use regulations*

On 7 November 2011 the European Commission issued a proposed Regulation amending Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items. Under the proposed amendments, delegated acts will be introduced in order to update the dual-use regime on a regular basis. The Commission has proposed these amendments in light of the rapid technological progress and the need to update EU regulation on dual-use items "on a regular and timely basis due to their security and trade implications". At present, changes to the dual-use regulation requires going through an ordinary legislative procedure, which is considered not optimal.

Proposal: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0704:FIN:EN:PDF

5.2. *ECJ strikes down ban on internet sales distribution*

In *Pierre Fabre v President de l'Autorite (Case C-439/09)*, the European Court of Justice (ECJ) has ruled that a contractual clause in the selective distribution agreement that bans the sale of cosmetics and personal care products on the internet amounts to a restriction under Article 101(1) of the Treaty of the European Union and is not objectively justified. The ECJ also held that the block exemption provided under Article 2 of Commission Regulation (EC) No 2790/1999 "does not apply to a selective distribution contract which contains a clause prohibiting *de facto*" the products from being sold on the internet.

Judgment: http://curia.europa.eu/juris/document/document.jsf?docid=84226&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&cid=715069

5.3. *ECJ renders judgment in satellite re-broadcasting case*

The European Court of Justice (ECJ) in *Airfield v Belgische Vereniging van Auteurs (Joined Cases C-431/09 and C-432/09)* has ruled that a satellite package provider must secure authorisation from the right holders when it "expands the circle of persons having access to the television programmes and enables a new public to have access to the works and other protected subject-matter". The rule does not apply if the right holders have agreed with the original broadcaster that the content will be re-broadcasted by the satellite provider and the works are accessible to a new public. The ECJ found that the activities of the satellite package provider went beyond mere provision of physical facilities.

Judgment: http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=Submit&numaff=C-432/09