

NEWSLETTER

Mewburn Ellis's Review of Recent Developments in European IP Law

Issue 1 August 1999

Welcome to Mewsletter - the first edition of Mewburn Ellis's new newsletter. We include items of Intellectual Property news that we hope will interest and be of value to you, as well as a few items about Mewburn Ellis and our people. If you have any comments on Mewsletter, or suggestions about any topics that you would like addressed in future issues, please let us know and we will do our best to incorporate them. We also produce information sheets on many subjects relating to Intellectual Property - see back page for a list, or find them on our website at www.mewburn.com.

"STRAW MAN" Opponents at the EPO

There may be occasions when you wish to oppose a European patent anonymously, by using a third party to file the opposition on your behalf. Is it allowable for someone to file an opposition at the European Patent Office in their own name when they are in fact acting on behalf of another party? In Europe, an opponent who files an opposition in their own name on behalf of another party is called a "Straw Man".

The relevant Article of the European Patent Convention (EPC) says that "any person" can file an opposition, but it has been argued in the past that "Straw Man" opponents should not be allowed, because the patent proprietor has a right to know who the "true" opponent is.

In 1997, this question on the admissibility of oppositions filed by "Straw Men" was referred to the EPO's Enlarged Board of Appeal (EBA) by two separate Technical Boards of Appeal. Mewburn Ellis represented one of the parties.

The EBA gave their answer earlier this year, concluding that:

"An opposition is not inadmissible purely because the person named as the opponent according to Rule 55(a) EPC is acting on

behalf of a third party."

That is to say, an opposition filed by a "Straw Man" is in principle acceptable. However, the Board went on to say that :

"Such an opposition is, however, inadmissible if the involvement of the opponent is to be regarded as circumventing the law by abuse of process."

One example of "circumvention of the law" given by the Board is for the patent proprietor to oppose his or her own patent using a "Straw Man"; an earlier EBA decision banned such self-opposition.

So, if there is a desire to hide the identity of the "true" opponent from the official record, a "Straw Man" can be used. However, this is an option to be exercised with caution because it will be open to challenge on the basis that it amounts to a "circumvention of the law", the result of a successful challenge being termination of the opposition proceedings. Also, the "Straw Man" is the person who, at least from the EPO's point of view, has the authority to control the opposition proceedings, including the authority to withdraw the opposition.

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Computer-Related Inventions: rapidly changing European Law

The Technical Board of Appeal of the EPO has made two important new decisions in the field of computer-related inventions which bring European law into line with the US *Beauregarde* case: T935/97 and T1173/97. Both cases arose from patent applications by IBM, and the two decisions were very similar.

Article 52 of the EPC states that a patent cannot be granted for a "computer program as such". The Board held that an invention is not a "computer program as such" whenever it has a "technical character" (which cannot just be that it causes electrical currents in standard computer hardware). "Consequently, a patent may be granted [whenever] a piece of software manages by means of a computer, an industrial process or the working of a piece of machinery [and] in every case when a program ... is the only means, or one of the necessary means, of obtaining a technical

effect." An invention can be patentable even "when the basic idea underlying the invention resides in the computer program itself".

They said that, to be patentable, the technical effect of an invention **need not be new**. In other words, an invention has, or does not have, a technical character irrespective of which elements of the invention are new compared to the prior art.

Furthermore, the Board held that if a computer program invention has a technical character, then claims to "a computer program product" which stores the program are also allowable. In other words, under the EPC, a computer-related invention which can be claimed as a method (or programmed computer) can also be validly claimed as a "computer program product", which covers a recording medium (e.g. a disk) storing the program. This brings European law into line with the US *Beauregarde* case. In fact, "computer program product" may also cover software downloadable from the Web.

In both decisions, the Board took into consideration the TRIPS agreement, since although TRIPS does not directly affect the EPO it "gives a clear indication of common trends". TRIPS states that "patents shall be available for any inventions, in all fields of technology".

The UK Patent Office has announced that it will follow the EPO decision and from now on allow "computer program product" claims. This applies when an invention has a "technical character", i.e. when the invention can also be validly claimed as a method (or as a programmed computer). However, the UK Patent Office is usually still stricter than the EPO in deciding when an invention has "technical character".

The President of the EPO and the European Commission have both proposed amending Article 52 of the EPC to bring it explicitly into line with TRIPS, including deleting the reference to "computer programs as such".

Legal Challenge to the EU Biotech Directive

By a majority vote in the Council of Ministers, the European Union finally passed Directive 98/44 on the legal protection of biotechnological inventions last year. This followed more than ten years of discussion. Member states have until 30 July 2000 to implement its provisions.

Late in 1998, the Netherlands (which voted against the Directive) launched a legal challenge at the European Court of Justice against the Directive and recently Italy (one of two countries which abstained) has joined in this challenge.

The main bases of the Dutch challenge are that proper procedures were not followed in passing the Directive; that the Directive is incompatible with TRIPS, the Biodiversity Treaty and the European Patent Convention; and that it disregards human rights.

The EU Biotech Directive at the EPO

The EPO have decided to implement the EU Biotech Directive by introducing four new Rules; 23b, 23c, 23d and 23e. This approach is more straightforward than amending the Articles of the European Patent Convention itself.

The new Rules have been published in the Official Journal of the EPO no. 7/1999 and will enter into force on 1st September 1999. The EPO Journal is available on the EPO website www.european-patent-office.org.

Visit our website at www.mewburn.com for more information about Mewburn Ellis and our services.

Proposed Changes to the EPC

1. The Community Patent: The European Commission intends to publish this year a draft Regulation setting up a Community Patent, that is a single patent covering the whole European Union. Consequential amendments of the EPC will be needed so that both patent systems can co-exist.

2. Translations: It has long been felt that the legal requirement to translate a European patent after grant is too expensive for the patentee. Possible changes to this requirement are being discussed. At the moment, the favourite alternative to translating the entire text is to produce an enhanced abstract, which will then be translated into the languages of the designated states. The patent claims will also be translated into those languages. The patentee will only have to translate the full specification when he or she intends to bring an action against a third party.

3. Priority: The TRIPS agreement (which was part of the GATT agreement) forces member states to grant certain reciprocal priority rights. There are proposals to amend the EPC to bring its priority regulations into line with the TRIPS agreement.

(Non)-infringement by Clinical Trials

In **Japan** it has been held (*Ono vs Kyoto* – Supreme Court) that a patent is not infringed by making and testing a patented product (a drug) for the purposes of obtaining the necessary regulatory approval so that it can be marketed immediately following expiry of the patent. The rationale was that, since it takes time to obtain the necessary regulatory approval, to prevent this activity during the life of the patent would effectively extend the term of the patent protection.

In **France** there is a court of

appeal decision that phase III clinical trials for market authorisation do not constitute infringement.

In the **UK** there is the *Monsanto vs Stauffer* decision which allowed experiments to find out something unknown about a patented product, but not to demonstrate (e.g. to a regulatory authority) that the product would work as claimed.

In **Germany** there are two decisions, popularly known as *Clinical Trials I and II*, which held that experiments can (and indeed normally do) have a commercial as well as a technical objective, and do not infringe so long as the experiments achieve technical progress, and are not directed solely to commercial ends. The German courts seemed to think that they were in line with the UK Monsanto decision, but this should be treated with caution.

In the **Netherlands** there are three cases, *Pharbita and Medicopharma vs ICI, Smithkline vs Generics* and *Kirin-Amgen vs Boehringer Mannheim*, of which the first two at least emphasise that Dutch law refers to the experiments being *solely* for the purpose of research of the patented object; so that there would be infringement if there is a commercial objective. The *Smithkline* case, in particular, contrasts with the Japanese case, in that the court specifically recognised the fact that it would take a competitor some time after the expiry of the patent to obtain market authorisation, and went so far as to grant a 14 month injunction against the defendant who had already done the preparatory work during the life of the patent. Nevertheless, the *Kirin-Amgen* decision held that research into a second medical indication for the drug could be allowed, even though it obviously had commercial potential, and was obviously carried out for that purpose.

Pleadings before EPO Boards of Appeal

According to decisions of the EPO Enlarged Board of Appeal (G09/91 and G10/91) fresh grounds for opposition shall normally only be considered in **appeal** proceedings with **the approval** of the patentee. However, if the claims have been amended, new objections relating to the amendments can be considered. In such cases, the Board should remit the case back to the opposition division. Moreover, it seems from T1066/92 that, after such remission, the opposition division is free to consider new objections even against claims which have remained **unamended**.

In T105/94 an objection of insufficiency had been pleaded (by a cross in the relevant box), but not substantiated by an opponent. It was held that the principles of G10/91 applied and it was not possible to substantiate this ground for the first time on appeal. On the other hand, when a particular document has been cited under Art 54(3) EPC, but with no explanation as to why the subject matter of the patent lacked novelty, a substantiation of the ground of lack of novelty was allowed during the appeal proceedings.

This leaves several outstanding questions, including:

In a case when there have been no amendments, but the Board of Appeal is faced with a new ground of opposition, can they remit the case back to the opposition division?

Also, can grounds for opposition which have been submitted by one opponent only and then taken up by a different opponent as the sole appellant be examined by the Board of Appeal without the patentees' consent (T758/90)?

Long Live International Exhaustion?

It is well established that when goods are placed on the marketplace within the European Union by a Trade Mark proprietor or with their consent, the rights in the Trade Mark are exhausted. In the well publicised *Silhouette* decision of the European Court of Justice it was held that this rule does not apply to the placing of products on the marketplace outside the European Economic Area (EEA), and that the subsequent importation of such goods into the EEA is therefore an infringement of the Trade Mark rights in the EEA.

In a recent decision of the UK Court, *Davidoff vs AG Imports*, some doubt was cast over the extent of the rule laid down in *Silhouette*. The defendant imported genuine Davidoff goods into the EEA, having purchased them in the Far East. The plaintiff sought summary judgement on the basis that these "grey imports" infringed their EEA Trade Mark rights.

On the basis of *Silhouette*, it might have been thought that the defendants were in an indefensible position. However, they argued that in the absence of explicit restrictions on the resale of goods, the plaintiff's consent to sale in the EEA should be implied. In effect they were saying that international exhaustion of Trade Mark rights should apply unless expressly excluded. The Judge decided that the *Silhouette* decision did not totally preclude the possibility of international exhaustion and that the defendants therefore had an arguable case. Consequently, the application for summary judgement failed, and the case will proceed towards a full trial.

It will be interesting to see how this area of the law develops, particularly since there are also political pressures to free up the market for "grey goods".

An Update on the Community Trade Mark

The **Community Trade Mark** (CTM) system is now well established, and many of our clients have already taken the opportunity to seek coverage for the whole of the EU in a single, very cost-effective registration.

CTMs are not examined on the basis of earlier applications/registrations. It is therefore important for all trade mark owners to police accepted CTMs when they are published in the CTM Bulletin. If the owner of a prior right in the EU wishes to prevent registration of a conflicting mark, they must file an opposition within the inextensible three month opposition period. We offer a variety of **watching services**, which check for published applications/registrations, and are happy to discuss these with you.

US businesses have been quick to see the advantages of the CTM system, and have filed more applications than any other single country. Australian, Canadian, New Zealand and South African trade mark owners have been more cautious. Perhaps trade mark owners in these and other countries should look at the CTM system with renewed interest now that it has been running successfully for over three years. Most of the teething problems, which resulted from an avalanche of filings when OHIM first opened for business, have now been overcome.

One great advantage of the CTM system is the possibility of claiming "seniority" from existing registrations in EU countries of identical marks for the same goods or services. The effect of claiming seniority is that the CTM benefits from the earlier rights in the existing registrations, even if the earlier registrations are allowed to lapse. So, a CTM can in effect be substituted for a family of existing national registrations.

For trade mark owners with individual registrations in several EU countries, this provides substantial long-term savings.

At Mewburn Ellis, we have several hundred CTMs on our books. We are well placed to handle **oppositions** for our clients, including of course oppositions filed against others: "offensive oppositions" rather than "defensive oppositions". We now have considerable experience, and fee earners regularly pool that experience.

A few statistics, provided by the OHIM for the period 1st April 1996 to 31st May 1999:

Applications filed:	Over	117,000
Applications published:	Approx.	70,500
Percentage opposed:		17.5%
Registrations:	Over	38,500
Appeals:	Under	500

Did you know?

Margaret Dixon, whose father George Ellis founded Mewburn Ellis with John Clayton Mewburn, was the first woman to practise as a UK patent agent.

Designs News

The European Union Design Directive

The European Union Designs Directive, which was first proposed in 1993, was adopted at the end of last year. The Directive, which must be enacted by all member states of the Union by October 2001, aims to harmonise the law on registered design protection.

A compromise between the European Parliament and the European Commission was reached in order for the directive to proceed – the subject of the compromise was the controversial “spare-parts” clause, which would have allowed car spare part manufacturers to copy visible spare parts on payment of a fair and reasonable remuneration to the original manufacturer. The solution was to allow countries to retain their existing laws on this point, and review the whole issue in five years time.

The changes to UK Registered Design law will include:

- ◇ the registration of the design of an article or part of an article will be allowed
- ◇ prior art will no longer be restricted to disclosures in the UK only. There will instead be an absolute novelty law, although with an exclusion for more obscure disclosures
- ◇ a new requirement for registration of “individual character” will be introduced
- ◇ a 12 month grace period will be introduced for the designer’s own disclosures

The UK government is currently drafting a proposal for the implementation of the Directive, and this will provide more clues as to how UK law will change in the near future.

The Death of the Novelty Search

The UK Designs Registry are no longer carrying out searches through previously registered designs to look for similar designs which may affect the validity of an application. This change is likely to have a minimal effect on the processing of cases by the Designs Registry, since in the past very few cases were objected to because of their similarity to earlier designs.

Information about UK Registered Designs, including a database of the actual registrations, is available on the UK Patent Office website (www.patent.gov.uk).

We can still organise searches of Registered Designs for you; please ask your regular Mewburn Ellis contact for details.

Case Review

No Copyright in Electronic Circuit Diagrams in the UK?

Formerly, UK case law (the *Anacon* case, 1994) held that a circuit diagram is a “literary work”, and so is entitled to copyright protection. However, a UK court has now decided (*Mackie Designs Inc. vs Behringer*) that circuit diagrams created after 1 August 1989 (when UK copyright law was amended) fall into the new category of “design documents”. This means that copyright in such a circuit diagram is not infringed by building a circuit board to the design.

Instead, designers can use short duration “design right” to prevent others making circuit boards to their design. However, design right is only available to designs which originate in certain countries - not including Japan and the USA. In *Mackie Designs Inc.*, the software was written by US employees of a US company, so there was no design right. The US company therefore had no rights which could be used to stop the copying of their circuits. This highlights the increased need to consider patent protection for circuits.

EPO oppositions and UK national revocation proceedings - Buehler vs Chronos

The UK Court of Appeal observed that the UK court can revoke an EP(UK) patent on the same grounds that had been raised in opposition at the EPO. Conclusions in the opposition are not binding on the parties in national revocation proceedings.

Substantiation of opposition T522/94

This EPO decision related to an alleged disclosure of an invention before the priority date. According to the decision, the notice of opposition must indicate “when”, “what” and under what circumstances, in particular “to whom” the alleged disclosure was made. This decision is important in cases when prior oral disclosure, prior use or the precise date of publication of a document is at issue.

Priority claim – T77/97

In this case at the EPO, priority was denied for two dependent claims directed to two individual compounds. The priority application contained a claim defined in terms of a generic formula which covered precisely four compounds (those two and two others), but did not separately list the four compounds.

The lesson, therefore, would seem to be to use the generic formula for the claims, but to list compounds specifically in the specification as much as possible, certainly in the area which is likely to be most important commercially, even if this greatly increases the length of the specification. This was (and possibly still is) commonly done in traditional pharmaceutical patents. This decision emphasises the potential importance for this seemingly tedious and wasteful practice, regardless of how small the group covered by the generic formula.

Supplementary Protection Certificates

The proprietor of a European patent, or of a national patent in a member state of the European Union, or in certain other countries may be able to extend the term of the patent by means of a Supplementary Protection Certificate (SPC) if the patent is in the field of medicinal/veterinary or plant protection products.

The aim is to "compensate" the patent owner for some "lost" patent protection caused by the length of time taken to obtain marketing authorisation for the product in question. An SPC is a national right available by application to the national patent office of each state for which a certificate is desired. The SPC must be based on a patent but since an SPC is only granted in respect of a specific active ingredient in a product, it is generally rather more limited in scope than the patent on which it is based.

The aim of an SPC is to restore 15 years of effective patent life between grant of the first marketing authorisation in the EEA for the product to which the patent relates and expiry of the SPC. The term of the SPC runs from patent expiry and is equal to the shorter of:

- (a) five years;
- (b) the period which elapsed between the filing of the patent application and grant of the first EEA

marketing authorisation less five years.

Under European legislation, SPCs are currently available in the following EEA states:

Austria	Italy
Belgium	Luxembourg
Denmark	Netherlands
Finland	Norway
France	Portugal
Germany	Spain
Greece	Sweden
Iceland	United Kingdom
Ireland	

SPCs may also be obtained in Switzerland (including Liechtenstein) and Cyprus under the national laws of those countries.

Patent Protection in Hong Kong

It is now two years since Hong Kong introduced their new patent law. At the time the law changed, many of you will have received a copy of our briefing sheet explaining the new procedure.

This is a reminder that there is now a two-step procedure for seeking patent protection in Hong Kong based on a UK patent application, an EP patent application designating the UK, or a PCT application designating the UK directly or via the EPO (the "parent" application). The first step is recordal of the published parent application and the second step

is an application for grant in Hong Kong, following grant of the parent application. There are strict deadlines by which these steps must be completed.

The deadline for Step 1 is:

For UK or EP(UK) - six months after publication of the parent application.
For PCT - six months after re-publication of the parent application by the UK Patent Office or the EPO, following entry to the National/Regional phase.

The deadline for Step 2 is:

For all cases - six months after grant of the parent application.

Incidentally, patent protection in Hong Kong can also be based on a Chinese patent application or a PCT application designating China, using the same two-stage procedure.

Official fees at the European Patent Office

From 1 July 1999, European search fees and international search fees charged by the EPO have been reduced.

Also, all 19 EPC contracting states can now be designated by paying only seven designation fees.

New Partner for Mewburn Ellis

We are very pleased to announce that on 1st August **Roger Grimshaw**, a Trade Marks specialist, became a partner in the firm. Roger has worked for Mewburn Ellis since 1988, having previously worked as an examiner at the Trade Mark Registry, and has extensive experience in all areas of Trade Mark law and practice.

Training

Our commitment to training within the firm remains strong, and in the last year three of our associates, **Stephen Carter**, **Jo Cripps** and **Tim Watkin** have qualified as European Patent Attorneys and a further two, **Chris Dennison** and **Robert Watson**, passed their UK qualifying exams. Chris did particularly well, being one of a handful of candidates nationwide passing all four papers in the UK Finals Examination in a single sitting. We also continue to invest in the future, having taken on four new trainees in the last year.

Year 2000

Mewburn Ellis are working to ensure that all our systems are Year 2000 compliant. Our computerised patent and trade mark records and diary systems, and accounting systems, have been analysed and revised as needed, and are fully Year 2000 conforming. All our other systems, too, are Year 2000 conforming, and all testing on them is planned to be completed by the end of September 1999, using British Standard Institution DISC PD2000- 1 A Definition of Year 2000 Conformity Requirements as our guideline.

The Death of John Ellis, CBE, former Senior Partner of Mewburn Ellis

With the death of John Ellis the profession of Patent Agency has lost an internationally admired and respected figure.

John Clifford Holgate Ellis was born in 1913 into a family of patent agents. His father, George Beloe Ellis, had taken the very first qualifying examination of the Chartered Institute of Patent Agents in 1888, and his uncle, cousins and sister also practised. Educated at Winchester and Trinity College, Cambridge, where he read Chemistry, he entered the family firm of Mewburn Ellis in 1935 and qualified both as a patent agent and as a solicitor in 1938.

He had a distinguished wartime army career, serving in the Royal Signals in India and Burma, attending Staff College Quetta and rising to the rank of Major. He was Mentioned in Despatches.

He was in the forefront of the activity in connection with the Strasbourg Unification Convention, and was deeply involved in the

drafting of the European Patent Convention and of the Community Patent Convention. John Ellis was invited to be a member of the British Government's delegations to the Diplomatic Conference in Munich and in Luxembourg which put the finishing touches to these momentous arrangements.

In 1976 he led a small team from the Chartered Institute invited to advise on the wording on the UK Patents Bill 1976, which became the Patents Acts 1977.

He was recognised in Europe, too. When the European Patent Office was set up in Munich, he was appointed *in personam* to its Standing Advisory Committee. In 1978 he became a member of the Administrative Council of CEIPI (Centre for International Industrial Property Studies), University of Strasbourg, which has since become a major source of training of Industrial Property practitioners and especially of European Patent Attorneys of many nationalities.

John Ellis was a man of the utmost

integrity both professionally and personally and was regarded by many abroad as an exemplar of that vanishing species, the English Gentleman. Typical of him was his reaction, when very senior, to complaints from new entrants that the British qualifying examination was too difficult. He re-sat it anonymously and passed triumphantly.

He had a piercing intellect, and an astonishing accuracy of expression whether in speech or in writing; this may have contributed to an apparent slight aloofness of manner and a lack of small-talk, but underneath were great loyalties to partners and colleagues and a profound generosity.

His father had introduced him to mountain-walking; this remained his main recreation until he was cruelly afflicted by a stroke some four years ago.

He married in 1943 Jessie Orr, who died in 1997. Their son and daughter survive him.

Information Sheets Produced By Mewburn Ellis

- ◇ European Community Trade Mark (CTM)
- ◇ European Community Trade Mark (CTM) Opposition Proceedings
- ◇ European Patent Applications - Grant Procedure
- ◇ Protection for Designs
- ◇ Trade Marks - the Internet and Domain Names
- ◇ Trade Marks: Madrid Protocol
- ◇ What is a European Patent?
- ◇ What is a Patent?
- ◇ What is a PCT Application?
- ◇ Hong Kong - Notice to our Clients
- ◇ Intellectual Property Portfolio Management
- ◇ Introduction to Licensing Intellectual Property
- ◇ Joint Applicants or Co-owners of Intellectual Property
- ◇ Merging Irish Trade Mark registrations
- ◇ Merging UK Trade Mark Registrations
- ◇ Mewburn Ellis and the Euro Patents in European (EU) Countries - Supplementary Protection Certificates (SPC's)
- ◇ Patents: Inventorship and Ownership
- ◇ Patent Watching Searches
- ◇ Recording Changes of Proprietor
- ◇ Trade Marks: Madrid Protocol - International Registrations - Procedure after Registration by WIPO
- ◇ UK Patents - Licences of Right
- ◇ UK Stamp Duty on Documents Executed after 16 March 1999

- ◇ USA Patent Applications - The Importance of Keeping Notebooks to Prove a Date of Invention in the USA

Our information sheets are regularly updated to reflect changes in Intellectual Property law, and the list is frequently extended in response to our clients' needs. Many of the sheets, together with other information about Mewburn Ellis, can be found on our website at www.mewburn.com.

EPO Holiday Dates

The European Patent Office (EPO) holiday dates for the remainder of 1999 are:

- 15th August (Assumption Day)
- 1st November (All Saints' Day)
- 24th December (Christmas Eve)
- 31st December (New Year's Eve)

OHIM Holiday Dates

The Office for Harmonisation in the Internal Market (Trade Marks and Designs) - (OHIM) - holiday dates for the remainder of 1999 are:

- 12th October (Spain's National Holiday)
- 1st November (All Saints' Day)
- 31st December (New Year's Eve)

Website Addresses

UK Patent Office:
www.patent.gov.uk

EPO:
www.european-patent-office.org
World Intellectual Property Organisation (WIPO):
www.wipo.org

Mewburn Ellis:
www.mewburn.com

Community Trade Mark (CTM) Countries

Austria	Italy
Belgium	Luxembourg
Denmark	Netherlands
Finland	Portugal
France	Spain
Germany	Sweden
Greece	United Kingdom
Ireland	

European Patent Convention (EPC) Contracting States

Austria	Liechtenstein
Belgium	Luxembourg
Cyprus	Monaco
Denmark	Netherlands
Finland	Portugal
France	Spain
Germany	Sweden
Greece	Switzerland
Ireland	United Kingdom
Italy	

EPC Extension Countries

Albania	Macedonia
Latvia	Romania
Lithuania	Slovenia

The information in this newsletter is simplified and must not be taken as a definitive statement of the law or practice. If you would like any more information, please ask your usual Mewburn Ellis contact, or e-mail us at: newsletter@mewburn.com.