



IP, IT and E-Commerce Bulletin

Country focus: Israel

The intellectual property environment in Israel has made great strides in recent years and is currently in the process of updating and improving its IP laws, agencies and law enforcement. Israel has adopted and implemented the Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement and is expected shortly to become a member of the Madrid Protocol for trade marks. In addition a new copyright law is in preparation which is expected to deal with the technological advancements currently not directly protected under Israeli Law. The Information Technology and Biotech industries in Israel are particularly innovative and many international companies are taking a very keen interest in them, meaning Israel is becoming a key country for IP collaboration and acquisition.

Copyright - Contributory Infringement

The Israeli courts are holding a wider range of parties liable for copyright infringement, as recently achieved by the Jerusalem District Court by invoking the doctrine of "Contributory Infringement". In this case, the political parties in Jerusalem's Hebrew University were selling photocopies of books to students at subsidized rates to attract votes. A publisher claimed copyright infringement against both the local Labour Party leader (as main infringer) and against the Labour Party and the University (as contributory parties). The court found both contributory parties responsible for the infringement since the University allowed the infringer to use their facilities and the Labour Party financed them. Furthermore, they did not stop the infringements although they could have done so easily. This is one of the first classic copyright cases to implement this doctrine although it has also been implemented in patent and defamation cases in the past.

Patent - business methods

In September last year, the Israeli Registrar of Patents adopted a position closer to European than U.S. policy, when it decided that a method for doing business which does not involve any technological aspect is not patentable. An inventor had filed a patent application describing a mechanism in which sales were promoted with coupons. The application was rejected as it described a "method of promoting the sales of goods and/or services". However, there are cases where a "business method" may be admitted as a Patent; for example, where it is part of a hardware and software system.

Privacy and freedom of expression on the internet

The Jerusalem Magistrates Court has created a mechanism to force Internet Service Providers to reveal the details of anonymous internet users who publish defamation online, thereby making it easier for those offended to file claims. The court had to balance the opposing principles of freedom of speech and the right to defend one's reputation and decided that a user's identity must only be revealed where there was a high likelihood that a defamation had taken place.

Domain names - fighting cybersquatting

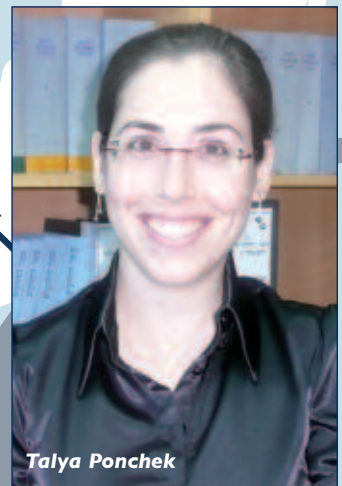
The Israel Internet Association (ISOC-IL) has implemented the Internet Corporation for Assigned Names' Uniform Domain Name Dispute Resolution Policy regarding the acquisition of a domain name identical to a well known trade mark by a cybersquatter. The ISOC-IL concluded in a recent case concerning the trade mark "ACER" that the domain name owner had registered the "ACER" domain name without any rights or legitimate interest in it. She had therefore acted in bad faith and contrary to the UDRP. She had also acted in bad faith by trying to sell the domain name to the ACER for 13,000 USD and an ACER computer.

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Suggestive trade marks

Companies are finding it increasingly difficult to unearth trade marks which are attractive, memorable and novel and which also fulfil the legal requirement of distinctiveness for registration. This issue is especially relevant within the cosmetics sector, where suggestive trade marks which evoke the qualities of a product for a consumer, without being descriptive, are becoming common.

Owners of these trade marks often become victims of their own success as once the trade marks are registered and successfully exploited, competitors start using them in connection with their own products, and defend such use by stating that the trade mark serves to describe their product's characteristics and therefore cannot be monopolized by any company. Competitors will then have the cheek to assert that the registered trade mark must accordingly be declared null and void.

This phenomenon becomes increasingly complex with the Community Trade Mark ("CTM"), because the meaning of a trade mark must be analyzed from the perspective of consumer audiences across the whole EU in order to decide whether it has distinctive character and a clear meaning. A word which is descriptive in, for example, Greece, may mean nothing at all in France.

Spanish and EU case law on this matter is wide-ranging, but one particularly interesting Judgement is that passed by the Territorial Court of Barcelona, regarding the distinctiveness of the CTM "nutricare" for cosmetic products and, specifically, hair lotions.

The owners of the *nutricare* CTM mark sued a cosmetic company for the use of this trade mark on its hairdressing products. The cosmetic



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company counterclaimed by demanding the nullity of the *nutricare* CTM, alleging a lack of distinctive character as it is a description of the product's characteristics. It claimed that *nutricare* is a neologism derived from joining two terms, easily perceptible as "nutrition" and "care".

The Barcelona courts dismissed the counterclaim and held that *nutricare* was distinctive, because it suggests, without describing, the product's qualities. The term "care" makes clear reference in English to the action of caring. But "nutri" by itself has no meaning in any European language, even if it is the root of many European words deriving from the Latin word "nutrire", and implies a meaning related to nourish. And so, the term "*nutricare*" is merely suggestive, informing the average consumer "indirectly" and requiring them to make an imaginative effort to get the intended message. By contrast, a descriptive denomination informs consumers directly and unequivocally about the characteristics of a product.

All this implies that suggestive trade marks should remain enormously attractive to consumers (who remember them easily) and to businesses (who can use them to distinguish source and suggest qualities with a single word). However, note that the case has yet to be ruled on by the Spanish Supreme Court, so there could still be a final twist in this tale.

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Interim measures in Italian IP code

The Industrial Property Code, the new Italian legislation regulating IP, came into force in March 2005. It contains some very important changes, particularly concerning interim measures and other kinds of sanctions available to protect intellectual property rights.

Before the Code, certain interim measures and sanctions were only available to protect limited types of intellectual property rights, such as trade marks and domain names. Now they are also available to protect unregistered distinctive signs, geographical indications, origin names and industrial secrets, all of which have now been re-classified so as to be included within the area of IP rights. These will now constitute a majority of the protectable rights. For example, the legal remedy of "description" (article 128) has been extended to this group of rights so as to afford them better protection. The remedy includes



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the right to acquire evidence relating to the counterfeiting entity. This new approach should guarantee that claimants can obtain evidence of counterfeiting directly from the people involved in the illegal activity and should prove particularly helpful for claimants seeking to quantify the amount of any damages claimed.

But the most important measure to protect owners of IP is probably the one known as the "inhibitory" measure, recently enacted by regulations in March 2006 (n. 140). This allows the claimant to obtain the withdrawal of the production, marketing and use of the object upon which the illegal activity is based.

Another important point to note relating to interim measures, is the establishment of new rules to deal with cases where a domain name has been registered in breach of the right of another person's trade mark or distinctive name. Transfers can now be arranged to the legitimate rights holder, either by way of a "sentence" (article 118, comma 6) or "the assignation of a precautionary measure" (article 133). Nonetheless, under the New Code, a claimant can only access these measures by depositing the requisite monies in court.

One potential downside of the new legislation is that the extensions of rights referred to above could reduce the number of applications to register factual distinctive signs as trade marks. However, this is made less likely by the fact that registered and factual signs are still not considered similar. It therefore may not be possible to extend the whole protective regime applicable to trade marks to factual signs in every event.

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Liability of operators of internet auction sites

With the problem of trade mark and product piracy growing, the facilitators of counterfeiting are getting more and more into the focus of IP enforcement. Landlord liability, liability of carriers and freight forwarders and, last but not least, liability of internet auction sites are being heavily discussed these days. This has resulted in a number of law suites filed, in particular, against the internet platform of ebay.

After its decision on March 11, 2004, on April 19, 2007 the German Federal Supreme Court has again decided on the liability of ebay and internet auction sites in general. The complaint was filed by the manufacturer of "Rolex" watches who claimed that a large number of counterfeits were offered on "ebay.de". While the district court and the Court of Appeal had rejected the complaint, with its decision, the German Federal Supreme Court referred to Art. 11 s. 3 of the Directive (EC) 2004/48, so called Enforcement Directive and decided that internet auction sites could be held liable if three prerequisites are met:

- (i) The ebay member offering the counterfeit product must have acted in the course of trade
- (ii) The trade mark infringement must have been obvious
- (iii) The trade mark owner must have informed the owner of the internet auction site of the infringement.

Then, the owner of the internet auction site must not only immediately stop the specific offer that he was informed about but, more importantly, take suitable measures to prevent future infringements of the respective kind. Even though, it is not obliged to implement measures that endanger the business concept as such (for example, reviewing each and every offer before publishing it on the internet) it must use any technically possible and reasonable measure to prevent the specific counterfeits from being offered on its site at all.



Magnus Hirsch

The Federal Supreme Court indicates that ebay has to use suitable software to filter counterfeits for example by searching for certain terms such as "counterfeit", "replica" etc. As most of the offers do not use such terms, it seems doubtful that such software will in fact work.

Whether the situation will substantially improve in the future remains to be seen but the decision certainly gives hope and an opportunity to the IP owners combating counterfeiting.

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Can a web page be submitted as evidence?

Following an initial ruling in the Italian High Court (n. 2912/2004) which held that a web page could not be produced as documentary evidence in a civil action in Italy, Italian doctrine and case law are currently setting objective criteria to assess whether and when web pages might be considered acceptable documentary evidence in court.

To be admissible in evidence, it has been identified that the web page must be produced as a certified copy extracted from the original which is (or was at the relevant time) available on the internet. Obviously, this poses a practical problem. However, there is also the issue of compliance with the Digital Administration Act Rules (Law Decree n. 82/2005) which provide that the use of a digital document as documentary evidence has to be evaluated taking in consideration the objective characteristic of its QUALITY, SAFETY and AUTHENTICITY.

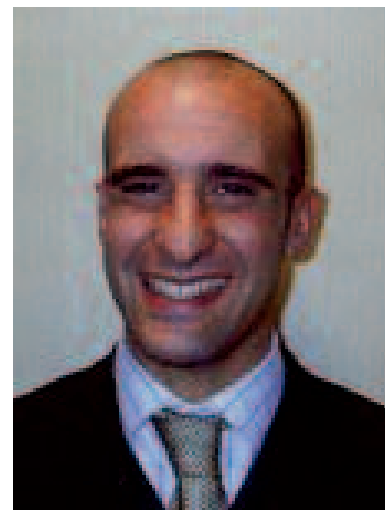
It is difficult to ascertain these characteristics within a web page which will from its nature contain several multimedia and hypertext documents that are not easy to duplicate. The requirement would apply to a web page duplicate (with a unique content and unrepeatable) rather than a web page copy (that is a document representing exactly a document's content, i.e. a photocopy).

So the question is to establish which elements must be included within a web page for it to be used in evidence.

A useful tool is available via digital signature. The public notary, who has to certify a web page for use in evidence by the court, must use a digital support (cd or dvd) and, for this reason, he has to be able to make his certification in a digital format.

Other elements required to be able to use a web page copy will be:

- (i) The judge must be able to "see" the web page: to do this he has to use the pc key



Niccolò Lasorsa

"saved as a full web page"

- (ii) To save the multimedia contents of a web page (video, photos, etc.) that cannot be saved in a local document, use a screenshot program or better still, a screen recording program could be utilised
- (iii) The public notary has to specify in his certification every digital instrument utilized for copying the web page (the software, browser, etc.)
- (iv) The public notary will have to specify in the certification the real IP address.

Finally the public notary will have to save all the files in a folder, compress the content (with a zip or tar program) and sign everything with the digital signature to create a link between the document's content and the certification.

This type of problem seems to be more of a technical issue than a legal matter. However, considering the fact that in the modern era, a large percentage of economic transactions are carried out via the internet, the legal world must have an understanding of this media and how it can be used within the legal system.

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Trésor leaves court smelling of roses but creates a stink

The Dutch Supreme Court has reached an intriguing decision concerning the fresh scent of white roses and lilies-of-the-valley, strengthened by iris, apricot flower and heliotrope with a background of amber, sandalwood and musk. On 16 June 2006 it held that this scent, from the perfume Trésor by Lancôme, was protected by copyright and that the scent of Kecofa's perfume, "Female Treasure", amounted to an infringing reproduction. And so, a scent can now be protected as a 'copyright work' under the Dutch Copyright Act.

This decision has been hailed by some as creating a revolution in Dutch copyright law and will inevitably lead to practitioners wondering if taste and touch are also now eligible for protection. The Dutch Copyright Act currently only expressly refers to works that can be perceived by the senses of sight or hearing; it doesn't mention works related to smell, taste or touch. However, the possibility of copyright protection of works related to these senses has never been expressly dismissed and indeed, maybe the window was already open as in previous proceedings, when copyright protection was sought for liquorice and chocolates a judge claimed that he was in principle receptive to the idea of copyright on taste. However, in both cases, protection was rejected because certain other relevant criteria were not met so the issue was never resolved.

Many writers have commented critically on the decision of the Supreme Court as interpreting how the existing statutory provisions should apply to tastes or scents could prove complicated. This could lead to uncertainties surrounding any attempts by clients to establish infringement. The question of what amounts to disclosure could cause problems, for example and the issue of multiplication could also prove difficult as a judge can't establish beyond dispute with his own nose or mouth if something smells or tastes the same as something else. Expert opinions will inevitably



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be needed, but even these will not offer complete legal certainty.

In any event, the Dutch have taken a large and brave independent step away from the rest of Europe with this decision, bucking the current trend towards harmonization which is spreading across the other EU countries. Both England and France generally reject copyright protection on scent. The European Commission likes unity and may well now issue a new directive decisively to deal with the current disparities. If the Commission follows the lead of the Dutch Supreme Court, this copyright revolution will spread to the rest of Europe. But if it rejects copyright protection on scent, Holland will have to put its recent judgment aside.

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Internet company ordered to pay damages for spam

Spamming is the sending of unsolicited e-mails and it accounts for more than three quarters of all e-mails received in Europe. Commentary from the European Commission states that Britain is the fourth most prolific sender of spam following US, China and Russia.

A recent case in Scotland involving an England based internet company highlights the risks in embarking upon unsolicited e-mail marketing campaigns.

Gordon Dick of Edinburgh sued Transcom Internet Services Ltd (Transcom) for sending him an unsolicited e-mail. Mr Dick told Edinburgh Sheriff Court that his e-mail address had been harvested by Transcom from a database which legitimately held his details. He sued for £750, the maximum amount allowed in a Sheriff Court, and unusually for such a court (which is akin to a small claims' court in England and Wales) the Judge lifted the normal £75 limit on legal costs and Transcom was ordered to pay over £600 in costs.

The message sent out by the court is clear, that they will use their power to deter businesses from using spam as a marketing technique. Whilst the level of damages in this case may be relatively low, the next case may not be restricted by small claims' court restrictions. Furthermore, as spamming is done in bulk, the e-mail Mr Dick received was sent to 72,000 people, so potential damages should be multiplied by the number of unauthorised e-mails sent. If Mr Dick has his way his new website,

containing a step by step guide on taking such actions, will encourage many others to do likewise.

The Privacy and Electronic Communications (EC Directive) Regulations 2003 (Regulations) prohibits the sending of unsolicited e-mails for the purposes of direct marketing unless the recipient of the e-mail previously consented to such marketing communication. Marketing e-mails may be sent in compliance with the Regulations provided that:

- The recipient's e-mail details were obtained in the course of the sale or negotiations for the sale of your product or service to that recipient
- The marketing is in respect of the same or similar goods or services to those bought by the recipient from you
- The recipient is given a simple means of refusing the use of his e-mail address with each communication.

This exception is sometimes known as the 'soft opt-in'. If you wish to send unsolicited e-mails that do not fit the criteria of the soft opt-in you must obtain the explicit consent of the recipient of your e-mail, for example by the recipient positively ticking a box to agree to the receipt of such unsolicited marketing communications.

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2012 and all that

How does legislation protecting Olympic intellectual property affect you?

In anticipation of what is likely to be the greatest British commercial bean feast of all time, the Government have taken steps to prevent anyone suggesting directly or indirectly any association with the 2012 London Olympics unless they have actually signed on the dotted line. This is going to have huge legal repercussions for advertisers and marketers alike and may well result in a plethora of legal actions.

The brands of the official sponsors of the London 2012 Olympics are now protected by statutory right. Anyone (who is not an official sponsor) seeking to associate their business with the Olympics or who wants to refer to the Olympics in the course of their business needs to be aware of it as well as the existing legislation protecting the use of the Olympic symbol and motto.

The LOAR

The new right is called the London Olympic Association Right ("LOAR") and has been created by the London Olympic Games and Paralympics Games Act 2006 ("the New Olympic Act"). The LOAR is owned by the London Organising Committee of the Olympic Games.

Infringement of the LOAR

It is an infringement of the LOAR if:

- In the course of trade
- A person uses in relation to goods or services
- Any representation (of any kind i.e. written, spoken or made in any other way)
- In a manner likely to suggest to the public that there is an association between the London Olympics and the goods or services.

There is no requirement that members of the public are likely to be confused by the association between the goods and the organisers of the Olympics. The word "association" is interpreted widely. However, it does exclude statements which accord with honest practices and do not make promotional use of a protected word (i.e. statements used in a context in which the Olympic Games are substantially irrelevant).

The New Olympic Act sets out the combinations of expressions that a court may take into account in deciding whether there has been an infringement of LOAR. The use of two or more expressions from Group 1 (TABLE A) may infringe, as may the use of one or more expressions from Group 1 and one or more expressions from Group 2 (TABLE A).

TABLE A

Group 1	Group 2
Games	Gold
Two thousand and Twelve	Silver
2012	Bronze
Twenty twelve	London
	Medals
	Sponsor
	Summer

Defences

There are a small number of defences, including:

- Use of a registered trade mark in relation to goods or services for which it is registered
- Publishing or broadcasting an event forming part of the Games or information about the London Olympics
- Incidental inclusion in literary, dramatic or artistic work or a sound recording, film or broadcast
- Consent by the London Organising Committee to the circulation of goods in the EEA
- Use of a representation necessary to indicate the intended purpose of goods or services.

Remedies for infringement of the LOAR are the same as for any intellectual property action i.e. damages or an account of profits, a permanent injunction and delivery up.

The Olympic Association Right

In addition, the New Olympic Act has also widened the scope of the Olympic Association Right which has been in existence since 1995.

The right protects:

- The Olympic five-ring symbol
- The Olympic motto ("*citius, altius, fortius*" meaning swifter, higher, stronger)
- Certain variations of the word Olympic such as Olympiad and Olympian.

It is an infringement of the Olympic Association Right to use in the course of trade without authority:

- One of these marks
- A representation that is so similar to one of these marks as to create in the mind of the public an association with the mark
- A word so similar to a protected word as to be likely to create in the public mind an association with the Olympic Games or the Olympic movement.

The definition of the word "association" is the same as for the LOAR.

Implications of the legislation

These two rights are very broad. The LOAR may well catch seemingly innocent statements or activities such as a sign outside a pub saying "Watch the London Games here this summer", a

cafe advertising "Special Olympic breakfasts available all summer during the Games" or a shop selling confectionary decorated with the Olympic symbol.

The London Organising Committee have made it clear that protection of the Olympic brand (through official sponsors) is key and therefore one would imagine that their primary objective would be to ensure that, in their eyes, the Olympic brand itself and sponsors' investment in the brand is not undermined. Accordingly, care must be taken by all trading entities and individuals (regardless of size and profile) before making any reference to, or associating their business with, the Olympic Games or otherwise fall foul of the legislation.

It will be interesting to see how the London Organising Committee chooses to police and enforce these broad rights. The Government has stated that it hopes the legislation will be applied with common sense. Only time will tell.

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TO OUR READERS

This Bulletin is intended to introduce and explain on a regular basis areas of European, North and South American Intellectual Property, IT and E-Commerce law of general interest to all of our clients. It is jointly written and produced by PLG's IP, IT and E-Commerce International Network which includes legal practitioners in several PLG firms and their contacts worldwide. We always welcome comments and questions on any matters raised in our Bulletin. Further information is available on all topics but nothing in the PLG IP, IT and E-Commerce Bulletin is to be regarded as a definitive statement of the law or as specific legal advice. Reliance should only be placed on specific advice obtained directly from the relevant practitioners after consideration of all relevant facts and circumstances. Readers are requested to direct their enquiries to the author of the relevant article.

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