

The Intellectual Property Centre Of Excellence Student Law Reports



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WIPO Moves Closer to New Treaty on Broadcaster's Rights

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Webcasting has been an area of massive growth in recent years. It is the transmission of television and radio, amongst other things, across the internet. Currently there is little protection for broadcasters who chose this method of communication, as all definitions of broadcasting refer specifically to the transmission by wireless means. The rights of broadcasters are governed by the Rome Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organisations 1961 ('the Convention') and the WIPO Performances and Phonograms Treaty ('WPPT').

On the 24th of November 2005 member states of the World Intellectual Property Organisation (WIPO) met to update the Intellectual Property rights surrounding broadcasting companies in the digital age. This was the thirteenth meeting of the Standing Committee on Copyright and Related Rights (SCCR) and the first since the General Assembly's decision in October to accelerate discussions on this matter. The hope is to hold a General Assembly in autumn 2006 with a view to a treaty being signed in early 2007. The SCCR has recognized the need to update the treaties governing this area of law, citing the increase in digital signal piracy in growing countries, since it's formation in 1998. The treaty is designed to confer rights identical to the WPPT on broadcasters, with an optional extension to webcasters, including rights to distribution, fixation and protective measures to combat piracy.

Two years ago the SCCR produced a 'Consolidated Text for a Treaty on the Protection of Broadcasting Organisations', prepared from documents presented by many of the member states. This has since been revised and updated, but remains the basis for discussions. While it has received praise from many quarters it is not without perceived flaws. Some of the greatest opposition to the treaty has been in relation to the Articles 16 and 17, the 'Technological Protection Measures' ('TPM').

Article 16

'Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by broadcasting organizations in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their broadcasts, that are not authorized or are prohibited by the broadcasting organizations concerned or permitted by law.'

Article 17

'Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any

right covered by this Treaty:

to remove or alter any electronic rights management information without authority;

to distribute or import for distribution fixations of broadcasts, to retransmit or communicate to the public broadcasts, or to transmit or make available to the public fixed broadcasts, without authority, knowing that electronic rights management information has been without authority removed from or altered in the broadcast or the signal prior to broadcast.

As used in this Article, "rights management information" means information which identifies the broadcasting organization, the broadcast, the owner of any right in the broadcast, or information about the terms and conditions of use of the broadcast, and any numbers or codes that represent such information, when any of these items of information is attached to or associated with 1) the broadcast or the signal prior to broadcast, 2) the retransmission, 3) transmission following fixation of the broadcast, 4) the making available of a fixed broadcast, or 5) a copy of a fixed broadcast being distributed to the public.'

Member's of the Electronic Frontier Foundation passed comment on these measures at the twelfth meeting of the SCCR. Three points were raised. Firstly the WPPT's provisions in this area have been largely ineffective for preventing the piracy of major movie releases, so how much more effective can we expect identical provisions, interpreted in the same manner, to be for broadcaster's rights. Indeed almost every major TV series or movie can be found on peer-to-peer networks around the world. While Governments are doing their best to shut down such blatant breaches of the WPPT the success is a best mixed. Secondly the EFF suggested that these measures would be bad for both innovation and competition, citing the failed US broadcasting flag, as it requires broadcast receivers to act in a specific way and therefore a ban on all other equipment. Without other varieties and variations of transmitters being permitted, who's to say what opportunities we could be missing, not to mention the monopoly that would be granted to the patent holder of any required equipment. Finally it was suggested that the rights were being given for the wrong reason and therefore in an inappropriate way. The rights granted are reproductions of monopoly rights granted by the WPPT and apparently serve only to give equality between different classes of rights. The EFF recommended that the SCCR examine if there is a better basis for the rights. Three further points were raised relating to webcaster's rights, though there is too little space for a discussion in this article. Information as to where these can be found is presented below.

It remains to be seen just what the final treaty will look like, though it appears certain one will appear. It is likely that the EFF's concerns as to the level of protection granted by such a non-specific provision as Article 16, given the lack of success of the similar WPPT provision, will give little comfort to broadcasters. Further, the likely outcome for webcasters is a treaty that would only apply to them should a country opt in. While fresh law is certainly required in this area the question remains, is this the right law? The full report on the thirteenth meeting is not yet available, but it will be very interesting to see if the questions raised by the EFF were taken on board.

For copies of the second draft consolidated treaty, see:

http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=44069

For other information on the meetings of the SCCR, see:

<http://www.wipo.int>

For a concise version of the EFF's statement to the twelfth meeting, see:

<http://cyber.law.harvard.edu/netdialogue/discussion/?p=27>

Idiots Guide To Intellectual Property, Part II

Copyright is the right of an author to claim ownership and exclusive rights over a work he or she has produced. The rights are governed by the Copyrights, Designs and Patents Act 1988 ('CDPA'). There are two stages to deciding whether copyright subsists in a work. The first is to determine whether the work is capable of being the subject of a copyright, the second to decide if the work qualifies.

Works capable of being copyrighted are set out in s1(1) CDPA. These include:

- (a) *original literary, dramatic, musical or artistic works,*
- (b) *sound recordings, films or broadcasts, and*
- (c) *the typographical arrangement of published editions.*

Once it has been determined that the work is capable of being copyrighted it must be shown that the work has been "**fixed**". This means that the work must take on some material form (e.g. a book for literary work). Copyright is not the protection of an idea, but the protection of an author's work and therefore it must be certain what the work consists of. This also acts as evidence that the work actually exists and gives the date when the work came into existence. As the different classes of work can be fixed in many ways, the fixation rules within the CDPA vary according to class.

A key part of any copyright is that the work is original (*s1(1) CDPA*). Except for databases there is no definition of originality within the Act. The standard is surprisingly low and set by **Walter v Lane [1900]** (A.C. 539) where Lord Davey stated that the requirement was not for original skill by the author, but that he did not "*avail himself of another's skill*".

Finally the work must qualify for protection either by the author being a national of or the work must have been first published in one any country to which the CDPA applies. The exception is if the country in question honours English copyright then the courts of England will recognize the copyrights of that country.

Copyright subsists in a work for the lifetime of the author, plus fifty or seventy years, dependant on media.

Patent Protection: Resolving Disputes

Intellectual Property rights need to be protected and enforced in order to allow money to be made from them. Holders of IP rights may face disputes relating to the ownership or validity of patents and/or have to take action to stop someone else infringing their patent.

It is estimated that High Court litigation to enforce an IP right can cost around £500,000 and disputes relating to patents are often the most expensive. This makes it very difficult for small and medium sized companies to protect their patents and whilst insurance is available to cover the cost of litigation, this too can be very costly.

In October 2005 the Patent Office launched new opinions service in an effort to help UK businesses avoid expensive litigation. Anybody can request an opinion relating to issues such as novelty or the infringement of patents. The Patent Office intend to deliver opinions within 12 weeks of the request being made.

The Patent Office Opinion Service is believed to be the first of its kind in the world.

Whilst opinions will not be binding, a Patent Office Spokesperson indicated that they would nonetheless provide a quick and informative answer to patent queries. It is hoped that these opinions will encourage parties in dispute to negotiate to avoid litigation.

The intellectual property insurance industry has indicated that it may consider opinions from the Patent Office amongst the factors they evaluate when assessing the risk attached to the insurance of IP rights. However a 'wait and see' attitude will probably be adopted by the industry, so clients intending to insure their IP rights should not expect premiums to fall immediately!

Practitioners present at the meeting were interested by the opinion service, but questioned whether it might be better to provide a binding arbitration opinion instead.

Sources

www.patent.gov.uk

Ian Lewis from Miller Insurance and Peter Hayward from the Patent Office speaking at BPP Law School on 24 November 2005.

Useful websites:

The home of UK intellectual property law, Government run:

<http://www.intellectual-property.gov.uk/>

The intellectual property institute of the UK:

<http://www.ip-institute.org.uk/>

Weird and Wonderful Inventions

BEGINNER DRILL 3

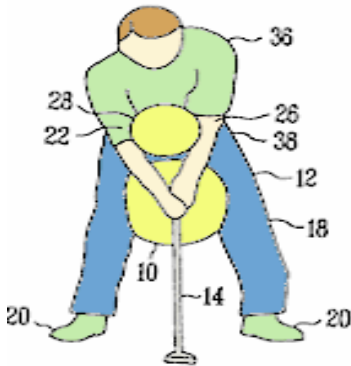


FIG. 16

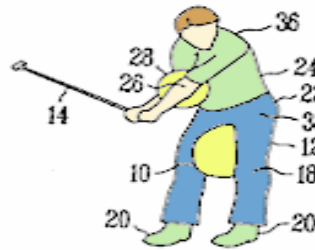


FIG. 17

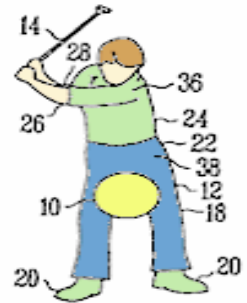


FIG. 18

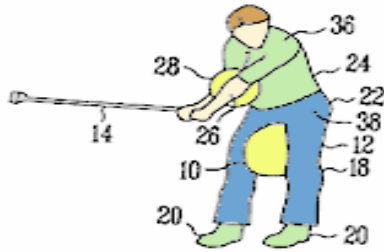


FIG. 19

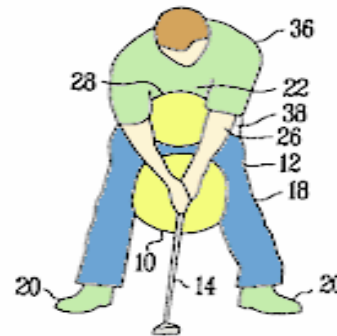


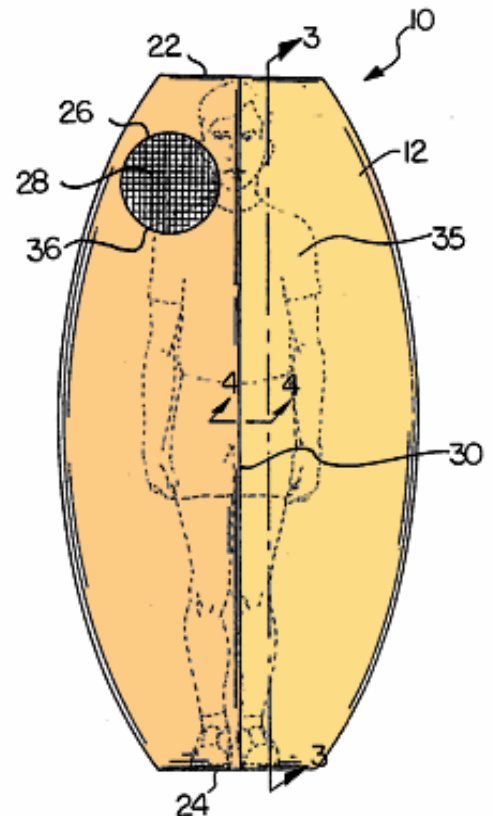
FIG. 20

Yes that's right, someone actually invented these contraptions. This week we feature the amazing "Big Balls" (patented in the USA in 1998). Apparently they help your golf swing! To quote the inventor:

"Pliable body spacers ... are placed between a limb and another body surface to restrict movement of said limb, wherein specific muscle groups are stretched and trained while imitating swing motion to induce muscle memory."

I think it must be said that surely if you have the time and willingness to go to these lengths just to improve your swing, then maybe lessons would be helpful? Even better, this is only half the picture, the next stage has smaller balls for under the armpits!

**Can guess what the invention to the right is?
Answer next month!**



Important Cases in I. P.

Gillette Group Finland Oy v LA Laboratories Ltd Oy (Case C-228/03) ECJ

The claim centred on the advertising of razor blade handles in Finland. The alleged trademark breach occurred because a sticker was attached to the boxes of LA Laboratories' Parason Flexor razors. It stated that the handles of the razors were compatible with both the blades of Gillette Sensor and Parason Flexor. Gillette at the time was the holder of the Finnish trademarks for both "Gillette" and "Sensor" and so applied for injunctions to prevent their use.

The claim focused on the interpretation of Article 6(1) of the **Trade Marks Directive (Directive 89/104/EEC)**:

- 1) *The trade mark shall not entitle the proprietor to prohibit a third party from using, in the course of trade,*
- c) *the trade mark where it is necessary to indicate the intended purpose of a product or service, in particular as accessories or spare parts; provided he uses them in accordance with honest practices in industrial or commercial matters.*

The relevant points were whether the use of the trademarks "Gillette" and "Sensor" were necessary to indicate the intended purpose of the product and if it was relevant, whether their use was in accordance with honest practices in industry.

In considering the point as to whether the use of the trademarks was necessary to indicate the intended purpose, the ECJ referred to its earlier decision of **BMW (Case C-63/97 [1999] ECR I-905)**. There it was held that if the purpose was to provide the public with "comprehensive and complete" information and that there was no other way of communicating this information, it was necessary.

As to whether the use was honest in accordance with normal industry practice the court produced a non-exhaustive list of examples of dishonest conduct, including: the implication of a connection with the trade mark owner, the affect of reducing the value or goodwill of the mark, or to imitate or replicate the branded product.

It is clear from the decision that the interpretation of Article 6(1) is reliant on the public's perception of the trademark's use. If the use of the trademark was not essential to the public's understanding of the compatibility of the two products, no defence would be available. Likewise, if the use of the trademark created a commercial link in the public's perception between the holder and defendant, or the defendant was using the trademark to align itself with just the market leader, when it was in fact compatible with a larger proportion of the market, its use would be dishonest and therefore a breach of the trademark.

Statute and other case law

Halliburton Energy Services Inc v Smith International (North Sea) Ltd and another [2005] EWHC 1623 (Pat)

In the UK, software which shows a technological effect, and has the capability of being applied in industry, will be treated as patentable subject matter.

Nichols plc v Registrar of Trademarks [2004] C-404/02 ECJ

The ECJ held that common surnames may indicate the origin of goods and services and so is not devoid of distinctive character, as previously held. Therefore the UK Trade Mark Registry has amended its practice in relation to surnames.