

ITMA review

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Christmas lunch in pictures

Money laundering – ITMA
recommended policy

DVD version of the
ROMARIN database

The curious case of the
chocolate mouse and the
spilled milk mark

Unregistered marks: being well
known in your home town is
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Enercon appeal gets blown away by CFI

Mikrolab fails to score with registration

Sunplus appeal goes down in flames



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PUBLIC RELATIONS

PUBLIC RELATIONS

Drifters win ruling against 'legendary' band member

Media Watch

In the run-up to Christmas there were several stories about dangerous goods and the flood of counterfeits on the market. The UK-IPO obtained plenty of regional coverage for their press releases announcing the IP Crime Report List 2007, estimating the IP crime market to be worth around £1.3 billion per year. The report highlighted the increasing use of the internet by criminals. One of the nine recommendations in the report is the establishment by UK-IPO of a secure website for law enforcement agencies and industry bodies to share intelligence. Let's just hope that any new measures prove more secure than those in HMRC and DVLA, to name but two government departments/agencies with a less than spotless record in that regard.

In what otherwise was a quiet period for trade mark stories, I picked up on one that has echoes of an earlier story I wrote about in this column concerning the group The Drifters. The latest story appeared in *The Stage* newspaper, which reported that Abdul Duke Fakir, one of the founding members of The Four Tops, successfully brought an action against Viscount Oliver Miller who used photographs of The Four Tops to publicise his own band despite never having been part of the soul group. In the High Court ruling, Judge Nicholas Warren declared Miller's registered trade mark VISCOUNT OLIVER'S LEGENDARY FOUR TOPS was no longer valid. For the soul fans and quiz-meisters amongst you, the original line-up was Abdul Duke Fakir,

together with Levi Stubbs, Renaldo Obie and Lawrence Payton.

Design Week Awards

The 2008 Design Week Awards take place on 4 March at the London Hilton, Park Lane. We are sponsoring the Identity Programmes category for the second year running, having previously sponsored the Own-Brand Packaging category. As part of our sponsorship deal we have several adverts appearing on the awards website and will be running further adverts in the print edition of *Design Week* to coincide with the awards ceremony and our own launch of the revised ITMA website. On the issue of the revised ITMA website, we have taken rather longer than anticipated, but rather than rush into launching a new website with loads of flaws, we thought it better to wait until most gremlins have been removed. Watch this space and, indeed the front page of the existing website, for details of launch day.

Careers

On 16 January we shall again be exhibiting at the Kings College Law Fair. This is usually very well attended and it is always interesting to see how students approach these events. Some turn up as if they've been partying all night - which they may well have been doing, while others present themselves as if they were facing a real interview; well turned out and enthusiastic. Guess which ones we focus on!

The same criteria apply to the College of Law's Beyond the Bar event though in a slightly different way.

Last year we had enquiries from many genuinely interested students; then there was a handful that were clearly there only to cock a snook at their colleagues who didn't want to enter the Bar. These exuded an air of arrogance that may stand them well on the Bench but would simply grate in a client's office! Again, not too difficult to see which ones we paid more attention to!

Business advice open days

The 2008 round of exhibitions kicks off with a two day event linked to the Spring Fair at the NEC on 6 and 7 February. The programme for 2008 takes in East London, Docklands (15 March), Aberdeen (8 April), Leicester (23 April), Llandudno (30 April), Northampton (15 May), Reading (12 June), The Lake District (1 – 3 July), Bradford (10 July), Twickenham (18 September), Exeter (16 October), Cardiff (6 November), Walsall (13 November), and finally Belfast (19 November).

News from the UK-IPO

The 2007 round of the IP Awareness Seminars concluded with two seminars at Harmsworth House on 10 December. Thanks go to Tom Farrand for making the ITMA presentation. 2008 begins in Edinburgh on 22 January and events are planned around the UK throughout the year. UK-IPO has lists of volunteers, but if anyone wants to add their names to the list please let Emma Brenton on 01633 814708 (or events@ipo.gov.uk) know.

Some of the groundwork for these seminars is being used for an IP Masters course providing training for business advisers that UK-IPO is holding in early January. Both ITMA and CIPA are making significant inputs to this course.

From the UK-IPO website, the deadline for applications for the Chair of the Strategic Advisory Board for IP (SABIP) is 21 January. This part-time appointment pays £20,000 for an estimated 20 days work, so if anyone wants a "nice little earner" in retirement, this seems a good opportunity.

Ken Storey, PR Manager,
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ITMA/QM Advanced Trade Mark Law and Practice Course – a student's perspective

I attended the two-year course during 2006 and 2007 as a way of both preparing myself for the advanced level ITMA examinations and to further my knowledge to aid my day-to-day work.

The course involved attending a one-day session each month over two years. Having sat the examinations in November 2007, I believe the course did provide a very good basis for these. Lectures in the morning provided a foundation of the law required to practice as a trade mark attorney. Important case law and statutes were discussed along with practical issues.

Lectures from representatives of both the UK-IPO and OHIM provided useful advice on procedural matters and gave a better understanding of matters such as oppositions and hearings. The lectures covered a wide range of subjects and thus exposed students to subjects they may not otherwise get much experience of in practice.

The tutorials in the afternoon provided an excellent basis for developing an understanding of the examination questions; how to tackle them, what the questions are actually asking and what is required

as a response. Generally, students would have an hour to complete a question in exam conditions. These would then be discussed in a tutorial. Exam questions can be tricky at the best of times and these sessions helped ensure that we knew what to expect.

The discussions that ensued helped explain the rationale and thinking behind the questions and also helped prepare us for tackling queries in the office. It can certainly be very useful to bounce ideas off your peers and the environment allowed all of us to feel confident in putting our thoughts and ideas forward.

The tutors led the way and ensured that the ideas developed in the right direction. All in all, very useful for both the exams and day-to-day problem solving in the office.

At the end of the two years, mock advanced examinations are held. These are sat in exam conditions and then marked and returned to the student in a tutorial. The mocks provide an excellent way to judge your progress and prepare you for the exams. Fingers crossed for April...

Charlotte Duly,
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New online application form TM3

A new trade marks online application form TM3 will be launched in April 2008 and will replace the current form. The design will be very different (it will follow the step-by-step format currently being used on the on-line

form TM6) and takes into account feedback received from customers. Further information will be available soon, but if you wish to discuss this in the meantime, please call John Hamilton-Jones on +44(0)1633 811198.

Money laundering – ITMA recommended policy

What is needed when and why

The procedures described below are intended to apply to all new clients who appoint XXX as their intellectual property advisors after the date of the implementation of this policy. This policy is being introduced to allow the staff to comply with the money laundering legislation and regulations and the Proceeds of Crime Act and to minimise, so far as is possible, the risk of any member or employee falling foul of such legislation.

Depending on the type of client involved there will be different requirements. These are set out below.

It should be appreciated, however, that the procedures in this document are not intended to cover every situation. In the event that any employee is concerned about any aspect of a client's conduct which they think contravenes or might contravene the money laundering regulations and or the Proceeds of Crime Act then they should act appropriately and inform the compliance officer without delay.

All new clients covered by these procedures should be identified in accordance with the procedures. Once the identification process has been undertaken for a particular client, it does not have to be repeated for new matters for the same client.

Copies of documents taken as evidence of identity of a client should be retained centrally.

If, in the responsible partner's considered opinion, there is no reason to be suspicious, then professional work can be undertaken for a new client before the identification process is complete. However, no further professional work should be carried out for a client if the relevant identification

procedures have not been completed satisfactorily within one month. No letters of engagement are to be sent to a new client until the checks under the money laundering policy have been carried out and completed satisfactorily.

Identification procedures must be carried out in respect of the actual client if different from the payer.

UK individuals

Appropriate identification documents for individuals include a passport or driving licence with a photograph, correspondence showing the individual's name and home address. The documents produced need to be originals.

In those circumstances where the individual does not have a photographic identification document then two forms of documentation should be obtained, both containing the individual's name and home address.

Such documents include;

- a) utility bills
- b) credit card statements
- c) bank or building society statements
- d) HM Customs and Inland Revenue or other central or local government correspondence
- e) benefit or pension books
- f) rent books or mortgage statements.

The copy documents should be retained.

UK companies

The company needs to be identified. This should be a straightforward matter of looking online at Companies House. The web page should be printed out and retained.

The individuals from whom you are accepting instructions should be

identified. For those individuals the information required should be as set out above under UK individuals. In addition you should satisfy yourself that the individual is authorised to act on behalf of the company. If the person is not an executive director or officer of the company (eg, company secretary), then you should ask for proof of his authority to act, for example a board minute to that effect.

Ideally initial correspondence from the client should be on the company headed notepaper. In the event that the individual claims to be a director or company secretary then a company search report should be obtained to confirm that statement.

If necessary the fee earner should send a standard letter to the individual for them to sign and return.

Overseas direct clients

For overseas direct clients you should obtain, where necessary, the same information about a direct overseas client as we would for a direct UK company or individual as the case may be. In the case of overseas companies, the relevant information should be accessible through national stock exchanges, state registers or Dun & Bradstreet. In case of difficulty, or to avoid spending too much time on the matter, the prospective client can be asked to provide such information.

Clients of lawyers, patent and trade mark attorneys

Where instructions are received from overseas patent attorneys or lawyers with whom we have no relationship, checks should be made to determine, for example, whether the firm or members of the firm of lawyers or patent attorneys are registered on the appropriate register, eg, in the US on the relevant state bar register, or are registered on that country's register of patent attorneys or lawyers.

If it is impossible to obtain this information then checks could include obtaining information about the firm from their website.

General points

The procedures set out above are intended to apply only to new clients

who are acquired by XXX subsequent to the introduction of these procedures.

These procedures are not intended to apply to existing clients unless a fee earner is aware of circumstances which raise suspicions of money laundering.

These procedures are not intended to apply to companies which are listed on a recognised stock exchange in the United Kingdom or the United States. This is because it is deemed that the regulatory authorities running those stock exchanges will have already carried out the appropriate checks.

These procedures will not apply to new clients introduced through those firms of solicitors or attorneys with whom XXX already has a relationship at the time of the introduction of these procedures.

These procedures are not intended to apply to clients of UK and EU law firms or patent and trade mark attorneys because they will be deemed to have carried out the appropriate checks themselves. However, please note that the fee earner should get the institutions, law firm or patent or trade mark attorney to confirm that they have carried out the appropriate checks. The Money Laundering provisions are part of EC directives.

Non-exhaustive list of activities which might constitute money laundering or infringe the Proceeds of Crime Act:

- 1) A client may ask for an invoice to be amended to show that an alternative business or individual pay the fees.
- 2) A client may ask for intellectual property rights to be transferred from one business to another or from a business to an individual.
- 3) A UK-based business instructing you, but making payments from a foreign jurisdiction.
- 4) Overpayment of invoices, eg, money paid in advance for some work, for which instructions are then cancelled and the money is refunded.
- 5) Request for refunds to persons or businesses other than those who originally paid for the work.
- 6) Being asked to create intellectual

property licences, where significant sums of money are being paid in royalties, to be used to transfer money abroad or within the UK.

- 7) The criminal provisions of trade mark infringement and copyright infringement are all activities which can fall under the money laundering regulations and Proceeds of Crime legislation.
- 8) If you pay the consideration for an assignment of intellectual property and then charge the client; that can constitute money laundering.
- 9) Undertaking work for a client whom you suspect has evaded tax constitutes money laundering.

Actions to be taken

In the event that anyone suspects a client of undertaking activities which might expose a member and or an



employee to investigation under the money laundering regulations and the Proceeds of Crime Act then that individual should:

- a) not advise the client of their concerns (notifying the client is an offence); and
- b) immediately advise, in writing, the designated compliance officer.

In the event that an employee suspects that a client is engaging in criminal activity, as defined in the Trade Marks Act 1994 or the Copyright, Patents and Designs Act 1988, then that individual should immediately decline to act for the client and advise the senior partner and the designated compliance officer.

Compliance officer

Staff must pass their concerns about any client activity that might be in breach of the money laundering regulations and the Proceeds of Crime Act to the compliance officer. The compliance officer will ensure that appropriate notifications are made to the appropriate authorities about any client activity that the compliance officer feels might be considered to fall foul of the money laundering regulations and or Proceeds of Crime Act. In the compliance officer's absence for more than a week, then the senior partner should be advised.

The compliance officer or his deputy, in the event that they consider that the notification from the fee earner indicates or might indicate breach of the money laundering regulations and/or the Proceeds of Crime Act must immediately notify the SOCA (Serious Organised Crime Agency) in writing requesting a response within forty eight hours.

At the same time the compliance officer must advise the fee earner not to carry out any work for that client whilst the checks are being carried out. The compliance officer must emphasise to the fee earner that the fee earner cannot under any circumstances advise or notify the client that they have been reported to the SOCA for suspected money laundering or breach of the Proceeds of Crime Act. In the event that the client queries the delay the fee earner should be instructed to advise the

client that the delay is due solely to the need to carry out necessary checks to comply with the money laundering regulations and the Proceeds of Crime Act.

Actions to be taken when dealing with a new UK client

- 1) The client needs to be identified.
- 2) In the event the client is a UK individual then a photographic identification document, such as a passport, should be requested failing which two forms of documentation, eg, utility bills containing the individual's name and home address should be obtained.
- 3) In the event that the client is a partnership or a limited company, then the individual instructing you should be asked for proof of their authority to act, for example a board minute to that effect. The initial correspondence from the client in these circumstances, should be on the company headed notepaper. If the individual claims to be a director or company secretary, then a company search report should be obtained to confirm that statement. In addition the same requirements, in relation to the individual representing the partnership or limited company, will be required as if the client was a UK individual, set out in 2) above.
- 4) Copies of documents should be retained dated and put on the client's file.
- 5) No work should be carried out for any new client until such time as these procedures have been completed.
- 6) These actions are in addition to any financial checks that would be carried out in the normal course of events.
- 7) These procedures are to be taken in respect of any new UK direct client whether an individual, partnership or company. The only exceptions would be where the company is a public limited company listed on the Stock Exchange when the procedures need not be carried out.
- 8) Clients of UK and European patent and trademark attorneys and

lawyers need not be subject to these procedures as they will be deemed to have been checked by the lawyer or patent or trademark attorney as the case may be. However, the fee earner should always ask the institution's firm to confirm that they have carried out the appropriate checks.

Actions to be taken when dealing with a new overseas client

1. In the event that a new overseas client is a direct client, ie, an individual, partnership or company then unless the company is quoted on a recognised stock exchange the same actions should be taken as for a new UK client.
2. For clients of lawyers, patent and trade mark attorneys outside the European Union where the lawyer, patent and trade mark attorney is known to XXX then no further action is required.
3. Clients of UK and European patent and trade mark attorneys and lawyers need not be subject to these procedures as they will be deemed to have been checked by the lawyer or patent, or trade mark attorney as the case maybe.
4. If, however, the client is represented by an overseas patent and trade mark attorney or lawyer, with whom XXX has no relationship, then the following actions should be taken.
 - (i) You are to determine whether or not the firm or members of the firm of lawyers, patent and trade mark attorneys are registered on the appropriate register, eg, in the US on the relevant state register or are registered on that countries register of patent and trademark attorneys.
 - ii) If it is impossible to obtain the information by this route then checks should include obtaining information about the firm from their website.
 - iii) If there are any serious concerns about any such firm no work should be undertaken for them until such time as the fee earner has discussed the matter with the compliance officer and or the senior partner.

NOTICE TO STUDENT & AFFILIATE MEMBERS OF ITMA

Advanced Trade Mark Law & Practice Course 2008

Change to format

This year the ITMA Advanced Course has changed to a modular format with separate modules for each of the three advanced papers. Each paper has its own timetable and these can be viewed via the Student notices page on the ITMA website via the following link <http://www.itma.org.uk/members/education-training>.

Why the change? First and foremost it was in response to student request — not everyone wanted or needed to take all the papers or did not want to take them at the same time. By splitting the course into modules students have more flexibility for how and when they take the exams and the new format also means the course is more focused.

When does the change take place? With immediate effect. Those students moving into Year 2 of the course still have the same teaching and content. Those just starting the course move into the modular system straight away.

What differences will I notice? Hopefully not much, other than improved flexibility and continuity.

The content of the course is much the same but you have the choice of taking all three modules in one year or, one or two modules a year, with the remaining module(s) the following year — whichever suits you.

What is the cost of the course? Those enrolled for this year will see no change to the fees. For anyone applying now, the fee will be £1,500 EACH for module T3 and T6, whilst module T4 will cost £750.

If you have any questions regarding these changes please contact Gillian Rogers in the first instance on 020 8686 2052 or via gillian@itma.org.uk. If Gillian is unable to provide an answer she will forward your query to the Education & Training Committee.

The Education & Training Committee

DVD version of the ROMARIN database

Information notice no. 22/2007 from the World Intellectual Property Organization, 21 December 2007.

1. Users of the ROMARIN DVD are informed that the International Bureau of the World Intellectual Property Organization (WIPO) has to take measures with a view to resolving problems of space available on the DVD. The size of the database and the images present on the disk is constantly increasing and the DVD will reach full capacity in a few months.

2. The International Bureau of WIPO envisages replacing the DVD carrier with a double-layer DVD carrier with a capacity of 8.5 Go (4.7 Go for a conventional DVD).

The price of the subscription will remain unchanged and the DVD can be ordered from the electronic bookshop on the WIPO website at the following address: <http://www.wipo.int/ebookshop/>

3. A double-layer DVD will be sent to users of the ROMARIN DVD to allow them to test whether the DVD can be read properly.

4. The International Bureau of WIPO reminds ROMARIN users that an online version (identical in all respects to the DVD version) is accessible free of charge and that it can be consulted on our Internet

site at the following address: <http://www.wipo.int/romarin/>

5. For any further information, please send an electronic message to the following address: romarin.mail@wipo.int

*World Intellectual Property Organization, 34, chemin des Colombettes, P.O. Box 18, CH-1211 Geneva 20 (Switzerland)
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Case O-302-07, Appeal to the Appointed Person, Amanda Michaels, 9 October 2007, In the matter of International Registration No 852022 in the name of August Storck KG of Berlin to protect a device mark in Class 30. In this case the Appointed Person overturned the decision of the hearing officer who, it was deemed, applied the wrong test for distinctiveness of a figurative mark. If a device mark alludes to the shape of a product but does not represent it, then the case-law about shape marks that represent goods, and to their two-dimensional variants, does not apply.

The curious case of the chocolate mouse and the spilled milk mark

Background

The applicant, August Storck AG (of gold-coloured sweet wrapper infamy: ECJ Case C-25/05) failed at a hearing taken by Mrs L Adams on behalf of the Registry to overcome the notice it had received of total provisional refusal to provide protection in the UK for International Registration 852022. The mark was for a device, pictured below left, which looks a bit like a chocolate mouse with a milk spill or even a cloud across its body. The colours white, light blue and brown were claimed and protection was sought in Class 30 in respect of: "Confectionery, Chocolate and chocolate products, pastries".

The notice of refusal was based on an objection under section 3(1)(b) of the Trade Marks Act 1994, which reads: "The following shall not be registered – (b) trade marks which are devoid of any distinctive character". It was said that the mark consisted "essentially of the device of a mouse being a representation of the goods", and so was "devoid of distinctive character for confectionery products in the form of a chocolate mouse".

At the hearing, Mrs Adams maintained the Registry's objections. She raised concerns about the capacity of the sign to function as a trade mark, in the light of the trade in novelty animal confectionery. This confectionery was primarily aimed at children or adults buying for children, the products being animal-shaped. In

her written reasons for her decision Mrs Adams elaborated that the sign applied for would probably be taken as being decorative or indicative of the shape of the product rather than individualising the trader's goods from those of another. She accepted that although the mark was not a faithful representation of the holder's goods, it was not "sufficiently different from the norm" to be capable prima facie of acceptance.

There was not in her view anything distinctive about the arrangement of the constituent parts of the device nor in the colours claimed. The mark merely informs the customer that the goods sold under it are chocolate mice. Citing case law, in particular Case C-25/05 P (August Storck KG v OHIM) referred to above, and which the applicant's attorneys would know well, she concluded that "only a mark which departs significantly from the norm or customs of the sector and thereby fulfils its essential function of indicating origin is not devoid of distinctive character and I do not consider that to be the case here".

The appeal and the Appointed Person's Decision

The main thrust of the appeal against the Registry's intransigence was that they had got their facts wrong, ie that the device mark is not a two-dimensional representation of the product, or put another way, consisting of a sign not "unrelated to the appearance of the products it

“the sweets are moulded roughly into the shape of an animal, which one might take to be a mouse, but which I think could just as easily be taken to be a cat”

covers”. This error fatally undermines the hearing officer’s findings that the mark lacks distinctiveness.

The Appointed Person, Amanda Michaels, concurred. Indeed, her own findings on inspection of a sample of the products were that “the sweets are moulded roughly into the shape of an animal, which one might take to be a mouse, but which I think could just as easily be taken to be a cat” [!]. This being so, the case law which had been cited by the hearing officer could not be applicable, since this was all to do with average consumers not being in the habit of making assumptions about the origin of products on the basis of their shape or the shape of their packaging in the absence of any graphic or word element.

Case C-25/05 thus, in summarising previous case law, noted, “In those circumstances, only a mark which departs significantly from the norm or customs of the sector and thereby fulfils its essential function of indicating origin is not devoid of any distinctive character for the purposes of Article 7(1)(b) of Regulation no 40/94 [and its UK TMA equivalent of s3(1)(b)]. That case-law, which was developed in relation to three-dimensional trade marks consisting of the appearance of the product itself, also applies where... the trade mark applied for is a figurative mark consisting of the two-dimensional representation of that product. In

such a case, the mark likewise does not consist of a sign unrelated to the appearance of the products it covers” (par. 28-29).



This had been cited by Mrs Adams. However, in the mind of Amanda Michaels, the figurative mark in question actually belonged to that category which “make an allusion to the nature of the products without being a representation, faithful or not, of the products in question”. The allusion was to a product made of chocolate that might be mouse-shaped or mouse-decorated, but it could also be an allusion, in the context of pastries, also part of the specification, to gingerbread.

“In my judgment”, she continues, “the case-law does not indicate that such marks suffer from the same intrinsic problems as ‘shape’ marks and marks which represent a particular product in terms of their impact upon the average customer”.

The Registry’s Work Manual (Manual of Trade Marks Practice), 3.8.1, states that: “The fact that a mark strongly alludes to characteristics of the goods/services is NOT a proper basis for a Section 3(1)(b) objection. Applicants can therefore expect an objection that the mark will be seen as a description of the goods/services listed in the application to be raised under Section 3(1)(c) or not at all”. No objection was raised under 3(1)(c), indicating that the mark is not descriptive.

The overall conclusion was that the hearing officer erred in principle by applying the wrong test. Exercising her prerogative to determine the case in the “interests of proportionality” the Appointed Person judged that the mark which had “no more than a modest degree of distinctiveness”, and not being “subject to any specific level of linguistic or artistic creativity or imaginativeness” (cf SAT 1, Case C-329/02 P, par 14) was not precluded from registration by section 3(1)(b). No order as to costs was made.

Romano Cholij,
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Unregistered marks: being well known in your home town is not good enough

Case C-328/06, Alfredo Nieto Nuño v Leonci Monlleó Franquet, 22 November 2007.

While the court conceded that there was no requirement for the earlier mark to be well known “throughout” the whole territory, the geographical extent to which it is well-known could not be confined to a city and its surrounding area if these did not constitute a substantial part of the member state.

On a reference from a Spanish court, the European Court of Justice has ruled that in order to be considered well-known, a non-registered earlier trade mark upon which a claim for the annulment of a later registered mark is based must be well-known throughout the territory of the member state of registration of the later mark or in a substantial part of it. However, the accepted meaning of “in a member state” prevents the term “well-known” from being applied to situations where the earlier mark might be well known only within the limits of one city which does not form a substantial part of the member state.

Background

Alfredo Nuño was the proprietor of a registered trade mark FINCAS TARRAGONA which covered various activities in the field of real estate. He initiated proceedings against Monlleó Franquet, an estate agent, who was using the non-registered mark FINCAS TARRAGONA to designate his own business. Mr Franquet denied infringement and claimed that the name was a well-known earlier trade mark that he had been using since 1978. He counterclaimed for the cancellation of Mr Nuño’s trade mark registration.

The relevant law is found in Article 4(1) of the Trade Marks Directive (89/104/EEC). This provides that a trade mark shall not be registered or be declared invalid if it is identical or similar to an earlier trade mark. Article 4(2)(d) defines an “earlier trade mark” as, amongst other things, one that is, on the relevant date, “well-known within the member state, in the sense in which the words ‘well-known’ are used in Article 6bis of the Paris Convention”. Article 6bis protects the owners of well-known marks against the use of an identical or confusingly similar mark.

The Juzgado de lo Mercantil 3 de Barcelona observed that Mr Franquet used his mark only in the city of Tarragona and its surrounding area, not in the whole of Spain nor a significant part of it. The national court decided to stay proceedings in order to seek guidance from the ECJ on whether the earlier unregistered trade mark must be well-known throughout the territory of the member state of registration or in a substantial part of it, or whether the protection granted by Article 4 also covers a situation in which the area in which the earlier trade mark was well-known was confined to a city and its surrounding area.

ECJ decision

In the most succinct of judgments, the ECJ ruled that Article 4(2)(d) of the Directive is to be interpreted as meaning that a trade mark must be well-known throughout the territory of the member state or a substantial part of it. While the court conceded that there was no requirement for the earlier mark to be well known “throughout” the whole territory, the geographical extent to which it is well-known could not be confined to a city and its surrounding area if these did not constitute a substantial part of the member state.

Comment

What appears to be clear is that anything less than a city will not be considered a “substantial part”. Unfortunately, the court doesn’t provide guidance on what above that threshold might constitute a sufficiently substantial part. What may be considered substantial for these purposes might vary considerably as different circumstances come before the national courts, for example a large city in a relatively small country. More concrete guidance would have encouraged a higher level of consistency in future cases.

Katerina Mikheev, *Hammonds*
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Enercon appeal gets blown away by CFI

Case T-71/06, Court of First Instance (Fifth Chamber), 15 November 2007. This was an appeal against the decision of the Second Board of Appeal of OHIM made on 30 November 2005 (Case 0179/2005-2) concerning the application for registration of a three-dimensional mark in the form of a ring-shaped cross section of a wind turbine as a Community Trade Mark.

In December 2001, the applicant applied to register a three-dimensional mark in the form of a cross-section of a wind turbine for goods in class 7, relating to, amongst other things, machines and machine tools; motors and engines. The application was rejected by the examiner under articles 7(1)(b) and 7(3)(b) of the Trade Mark Directive as the mark was devoid of any distinctive character and had not acquired sufficient distinctiveness through use.

The Court of First Instance reiterated the general policy in relation to three-dimensional marks consisting of the appearance of the product itself, in that the public perception in relation to three-dimensional marks was not the same as for two dimensional marks. It is a well established principle that only a three-dimensional mark which departs significantly from the norms and customs of the market sector and therefore fulfils its essential function of indicating the origin of goods will be held to have distinctive character.

The applicant argued that the design of the wind turbine, in the shape of an American football, was sufficiently distinctive in comparison to other forms of wind turbine casing on the market. The fact that the design had been produced by the famous designer, Norman Foster, enabled the mark to be distinguished from the variations of the product on the market and accordingly would enable the consumer to identify its commercial origin. The product was aimed at a highly specialised market of professionals, who would recognise the individual characteristics as originating from the applicant.

The application argued also that the Board of Appeal had infringed the general community principles of reasonable co-operation and the

protection of legitimate expectations, in that it had not invited the applicant to provide supplementary evidence as to the mark having acquired distinctive character through use.

The Court of First Instance held that the product covered by the mark was aimed at highly specialised professionals who would be highly knowledgeable within their industry sector. The shape of casing for wind turbines generally resulted from the shape of the gear box. The three-

The applicant argued that the design of the wind turbine, in the shape of an American football, was sufficiently distinctive in comparison to other forms of wind turbine casing on the market.

dimensional mark in the form of a ring shaped generator, stood out from other designs on the market. However, the Court of First Instance held that the professional consumer would consider that the shape of the wind turbine resulted from the use of another innovative technique instead of being based on the shape of the gear box.

Although the shape represented an innovative technique, it would still be considered as a variation in the shape of the product and, as such, was devoid of any particular elements which would allow the relevant consumer to identify the commercial origin of the product. The mark did not permit the consumer to distinguish the mark from those of any other businesses without having to pay a significant degree of attention to the product.

The Court of First Instance also found the fact that the wind turbine casing had been designed by Norman Foster did not provide the product with a sufficient degree of distinctiveness.

The Court also held that the Board of Appeal had not infringed the general community principles relating to reasonable co-operation and the protection of legitimate expectations, in that they had not invited the claimants to provide supplementary evidence relating to the acquisition of distinctive character through use. The principles of fair co-operation and of the protection of legitimate expectations were fully recognised by OHIM and the courts and they had provided the applicant with sufficient opportunity to put forward its arguments in accordance with the due process of law.

In any event the applicant was required to submit proof that the mark had acquired distinctive character through use in a substantial part of the Community. The applicant had only provided survey evidence for Germany and Austria relating to the months of March to April 2005. The applicant had failed to provide sufficient evidence that the mark had acquired distinctive character in Spain and Denmark and had therefore failed to establish that the mark had acquired distinctiveness through use in a substantial part of the Community.

The appeal was rejected in its entirety. The case follows the general pattern of cases establishing that the registration of three-dimensional shape marks, whereby the shape of the mark consists entirely of the shape of the product, is inherently more difficult than the registration two-dimensional word or device marks.

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Mikrolab fails to score with registration

MPDV Mikrolab GmbH, Mikroprozessordatenverarbeitung und Mikroprozessorkontrolllabor v OHIM, Case T-459/05 (8 Nov. 2007).

On 1 September 2003, MPDV Mikrolab GmbH, Mikroprozessordatenverarbeitung und Mikroprozessorkontrolllabor ('MPDV Mikrolab') applied to OHIM to register the mark "manufacturing score card" in respect of Class 9, computer equipment, computer software; Class 35, advisory services in the field of business management science, advisory services relating to business organisation, advisory services relating to staff management, advisory services relating to business management; business expertise services; marketing, market studies; public opinion polls; public relations; preparation of statistics; placement of staff; recruitment services; Class 42, provision of technical advice, technical project studies; provision of technical expert appraisals (my translation from French, no official translation available).

OHIM rejected the application on the grounds of Art 7.1(b) and (c) of Council Regulation 40/94 because it held the mark to be descriptive of the goods and services concerned and devoid of distinctive character. On appeal by MPDV Mikrolab, OHIM's decision was subsequently upheld by the Board of Appeal (BoA) and MPDV Mikrolab filed an application before the Court of First Instance (CFI) requesting the annulment of the BoA's decision claiming that it was in breach of Art 7.1(b) and (c) of Council Regulation 40/94.

The case before the CFI

MPDV Mikrolab ran its case on the following arguments:

- The mark "manufacturing score card" is made out of three elements that could be combined in multiple ways creating different meanings. The mark "manufacturing score card" has no clear meaning without an additional explanation.
- The words "manufacturing" and "score" have various meanings, which combined with the word "card" can be understood as

referring to "an accounting card for industrial manufacturing processes" of whatever nature.

- The mark "manufacturing score card" is not a technical term commonly used in the field of industrial production, but a term invented by the applicant and, with few exceptions, only used by the applicant.
- For the mark to be considered descriptive, the word or expression must have a clear and unique meaning, unlike the present case.
- The applicant referred to a number of EU national, CTM and US registered trade marks containing the element "scorecard".

The CFI examined the Art 7.1(c) ground first and referred to the established principle of *Freihaltebedürfnis* (ie, the need to keep words or expressions free for other traders to use) that inspired this provision. It then moved on to state that the descriptiveness of a mark can only be defined in relation to the goods and services for which registration is sought and in relation to the relevant consumers.

The CFI ruled that the services in classes 35 and 42 of the application in issue, being services provided in the field of industrial management, are addressed to a professional public, whereas the goods in class 9 can be addressed to undertakings as well as private customers. It also noted that the relevant language is English and that, therefore, the relevant consumer would be an Anglophone consumer.

On the descriptive character of the mark, the CFI ruled that the BoA correctly stated that the mark would be immediately understood by the relevant public as an accounting card recording data relating to the control of production in undertakings. The card in issue, identified as "score card" would normally be used in a computer, would be updated automatically and would be created with the use of software. It follows that the mark "manufacturing score

card" is descriptive of the goods applied for in class 9. It can also be considered descriptive of the services applied for in classes 35 and 42 in that those services can be provided for the control or increase of production performance in undertakings. The mark is, therefore, descriptive of the purpose of those services. Since the relevant public is English speaking, it would know the nature, characteristics and expected use of the mark. Therefore, the BoA could validly consider that in one of its possible meanings the mark describes a characteristic of the goods and services in issue and, as a result, should remain free for competitors to use.

With regard to the Art 7.1(b) ground, the CFI referred to the principle accepted in jurisprudence whereby each of the grounds for refusal in Art 7.1 must be examined separately. However, it admitted that there is an overlap in the grounds in paragraphs (b) to (d). In particular, according to the CFI's jurisprudence in the case *TELEPHARMACY SOLUTIONS* (*Telepharmacy Solutions v OHIM*, T-289/02, 8 July 2004) if a word mark is descriptive of the goods and services concerned according to Art 7.1(c), it is necessarily also devoid of distinctive character under Art 7.1(b).

On the earlier EU national registrations relied on by the applicant, the CFI ruled that whilst these can be taken into account in assessing the registrability of a Community Trade Mark, they do not have determining value. The CFI also reminded that no provision of Council Regulation 40/94 imposes on OHIM or on the BoA to conform to the decisions of EU national offices in similar cases (*Deutsche SiSi-Werke v OHIM*, C-173/04, 12 January 2006).

The CFI rejected, therefore, the application for annulment of the BoA's decision and ordered MPDV Mikrolab to bear the costs.

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Sunplus appeal goes down in flames

Case T-38/04, Sunplus Technology v OHIM, 15 November 2007. The Court of First Instance dismissed Sunplus's appeal against a refusal to register the figurative mark SUNPLUS as a Community trade mark, on the basis of a likelihood of confusion with earlier registrations of the mark SUN by Sun Microsystems. The case is another to demonstrate, amongst other things, the attentiveness of the relevant public in relation to IT products.

Background

Sunplus applied to register as a Community trade mark a figurative mark containing the word SUNPLUS, to the left of which appeared a large S with a four-pointed star in its centre. Registration was sought in respect of various goods in Class 9, the specification largely comprising computer chips and circuits:

Sun Microsystems Inc opposed the registration on the basis of a likelihood of confusion with its earlier marks: German registrations of the word mark SUN in the UK and in the Benelux for the word mark SUN.

The earlier decisions

The Opposition Division of OHIM upheld the opposition and refused to register the mark. It based its decision solely on the Benelux registration, which covered various computer parts under Class 9. The Fourth Board of Appeal upheld that decision. It considered that, despite the marks being visually dissimilar, the identical nature of the goods and the high degree of phonetic and conceptual similarity between the marks were sufficient to entail a likelihood of confusion on the part of the Benelux public. Sunplus appealed.

Decision of the CFI

Sunplus appealed solely on the basis of Article 8(1)(b) of the Community Trade Mark Regulation (40/94/EC), contesting that there was any

likelihood of confusion. The CFI defined the relevant public as producers in the information technology field or computer users, including those who assemble the component parts of their computer hardware themselves, within the Benelux. The parties accepted that such a public should be considered to have an above average span of attention and level of understanding of English.

Similarity of goods

Sunplus attempted, unsuccessfully, to argue that none of the relevant goods were identical. First, its attempted distinction between components and finished products failed. Components were included in some of the product categories covered by the earlier mark. Secondly, the goods could not be distinguished by virtue of their end-users. The goods covered by the opposing marks were both aimed at specialist producers and at end users, particularly those who assemble the component parts of their computer hardware themselves.

However, the Board of Appeal's finding that the relevant goods were identical could only be upheld in part. Not all of the goods were identical, in particular integrated circuits and electronic circuits. That said, all of the goods in dispute belonged to the field of information technology.

Furthermore, all of the goods covered by Sunplus's application could be regarded as either "computer components" or as "electronic data carriers", or as "computer accessories" covered by the earlier trade mark. Consequently, it was possible to regard all of them as having, at the very least, a very high degree of similarity.

Visual similarity

The CFI considered that the Board of Appeal was fully entitled to hold that the competing marks were visually different. It noted that the additional word PLUS and the figurative component based on the letter S and a star, in the mark applied for, introduced significant visual differences between the two marks. However, first, the earlier mark was entirely reproduced in the word component of the trade mark applied for. Secondly, SUN constituted the dominant component in the overall impression in the complex mark, due to the absence of any distinctive characteristic of the word PLUS which, in relation to the word SUN, was only a laudatory addition.

Phonetic similarity

The CFI found partial phonetic similarity between the two marks, insofar as the common element SUN is pronounced in the same way. It was also the dominant component, at the start of the word, on which the attention of the consumer would be focused. The phonetic difference, resulting from the word PLUS in the mark applied for, was not sufficient to outweigh the similarity. Moreover, the differences noted at the visual level could not be taken into account.

Conceptual similarity

The Board of Appeal was fully entitled to hold that the marks both referred to the idea of "sun". The English word "sun" would be easily understood by



the target public, especially because the concept is unexpected when used for computer products and would therefore have a greater impact. The visual differences, rather than cancelling out the conceptual association, reinforced it. The enhancing term PLUS was not distinctive in any way, and could be viewed as a way of emphasising the word SUN. The same was true of the figurative component of the mark applied for, which could be perceived as a stylised sun. Further, the fact that SUNPLUS formed no part of everyday language did not alter that finding.

Conclusion

The Board of Appeal was therefore entitled to hold that there was a high degree of similarity between the marks. It was equally entitled to find a genuine risk that the relevant public, notwithstanding its attentiveness, might believe the goods covered by the two marks had the same commercial origin.

Sunplus made two further arguments, but neither was successful in calling this conclusion into question. Firstly, any inconsistency with previous decisions of OHIM (as alleged by Sunplus) was irrelevant as Regulation 40/94 is the only standard by which each decision must be assessed. Secondly, the CFI rejected Sunplus's argument that the distinctive character of the earlier mark, SUN, was weak on account of the registration, in the Benelux countries, of several other trade marks containing the word component "sun" and concerning goods in Class 9.

The material relied on by Sunplus was not before the Board of Appeal and therefore had to be excluded. In any event, those registrations were not sufficient to exclude all likelihood of confusion. For a start, the registrations of themselves did not show genuine use of the marks. Furthermore, it was impossible to deny that the earlier mark had, at the very least, a normal distinctive character for the goods it covered, given the absence of any conceptual link between computer goods and the notion of "sun".

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Trade marks of the month

Trade Marks Journal No. 6715 21 December 2007

2387609A 9 December 2004 (16)

The mark consists of the colour Pasture Yellow C applied to the cover of the goods

Proceeding because of distinctiveness acquired through use.

Printed directories providing classified business advertising and information services.

Yell Limited, Queens Walk, Oxford Road, Reading, Berkshire, RG1 7PT.

2471125 1 November 2007 (03)

feel the knead

massaging bath soap, bath soap, cellulite firming gel for the body

Brandhandling International Limited, Millennium House, Victoria Road, Douglas, Isle of Man, IM2 4RW.

Agent: Judith Tonkin Brandhandling Limited, 167-169 Kensington High Street, First Floor, London, W8 6SH.

2468501 3 October 2007 (09)

Fart-o-Matic

Games software for use with mobile phones; Games software for use with computers

Teazel Limited, 9 Avon Carrow, Avon Dassett, Southam, Warks, CV47 2AR.

Agent: Richard Taylor, Teazel Limited, 6 Avon Carrow, Avon Dassett, Southam, Warks, CV47 2AR.

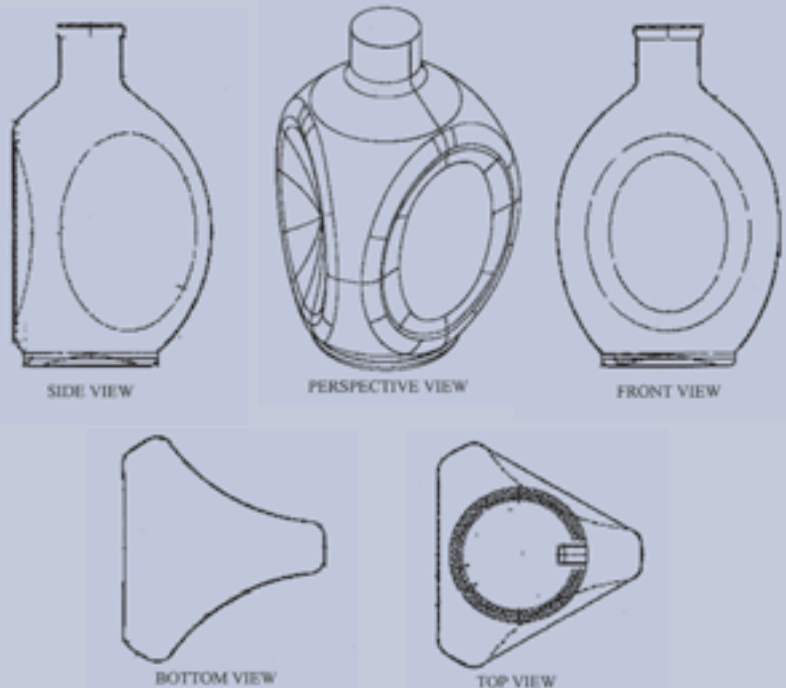
Trade Marks Journal No. 6717 04 January 2008

2473401 26 November 2007 (33)

Alcoholic beverages.

Diageo Brands B.V., Molenwerf 10-12, 1014 BG Amsterdam, The Netherlands.

Agent: Diageo, Intellectual Property Department, 8 Henrietta Place, London, W1G 0NB.



The mark consists of a 3 dimensional shape.

Who's who in ITMA

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First Vice President: Gillian Deas, gmd@dyoung.co.uk

Second Vice President: Maggie Ramage, maggie@ramage.co.uk

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Jane Attreed, jane@itma.org.uk

Geraldine Flood, geraldine@itma.org.uk

Public Relations Manager: Ken Storey, ken.storey@btinternet.com

Editor, ITMA Review: Kelly Robson, kellyrobson@btinternet.com

Joy Dublin – new ITMA Management Accountant

Joy recently joined the Institute, having taken over from Angela Williams who retired after 16 years. She is a qualified Accounting Technician and has worked with various not-for-profit organisations for the past 10 years. Her previous experience in similar situations will certainly be an asset in managing the day-to-day finances of ITMA and ensuring that the management board receives relevant financial information for decision making. Joy's role also includes responsibility for expanding the current accounting function in line with the Institute's strategic plan.

Three new Directors appointed for UK-IPO

Three new board-level appointments have been announced by the UK Intellectual Property Office (UK-IPO) following recent moves to recruit new talent.

Andrew Layton, who until recently was Director of Nuclear Policy and Liabilities at the Department of Business Enterprise, will be joining the board of the UK-IPO as the new Director of Trade Marks and Designs.

The former Director of Trade Marks and Designs, **Robin Webb**, has moved to become the new Director for Innovation.

Edmund Quilty, currently Finance and Business Planning Director at UK Trade and Investment will be joining UK-IPO as the new Director of Copyright and IP Enforcement on January 14, 2008.

NEWS OF MEMBERS

Coller IP Management Ltd are pleased to announce the appointment of **Sue Ratcliffe** (Ordinary Member) as of the 18th December 2007 as a Senior Patent and Trade Mark Attorney; she can be contacted on Tel: 0870 4021624 Fax 0870 402 1659 or by e-mail at sue.ratcliffe@colleripmanagement.com.

Eric Potter Clarkson LLP has changed its name to **Potter Clarkson LLP** and adopted the above identity. **Ian Buchan** (Fellow) has now retired from Potter Clarkson LLP, but will remain associated with the firm as a Consultant. The firm wishes Ian, and his wife Carol, every happiness for the future. Potter Clarkson LLP is also pleased to announce that **Jackie Tolson** (Ordinary Member) and **David Thompson** (Ordinary Member) have joined the firm.

Paul Bowman, the former senior partner of Lloyd Wise, Patent & Trade Mark Attorneys, joined leading London-based Intellectual Property practice Mathys & Squire on 3 December. Bowman (pictured below left) joins Mathys & Squire after 35 years with Lloyd Wise, 27 of which he served as a partner. He was appointed senior partner in 2000. Mathys & Squire senior partner **Peter Garratt** is pictured below right.



UK-IPO Chief Executive, Ian Fletcher said, 'I am delighted with the new appointments and am confident they will add a breadth of talent and experience to the UK-IPO ahead of what promises to be a ground-breaking year for us and our customers.'

*ITMA Christmas lunch,
11 December 2007,
Royal Lancaster Hotel*

Photos by Kat Hannon

Top table...



*Alan Verner, Verner Shipley, Keith Havelock, and
Chris Weatherly, Sopers Oast*



PEOPLE



*Angela Fox, Jenkins, Chris McLeod, Hammonds,
David Musker and Nina Hurley, both Jenkins*



Jane Harlow, D Young & Co



*Mike Knight and Robin Webb,
UK-IPD Director for Innovation*



*Lord Triesman,
Minister for IP*



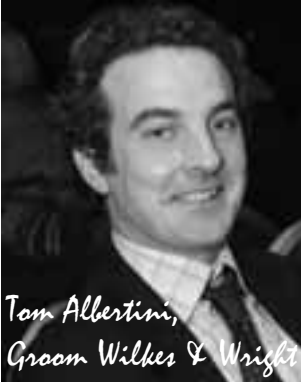
*Steven Jones,
Baker & McKenzie*



*Spencer Burgess,
Carratu International*



*Richard Heath,
Unilever plc*



*Tom Albertini,
Groom Wilkes & Wright*

*Maggie Ramage, Alexander Ramage Associates, and
OHIM President Wulbo de Boer*



*Stewart Rayment, Kingsley & Talboys, Andi Murch
and Alice Mastrovito, both Mastrovito & Associates*

Sarah Hadland, Pitmans



The prizewinners...



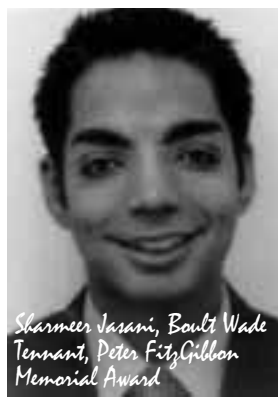
Anna Blackburn, Frank B Dehn & Co, John Parker Memorial Award



Louise Popple, Taylor Wessing, Adrian Spencer Memorial Award



Stephanie Hall, AA Thornton, Payne/Bennett Memorial Award



Sharmeen Jasani, Boulton Wade Tennant, Peter FitzGibbon Memorial Award

ITMA President Philip Harris and Lord Trieman, Minister for IP



Margaret Redman, Phil Redman and Julie Redman, all A1 Trade Marks,



Philip Sanger, Withers & Rogers, Nick Wilson Memorial Award



New Year verses from 'The Scribe'

Our Friend

He had his faults, like all of woman born
These and himself alike we deeply mourn.
They made of him a man we ill could spare –
It was his virtues that were hard to bear.
(C Carswell)

The Politician

I know of a fellow called Menzies
'Bout whom the peculiar thing is
He incessantly chatters
Political matters
And works himself up into frenzies.
(A Browning)

Prayer

There was an old Scotsman from Sydney
Who suffered from pains in the kidney
He prayed to the Lord
That he might be restored
And He promised He would – but he didna.
(N Munro)

Season's Greetings

I remember, I remember
Nothing further after that
But I wakened in the morning
On an alien lobby mat
And I felt not unpersuaded
Though my reasons were not clear
That I'd spent a merry Christmas
And a prosperous new year.
(G Fletcher)

FORTHCOMING EVENTS 2008

22 January	Evening Meeting: The Olympic Symbol, etc Protection Act 1995 (2 ITMA CPD Points)(1 Law Society Hour) (1 Bar Council Hour)	Royal College of Surgeons
5 February	Charity Quiz Night	Punch Tavern, Fleet Street
19 February	Evening Meeting (2 ITMA CPD Points)(1 Law Society Hour) (1 Bar Council Hour)	Royal College of Surgeons
13 March	IPR in China 2008 (4 ITMA CPD Points)	Stanhope Hotel, Rue du Commerce, Brussels
31 March – 1 April	PTMG	Dublin
2 – 4 April	ITMA London International Meeting (9 ITMA CPD Points)	Royal Garden Hotel Kensington High Street
25 April	President's dinner	Meridian Hotel, London
29 April	LexisNexis Butterworths Licensing of IP Rights (5 ITMA CPD Points)	Central London
17 – 21 May	INTA	Berlin
18 – 21 June	ECTA (12 ITMA CPD Points)	Killarney
25 – 26 September	ITMA Autumn Conference (9 ITMA CPD Points)	Alicante
1 – 4 October	PTMG	Istanbul

More details can be found at www.itma.org.uk. Bold type indicates an ITMA organised event.