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a step closer

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Protection and design of
foodstuffs and packaging

Young talent: Manus VR

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for virtual reality applications

The safe road to China

What's important for trademark
registration in China?

Fortify

PROTECT INNOVATIONS, IDEAS AND TRADEMARKS



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WENDY PANG
HEAD OF IP AT DANONE'S WATERS, EARLY LIFE AND MEDICAL DIVISIONS

**'If we need to take a big fight
to strengthen some
of our brands, I'm ready
to do that'**





I have been actively involved in NLO for 30 years. Intellectual Property continues to excite me and no year is the same. At NLO and NLO Shieldmark there are always new developments which invigorate me. 2016 is certainly no exception.

As a partner and MT member, I am closely involved in the foundation of our new office outside the Netherlands: our firm in Ghent, based on the Innovation Campus in a lovely, modern office building. The relationship between the Netherlands and Belgium is special. As neighbours, we have many similarities and many differences. In between, something amazing is created. The 10 membered staff at the Ghent office are therefore a wonderful melting pot of Belgian, French and Dutch professionals. We share knowledge and experiences in order to make our enterprise in Belgium a success. If you are ever in the vicinity, please visit us in Ghent!

But it's not just the new office in Ghent which creates new dynamics. In January, for example, the new European trademark guideline came into force, and this will be followed in March by the amended Community Regulation. Both have extensive far-reaching consequences for trademark holders. Incidentally, in the Fortify we devote extra attention to trademarks and designs. Starting with the main article which focuses on our client Danone.

We also follow developments relating to the Unified patent. Within NLO, I am the partner responsible for teams like 'Renewals' and 'Translations'. Obviously, we have been preparing for the changes involved in the Unified patent – possibly by 2017 - for some time. With our Business Development Team we anticipate this situation to create new services. Overall, there's a lot happening in the coming years. I'm looking forward to it!

Erwin Ehrenburg
Managing Partner NLO

'The relationship between the Netherlands and Belgium is special'



*'What about the copyright
on uploaded texts and
images owned by third
parties?'*

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Wendy Pang

WENDY PANG, HEAD OF IP AT DANONE'S WATERS,
EARLY LIFE AND MEDICAL DIVISIONS

Protecting and strengthening brands at Danone

When Isaac Carasso founded Danone in Barcelona in 1919, the company introduced Spanish doctors to the health benefits of yogurt. The yogurt was named after the founder's son Daniel, nicknamed 'Danon' in the local Catalan language. The brand name has remained an invaluable asset ever since. Today, with operations in over 140 countries, 22 billion euros in turnover and over 900 million consumers worldwide, Danone has become one of the world's leading food companies. Part of that success rests on the strength of its brands: Evian water, Nutricia medical nutrition and of course Danone dairy products are known the world over.



As the head of IP for three of Danone's product divisions, it is Wendy Pang's goal to protect and strengthen the Danone brands and thus ensure they will also contribute to the company's future success.

Nearly three years ago you left private practice to become an in-house IP lawyer. What in your opinion is the biggest difference between both positions?

"The main difference is in the proximity to the business. As an in-house IP-lawyer at Danone I am very much involved with developing strategies for our various brands. That means I'm working really closely with the business, much closer than you can work with your clients as an external lawyer. It means that a lot of the work I do now at Danone is not driven by IP as such, it's about using IP as a tool to reach a solution that the business wants."

In order to contribute to Danone's business goals, what are the main items on your agenda and what are your goals for the next couple of years?

"The first is risk management and risk reduction, the second is building stronger brands and a strong reputation for Danone. Risk management is now on everybody's mind. We obviously know very well how to deal with the standard risk management aspects like clearances and making sure we don't infringe the rights of third parties. Trying to identify any hidden risks is another aspect though that can be challenging in a global organization like Danone's. We need to ensure that local businesses are aware of and comply with agreements negotiated globally or regionally and vice versa. The potential damage resulting from such risks in terms of litigation or product recalls can be huge, hence the prominent position on my agenda."

With respect to the second item on your agenda, how do you as an IP lawyer contribute to building stronger brands?

"Building stronger brands requires that our team works together with local and global business teams. One part of that is educating them on IP issues and on the work that our team does, so we're not just seen as people who they can tell what trademarks to register. Another part of us working together with the business involves picking our core brands and identifying, with the people who develop these brands, what brand elements they think are key. We work closely with the marketing teams to determine what we want to stop third parties doing, and with that in mind, we can together identify which elements of their brand are most important to them. Then we decide how we can protect and build those elements going forward. Aside from appropriate IP protection, that means us stopping others from using those elements, but also from our side being strict on what variations on those key elements we allow local teams to use."

So building stronger brands mainly involves working with the marketing teams?

"Obviously the marketing teams are important internal clients of ours, but so are the innovation teams that develop and create new packaging. Sometimes with new packaging we want to protect both a technical innovation with a patent, as well as the new design elements that make the packaging stand out from other products on the market. So our team has to be working closely with the patent team and make sure we're lined up, for example to prevent that a patent is filed prematurely and thereby destroys novelty for us. In general, my job is a lot about investing in relationships and making sure we're all pulling in the same direction and really become business partners."

So from an IP perspective, building stronger brands is not primarily about registering more trademarks or designs, but more about creating awareness and changing mindsets in the business?

"Absolutely! We file, register and protect all these things, but you always have to ask what the purpose is. That is what I have also been trying to educate the business about. We have to know what is on the market and what other people are doing in terms of getting close to us and to actually stop that. So I'm very much not the type of IP lawyer that says we have got to register more trademarks. That requires a lot of time and resources which you then can not use on the things that actually matter. The aim is to build the strongest and most focused portfolio, not the most extensive portfolio."

What would you say are the biggest challenges you face in managing a global IP portfolio?

"One main challenge certainly is the global aspect of the job. Often our primary internal clients are working at a global level, rolling out for example a global marketing campaign in different countries. Now the teams in these countries sometimes want to do their own thing and add certain local elements. That can cause some conflict between global and local teams. For us that can be challenging, because both are our clients."

'A lot of the work I do now at Danone is not driven by IP as such, it's about using IP as a tool to reach a solution that the business wants'

Do you have a general approach for resolving those issues?

"Generally we start to work with global teams and try to understand what the global picture is. But the difficulty is that it doesn't always work in countries where there may be very specific regulations or local practices, and so we really get pushed sometimes by local businesses. We might for example have an overall IP policy that says we don't file what we are not going to use, or file things that might be descriptive. But in some countries in Asia for example, that doesn't work because there everything that is on the package has to be filed, otherwise the product can't be put on the market."

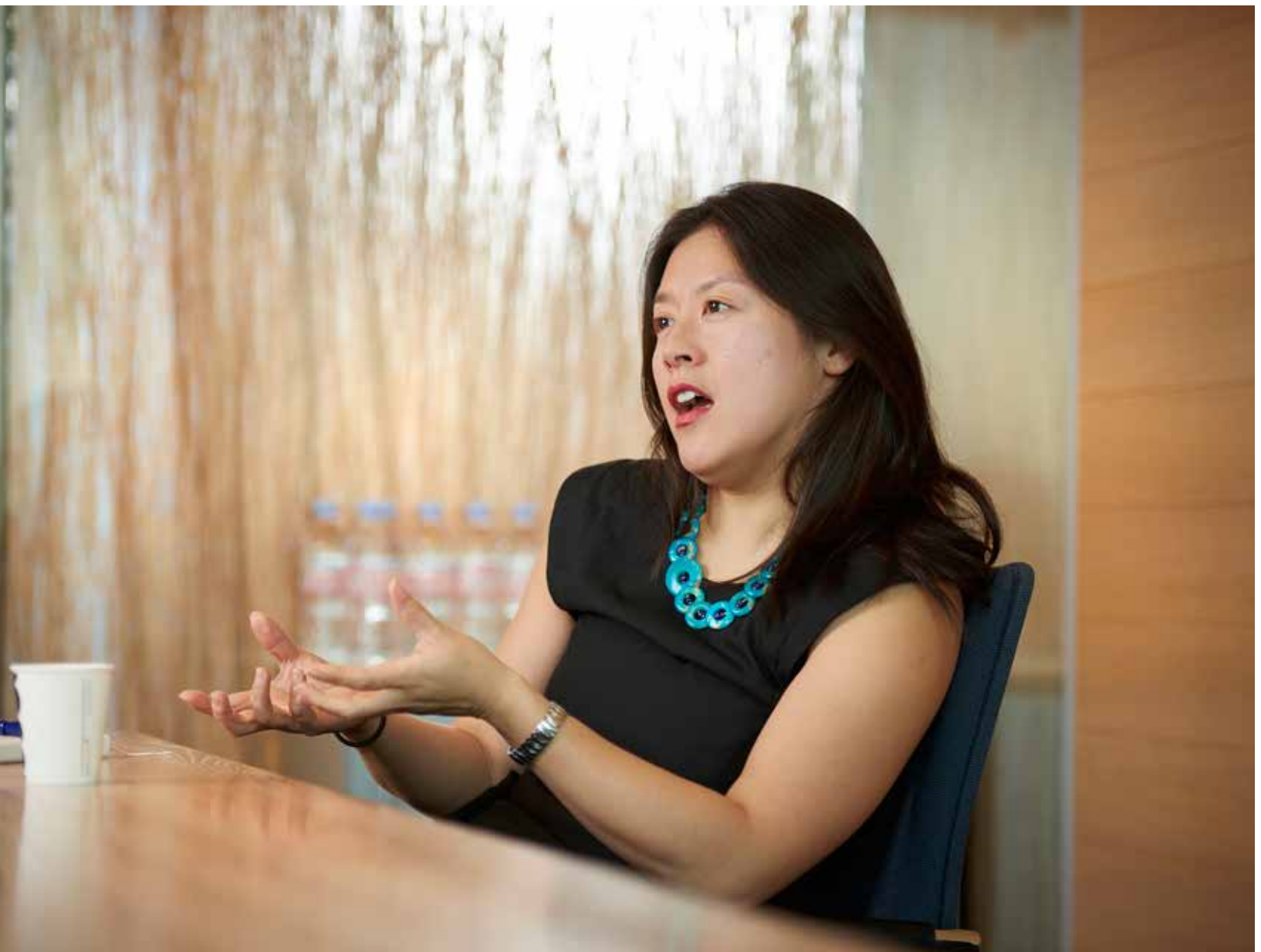
Another issue is consistency around the world. Some of our logos may have been used under different brands in different ways over many years. It is quite difficult to then be very strict and insist that it must be used in a certain color, for example. Part of my job is understanding the reasons behind the push from local teams and to determine if we really need to make an exception. Sometimes we have to be adaptable if there is a real business or legal need to depart from our normal rules, but we do also need to maintain our position at times, for example by educating global marketing as to what we do and why, and getting their help in pushing local marketing teams to understand as well."

Are there certain red lines or issues where you can't deviate from your global IP policy?

"Sure! It is much harder to budge when there is a risk in terms of third parties. We have had situations, for example, where we would have run the risk of infringing third party trademarks if we launched a product with a certain name. Therefore we worked out a co-existence agreement with our competitor that covers lots of different territories. That is where we need to make sure that everyone within Danone complies with the global agreement. Obviously on that we have to be very strict."

How is the IP function within Danone organized, and what sort of formal voice or decision power does it have within Danone?

"As part of the legal function the IP team reports to the General Secretary, a function that was created at the beginning of 2015 and that is part of Danone's Executive Committee. The General Secretary's office, which includes communications and public affairs, legal and regulatory affairs and compliance among others, has stated that building strong brands is one of their main objectives. It has appointed a Chief Brand Officer who is in charge of the equity of the DANONE brand."



This representation at the top level of the company shows the importance of our brands to the company, which also demonstrates the key importance of IP within the group. So lately the IP function has developed a more powerful voice. We are finding ourselves on some of the boards around Danone, and with that comes more impact. That will be enhanced even further with our new global IP policy that will be rolled out in 2016 through the General Secretary function around the world. The new IP policy is more formalized, with stricter rules that relate to both the risk management and building stronger brands aspects of the IP function."

What does the new IP policy include?

"Some of it sounds very obvious, there are general rules like not copying third parties' rights, and using our brands in ways that are consistent with our brand guidelines, et cetera. Of course we did have a brand protection policy before, but there was quite a low awareness of it. So the new policy is in part to increase awareness, and also to equip local teams to deal with simple or straightforward FAQs. But to me the key is: up to now some of these things haven't been passed onto marketing and legal teams in the form of rules they should adhere to and that will really be enforced. There has in the past been lack of clarity in terms of what are rules, what are guidelines, what is nice to have? That will become a lot clearer now."

How does this new IP policy affect the part of your job where you have to judge whether local teams have legitimate business reasons to deviate from global policy?

"The job will still be about that. The new IP policy really gives us the tools, or better equips us to do the job we do today. It gives us a formal backing, a backing that has been approved at a very high level within Danone. That is helpful because it provides us the support and legitimacy that we need."

Can you describe what a global consumer company like Danone faces in terms of infringements on its IP portfolio?

"The main difficulty that many consumer goods companies face is probably the private label issue. We have important relationships with the supermarkets that sell our products. Obviously we need to maintain those relationships if we want to keep selling our products. At the same time, as our biggest customers they are copying our get-up, getting sometimes very close to our products. That is definitely a challenge, especially being sensitive to the business relationships, and involves working closely with our commercial teams when deciding what action to take – but we have to be tough if we want to build and maintain strong brands."



Wendy Pang is the Head of IP for Danone's Waters, Early Life and Medical divisions. With her team of legal counsel, paralegals and trainees she manages all contentious and commercial IP issues at a global level and advises the business on the protection and enforcement of their trademarks, designs and copyrights.

Previously she was a Senior Associate in the IP Group of Baker & McKenzie's London office where she acted for her clients in litigation in the High Court, Court of Appeal and the European Court of Justice.

Wendy Pang graduated in 2000 from the University of Nottingham (B.A., Law with European Law, first class honours) and holds a Post Graduate Degree in IP from the University of Bristol (2006). She lives in Paris, France and is multi-lingual with fluency in English, Cantonese and French.

Is there a red line with respect to how close you let copycats or private labels get, and how do you determine when to enforce your rights and fight back?

"That has to be determined case-by-case. We look at the whole picture: how big our operation is, how big is our business with that brand, if we are operating in a particular country and if we have any potential challenge ourselves, and also if it is a business priority. One of the challenges I may face in this respect is to convince the business which is the right fight to pick and when – the business may be frustrated by a copycat or a private label but there may be circumstances that make it difficult for us to act. Obviously there are budgetary and PR considerations, but those are not the only reasons. Cases get harder if our brands or elements of our brands, like fruits used to designate the flavour of a drink, have a lower level of distinctiveness. So we have to make sure that the key elements of our brands are used consistently to build and maintain their distinctive character, which means working with the business around the world to ensure that we don't allow too much "playing" with our logos before they are strong enough. That might be something that marketing doesn't like because it limits their freedom, but this comes back to my push for wanting strong elements

'If we need to take a big fight to strengthen some of our brands, I'm ready to do that'

of our brands, not just the whole brand. People know what is easier to get away with and what is not, so they might just take the look, the color scheme, figurative elements and not the word element. And if in certain countries we are not well-known enough with those elements, then it makes it tougher to protect our brand there. We need to be even more vigilant about enforcing our rights and if appropriate, pick a target and send a message that is going to make some noise. A message to make it clear that Danone doesn't sit and not defend its rights, that we are active in that and we will stop people from getting too close to the line."

So you are looking for a good fight?

"It's good to occasionally have a fight with a lot of publicity, but you have to pick the right fight to build the reputation you want to have. One major successful case would then make it much easier to deal with potential future conflicts, because when for example you send a cease and desist letter, the counterparty will be more likely to back off from a fight. But I should be clear: it is certainly not the goal of an in-house IP lawyer to have litigation at all times, which would be very expensive. We will continue to try to resolve issues through alternative means, such as settlements and discussions. But if we need to take a big fight to strengthen some of our brands, I'm ready to do that."

ABOUT DANONE'S BRANDS

- In 2014 40 countries sold medical nutrition products under the Nutricia umbrella brand.
- More than 400 people are dedicated to Nutricia Early Life Nutrition's research & development.
- NLO Shieldmark is responsible for the global portfolios of Danone's Early Life Nutrition and Advanced Medical Nutrition.

INTRODUCING

René van Duijvenbode and Harm van der Heijden new partners of NLO

From 2015, the number of (trainee) patent attorneys at NLO and NLO Shieldmark soared. 13 new colleagues were welcomed. Obviously, the opening of the new office in Ghent, Belgium, gave a considerable impulse to this growth: five experienced European attorneys switched to NLO. But it wasn't just these new colleagues who took a new step in their careers. Two NLO patent attorneys recently became partners. These appointments underline NLO's strong growth in recent years. We like to introduce our new partners to you.

With the appointment of René van Duijvenbode, NLO has a new partner who has already proven to be a passionate and committed patent attorney for many years. In 2015, his client nominated him for the Client Choice Award 'Intellectual Property – Patents', which he subsequently won.

Van Duijvenbode: "For a long time, my team and I have enjoyed promoting the commercial interests of our clients, right up to the 'courts' of the European Patent Office. That's

where things get really serious for the Opposition departments and the Courts of Appeal. The stakes are high and it's nice to be able to make a difference. I am therefore very much looking forward to the possibilities of the Unified Patent Court".

Harm van der Heijden, who has worked for NLO since 2009, is also experienced in conducting procedures. Not surprisingly, both Harm and René successfully completed the "Patent Litigation in Europe" (2014-2015) training run by CEIPI Strasbourg in 2015.

Van der Heijden: "For patent attorneys, this is a special time because big steps are currently being taken to make Europe a unified area when it comes to patent. Clients are therefore increasingly coming to us as the designated patent advisor for all of Europe. As a partner of NLO, I look forward to continuing to expand the practice."



RENÉ VAN DUIJVENBODE
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René has worked for NLO since 2003 and leads a team of seven patent attorneys. René is specialised in physical chemistry, surface chemistry, colloid and polymer chemistry, food technology and baby and medical food. He works for various large

and medium-sized companies. He very regularly (15 to 20 times a year) takes part in hearings at the Opposition department or the Court of Appeal at the European Patent Office.



HARM VAN DER HEIJDEN
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Harm van der Heijden has worked for NLO since 2009 in the Eindhoven office, where he leads a team of six patent attorneys. He mainly focuses on innovations in the fields of electrical engineering, physics, telecommunications and software. Before joining

NLO, Harm was a researcher with Philips Research and an architect at NXP Semiconductors.



Peter van de Sande (l) and
Sander van Berkel (r)

MAGIC BULLETS AGAINST TUMORS

State of the art decoration on molecular scale

'A top molecule' is how Sander van Berkel describes the discovery of BCN, made in 2010 at Radboud University in Nijmegen. Now this molecule is the basis for Synaffix, a young biotech company in Oss that now has many big pharma companies as partners. An interview with co-founder and director of R&D Operations Van Berkel and CEO Peter van de Sande about their ambitious plans for a tiny molecule.

At the beginning of the last century, the German doctor Paul Ehrlich introduced the concept of the 'magic bullet': an ideal drug that would precisely target the place in the body where it was needed and nowhere else. In practical form, these 'magic bullets' were still far beyond the reach of the medical world. Since the beginning of this century, however, the marketing authorisation of the first antibody drug conjugates (or ADCs) has given doctors the resources which go some way to achieving Ehrlich's 'magic bullets'. An ADC is, to continue using ammunition vocabulary, a 'guided missile': a destructive load (the drug) is connected to a navigation system (the antibody) that guides this load straight to its target in the human body, i.e. the tumour (see box).

As the 'Connect to Cure' part of the company name reveals, Synaffix specifically focuses on the connection between drug and antibody. While Van Berkel draws the process by which that connection is achieved on a piece of paper. Van de Sande points from his office to a tall tree outside on Pivot Park in Oss where Synaffix is based. "Remember, what Sander's drawing is not to scale. If the antibody is as big as

that tree over there, we can pass through all the waving branches and attach a birdhouse to a specific branch high up in the tree. What we do is 'state of the art' decoration, but then on a molecular scale."

What did you actually have in 2010 when you thought of the possibility of building up a business?

Van Berkel: "The basis of Synaffix is bicyclononyne, or BCN for short. This is a molecule with fantastic properties: it can react very selectively, without adding a catalyst, with azide-containing molecules in any desired medium. These reactions take place very fast, without creating waste products and are very popular among people who work with biological

'The most important thing that we do is trying to bring a cure for cancer a step closer'

systems. As researchers at Radboud University, Floris van Delft (co-founder and current Chief Scientific Officer of Synaffix, ed.) and I spent a long time working with these kinds of molecules, which finally resulted in BCN. Because it seemed to work so well and because the synthesis is so simple, we had an invention which we felt we could commercialise. The idea was initially to offer BCN and derivatives to research groups and companies which, like us, are engaged in so-called click chemistry, but who can't make the molecule themselves."

'The results show that Synaffix ADCs are more effective than the market products and that the side effects are considerably less harmful'

Van de Sande: "The field of click chemistry was growing exponentially in those early days and that formed the basis for the initial business model. We sold our molecules, which we had just patented (see box, ed.), on a small scale to various parties who used them for research purposes. However, we realised that this wasn't the way to get maximum value from our technology. After an in-depth market survey, we decided to focus mainly on high quality applications of our molecules in complex biomolecules, particularly in the field of ADCs for specific cancer therapies. In this application, the advantages offered by our technology come into their own."

What makes your technology so suitable for ADCs?

Van Berkel: "When we decided to focus on ADCs, we only had half of the BCN for the connection, namely the part that is attached to the drug. Thanks to targeted research, we then made a great discovery which enabled us to elegantly attach the other half to the antibody. In itself, that's a small revolution in the way in which ADCs can be made. Furthermore, with that second technology pillar, we have the ability to very simply and quickly modify all off-the-shelf antibodies to make them suitable for our technology. To continue Peter's tree analogy: to develop new ADCs we don't first need to build new trees and let them grow. We can prune any existing tree so that it becomes suitable for our technology, saving a lot of time and money."

Van de Sande: "The most important thing that we do is to increase the effectiveness and the safety of specific drugs.

By doing so, we are trying to bring a cure for cancer a step closer. With our technology, we are improving the stability of the connection between antibody and medicine, also the payload. These payloads are toxic substances which are up to ten thousand times more toxic than existing chemotherapy. So you can only use such payloads if they very selectively target the tumour. If they go off track and get into the blood stream, this can cause serious side effects elsewhere in the body. In general, the greater the stability of the connection between antibody and drug, the higher the dose you can safely administer and the more effective the treatment may be. Finally Synaffix ADCs are made so that they are more homogenous than the ADCs which are currently on the market. To use the tree analogy again: we connect the payload each time to the same branch. With the commercial ADCs, the payloads are attached to different branches which means they are much less effective."

Can you already express the power of your technology in clinical terms? In other words: what advantages does it offer patients?

Van de Sande: "Our technology hasn't been tested on people yet. All the data we have are based on animal models. We usually compare Synaffix ADCs with the two ADCs which are now on the market. So we use the same antibodies and the same payloads, but then connected via our own technology. The results which we've produced so far show that Synaffix ADCs are more effective than the market products and that the side effects are considerably less harmful. But remember: at the moment these results only apply to this particular animal model and for the tumour material used. So it may be different in cancer patients. We therefore remain cautious, but on the other hand, all the test results we have so far indicate that our technology really gives better safety and effectiveness."

What steps will Synaffix be taking next?

Van de Sande: "The preclinical test phase will soon be completed. The aim is then to start clinical testing on cancer patients in the coming years. For this purpose, we are working together with pharmaceutical companies which use our technology in the development of their ADCs. If the first clinical results are good and new ADCs made with our technology prove to be safe and effective in people, then we'll celebrate. Because of the necessary follow up studies, it will then take at least three to five years before these drugs are actually on the market. Furthermore, in-house development of ADCs may offer a new growth perspective. But that discussion is still in an explorative phase; we must first learn to walk before we can run."



THE 'MAGIC BULLETS' OF MEDICINE: WHAT ARE ADCs?

Antibody-Drug Conjugates (ADCs) are antibodies to which a cytotoxic or cell-killing substance is attached.

Antibodies are an essential part of the human immune system and there are around 100 million different variants in the body. Each variant recognises certain foreign elements, such as bacteria and viruses and in some cases also cancer cells. Antibodies recognise so-called markers on the outside of these cells and attach themselves to them. The accuracy and selectivity with which that happens makes antibodies ideal for treatments for cancer or rheumatoid arthritis. Five of the ten best sold drugs in 2015 were based on antibodies.

In these drugs, just the binding of the antibody to its target already has a therapeutic effect. For antibodies which target cancer cells, the effect can be enhanced by attaching a toxic substance to the antibody. After binding, the resulting ADC is then absorbed by the tumour cell. Once inside the cell, the ADC is broken down, releasing the toxic load and killing the tumour cell.

Two ADCs have market authorisation: Adcetris to treat certain lymphoma and Kadcyla for breast cancer. Dozens of new ADCs, mainly targeting cancer, are currently being tested on patients in clinical trials.

How has Synaffix protected all its findings?

Van Berkel: "Our first patent application was for the BCN molecule itself, a compound claim for the connection in the field of 'metal-free click chemistry'. As we said, we then started looking for a method to use the advantages of this pioneering technology in complex biomolecules, particularly looking at high quality applications in targeted cancer treatments. The method we developed resulted in our second patent. We then focused particularly on ADCs. We protect our inventions in that field by product claims and applications, with claims for reactions and processes for making them. If you have a platform technology like ours, it's standard practice to further expand your IP portfolio. Our field is developing fast and many players are active in it. That means the bar is being raised higher and higher, forcing us to continue improving and innovating. There's a world of difference between what we can do now and a couple of years ago. So you obviously have to protect all those improvements."

Start-ups sometimes fail to realise the importance of IP protection. What made you aware of how important it is?

Van Berkel: "That was a harsh learning curve. When Floris and I were still working as researchers at the university, we developed the DBCO molecule, a precursor of BCN, and immediately published an article about it. At the time, we never thought about patenting that molecule. Now it's frequently used worldwide. We learned that whenever we discover anything, we must immediately consider whether it is interesting and relevant enough to patent. For BCN, in several respects superior to its predecessor, it was immediately clear that this should be patented. Ultimately, this led to the foundation of Synaffix."

Van de Sande: "In view of this experience, within Synaffix we agree that publishing new data comes second to patenting new discoveries. Now we keep a lid on an invention for longer so that we first really know what its potential is."

How does Synaffix protect the patent portfolio in practice?

Van de Sande: "Very simple: without patents, there's no Synaffix. The patent portfolio is clearly one of the reasons why the company exists. To start with, in our sector you have to attract investors. Furthermore, you need a well organised IP portfolio before you can launch anything on the market. In recent years, we've therefore devoted a lot of time and energy to building up our IP portfolio. We now have a very complete portfolio of fifteen patents including pending applications, which is quite a lot for a young company like Synaffix. We now have such a strong position that we aren't dependent on one single patent and others not in the same field as us can be active without taking a licence on our technology."

Do you come across competitors who still try to move into your field?

Van de Sande: "We work in a sector which tends to respect patents. But if competitors see an opportunity to work around us, you have to assume that they'll try to gain an advantage. We also see cases where mainly larger pharmaceutical companies oppose patents which don't suit them. In that respect, as a small company you can't claim everything. You can't build castles in the sky; claims have to have a solid foundation and be realistic."

Synaffix has registered a number of trademarks. What is the added value of trademarks for a highly specialised business-to-business company like Synaffix?

Van de Sande: "Clients don't buy or in-license our technology because we've registered GlycoConnect or HydraSpace as a trademark, for example. In our world, trademarks are mainly very useful for communication in business development. It's nice to have a label for your technological innovations and not just have to use patent numbers or complicated descriptions. And because our trademarks sometimes give a tiny glimpse about the specific approach we use or its planned application, we can demonstrate a bit of 'category leadership'. So trademarks help us communicate our value proposition, and if they are used consistently, they certainly contribute to the company's success."

*'Without patents, there's
no Synaffix'*

European design protection – worth your money?

AUTHOR: FLORENCE TORDOIR

Every company that spends money and resources on research, development and marketing for its products needs assurance that competitors (or other third parties) cannot take advantage of its innovation. Profiting from innovation requires a good business model and an IP strategy is an important part of that business model. Unlike trademarks, patents and copyright, which are well known and commonly used, design protection is sometimes forgotten or underestimated. However, the design of products, packaging, logos, drawings and artwork plays a key role in distinguishing new products from those of competitors. This article outlines the benefits of Community design protection, including legal conditions and scope.

History

The Community Design Regulation (6/2002) provides EU-wide protection for both unregistered and registered Community designs. Unregistered design rights have existed since March 6 2002, while the registered form of the right became available on April 1 2003. Today, 62% of EU companies use designs in their business. As illustrated in Figure 1, the Office for Harmonisation in the Internal Market (EUIPO) registered nearly 98,000 Community designs in 2014. An application for single or multiple registered Community designs can be filed via EUIPO. It is also possible to file a registered Community design via the Hague System offered by the World Intellectual Property Organisation. Before the implementation of the Community Design Regulation, only Benelux had introduced a uniform design protection law. In all other EU member states, the protection of designs was regulated by the relevant national laws and was confined to the territory of the member state concerned. This inevitably caused problems – it led to conflicts in the course of trade between member states, created possible divisions in the internal market and posed an obstacle to the free movement of goods. The creation of the Community design was therefore necessary. A registered Community design is a unitary right that has equal effect across all 28 EU member states.

Definition of 'design'

Mere ideas and concepts do not qualify as intellectual property; instead, intellectual property defines and protects human innovations and creations. A design protects the appearance of a product and is intrinsically linked to the product. In a legal sense, an industrial design constitutes the ornamental or aesthetic aspect of a product. An industrial design may consist of three-dimensional features (eg, the shape of an article or packaging) or two-dimensional features (eg, patterns, lines or colour). To qualify for Community registration, a design needs to be new and possess individual character:

- 'New' means that no identical design has been disclosed before it. If two designs differ only in immaterial details, they will still be considered identical.
- Possessing 'individual character' means that the overall impression conveyed to the informed user differs from that conveyed by any other previous designs.

With respect to the requirement that a design must be new, the Community Design Regulation provides for a one-year grace period in which a business can investigate whether a product is worth protecting before applying for registration. Almost any industrial or handicraft item can be eligible for design protection (except for computer programs), provided that it is not against public policy or certain morality standards. Words, sounds and colours are examples of elements that cannot qualify as designs, as they cannot constitute the appearance of a product. However, they may qualify for trademark protection. Design protection is limited to the appearance – as opposed to the functionality – of the product whose design is registered. Products whose appearance is solely dictated by their technical function cannot qualify for design protection; however, they may qualify for patent protection. Registered Community designs filed at EUIPO include blueprints, packaging, computer icons, graphical symbols, cartoon characters, colour logos, posters, furniture, parts of products, logos, typefaces, drawings and artwork, get-ups and ornamentation.

Scope

A Community design should, as far as possible, serve the needs of all industry sectors in the European Union. Some of these sectors produce large numbers of designs for products which have a short market life, where protection without the burden of registration formalities is an advantage and the duration of protection is less significant. However, there are also industry sectors which value the advantages of registration for the greater legal certainty that it provides and require the possibility of a longer term of protection, corresponding to the foreseeable market life of their products. This consideration led to the creation of two forms of protection: the short-term unregistered Community design and the longer-term registered Community design. Both provide protection against the manufacture, sale and import/export

of any product incorporating the protected design without the consent of the rights holder. However, registered and unregistered Community designs are quite different in terms of their scope of protection and duration.

An unregistered Community design provides protection for three years from the date on which the design is first made available to the public. A registered Community design provides protection for five years from the date of registration and can be renewed every five years up to a maximum of 25 years. The scope of protection of an unregistered Community design is limited to designs that are a conscious, intentional copy of the protected design, made in bad faith. In cases of apparent infringement, the ability to prove both authorship of the design and the date on which it was made available to the public is crucial. The scope of protection for a registered Community design is broader, as it grants protection against identical and similar intentional and unintentional copies of the registered design. Proof of the date of creation is not required, since the date of filing takes precedence. Determining which option to choose depends on many factors, including budget, type of product and timing. If an unregistered Community design is chosen, it is crucial to document the first date on which the design is made available to the public.

Filing conditions

The procedure to apply for a registered Community design at EUIPO is straightforward. It does not include an examination of whether the design is new or possesses individual character. The examiner checks only whether the submission qualifies as a design and whether it contains any element that goes against public policy or morality. The procedure does not provide for oppositions; however, third parties may request that a design registration be declared invalid via an administrative procedure before EUIPO. This invalidity procedure can be launched against a design only once it has been registered (i.e. not during the registration process). An applicant can file multiple designs in one application, without limitation.

The only condition is that the products to which the design is applied belong to the same Locarno class (i.e. the same type of goods); however, this condition does not apply when the application concerns ornamentation. Multiple applications are frequently used (e.g. for variations in the style and colour of products, for furniture sets and for variations in logos), as the extra cost per additional filing is relatively low. Besides the relatively low costs of the official fees (€350 for a single design) and the simple procedure, registration is also very fast. For most applications a registration certificate is obtained within a few days. Compared to the timeline and procedure for trademarks and patents, the design registration process is fast, straightforward and cheap.

Registered Community design as complement or alternative

A registered Community design is one choice from a palette of IP rights – and one IP right does not per se exclude another. Registered and unregistered Community design rights can be used cleverly to optimise all IP rights or as an alternative between them.

Trademarks

Where a company has designed a word mark, with a complex figurative logo and produces a diverse range of products, registering trademarks in all Nice classes will be costly. In this scenario, registering a new logo as a Community design could be an option – this would extend protection to all kinds of product which include the logo. Further, the rights holder can prevent its logo from being used by third parties on goods other than those with trademark protection. As an added incentive, no use obligation exists for designs (in contrast to trademarks). Design registration has certain advantages against trademark registration:

- It covers all goods and services;
- It is independent of the product; and
- It is less costly than trademark registration.

However, design registration has the following disadvantages:

- The duration of protection is limited to 25 years;
- The design must be new and to have individual character in order to be valid; and
- In order to prove infringement, the degree of resemblance needs to be stronger than that for trademarks.

In the case described above, the design registration would complement the trademark registration, with the aim of strengthening protection against merchandise infringement.

Descriptive word marks: EUIPO and other national EU trademark authorities have recently started to refuse registration of descriptive word marks accompanied by a simple figurative logo. It is expected that these types of logo will increasingly be filed as registered Community designs instead. However, whether this is option will give the intended protection remains to be seen.

Distinctiveness: Many new product and packaging shapes which do not satisfy the distinctiveness requirement for trademark protection may qualify as a Community design. Design law may therefore serve as an important supplement to trademark law. For example, new distinctive designs may initially be protected under the Community Design Regulation while the rights holder distributes and promotes the distinctively shaped product or packaging in order to create the perception in the minds of consumers that the shape is being used as a trademark.

Patents

Many products include a common area that covers both patent and design rights and are frequently protected by both types of right. Although a design may not comprise the appearance of a product which is solely dictated by its technical function, the Community Design Regulation does not limit the protection of designs (and parts of designs) which fulfil a technical function. Design protection can therefore be a relatively lowcost addition to a patent application. When applying for both applications, great care must be taken regarding the timing of filing and publication, in order not to harm the novelty of either claim. In these circumstances, deferment of publication can be a solution.

Copyright

Copyright protection depends on national laws and arises without any formal requirements through the creation of a work of literature, art or science. It requires proof of the date of creation and proof of authorship. Many works that are protectable under national copyright laws are also protectable as a registered Community design. The main advantage of a registered Community design over copyright protection is that it covers all EU member states, providing one clear right that is governed by a single law. Further, the proof of date and authorship is covered by the registered Community design. However, the term of protection is shorter than that for copyright, which runs during the life of the author and for 70 years thereafter (under Dutch copyright law).

marketable asset and protects against copying and counterfeiting. So, have you developed or created a new design for a product, packaging, logo or ornament? Have you or your IP adviser performed a search of the Internet and available databases to check the novelty of the design, and was the outcome positive? If so, you should apply for a registered Community design, including the correct illustrations of all perspectives necessary to show every feature of the design. Registration gives you the benefit of being the presumed exclusive owner of the design in 28 countries – and all future EU member states – for up to 25 years. On registration, you may indicate on the product and in advertisements the ‘(d)’ symbol and state that your product is a registered Community design.

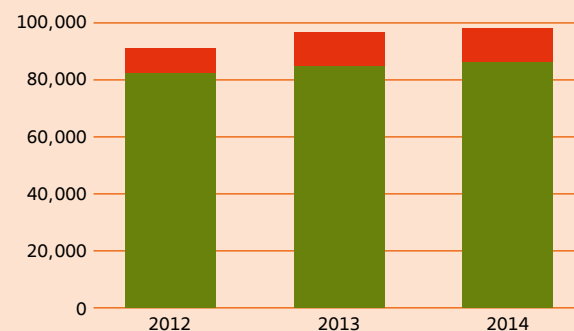
A registered Community design gives you a defensive advantage. Competitors are clearly informed about the alleged exclusive right and the online public register will show the design right if a search is performed. The registered Community design can be used in case of infringement – initially in a letter of summons and later (if necessary) in court. Further, counterfeiting and fraud are easier to address with a certificate in hand – for example, the registered Community design can be registered at Customs. Besides the defensive advantage it provides, a registered Community design right counts as a company asset that may be traded, licensed or pledged and has value in case of sale. A registered Community design does not limit the other IP rights that can be applied to your innovations: it is a valuable complement to trademarks, patents and copyright. In short, Community design registration is worth your money and your company is worth Community design registrations!

Figure 1
Increase in registered Community designs from 2012 to 2014

EUIPO received close to 98,000 registered Community designs in 2014, up 1% on 2013. Of this total, international filings rose by 5% to more than 10,300. While lower than forecast, this increase represents a solid performance given the economic conditions. During the year, design e-filing continued to grow in popularity, reaching 92% of the total in December, 12% higher than in 2013.

Source: European Union Intellectual Property Office. Freely available at www.euipo.europa.eu

RCD VOLUMES



	2012	2013	2014
■ Direct	83,135	86,848	87,454
■ Int	9,163	9,854	10,302
Total	92,298	96,702	97,756
% of total	10%	10%	11%

Food for thought: protection and design of foodstuffs and packaging

AUTHORS: BART TEN DOESCHATE AND PETER SIMONIS

Consumers come across food and drink products every day, and several times a day they must choose between the products of various suppliers. The distinguishing power and brand experience of these products and their packaging plays a big role in these choices.

Types of trademarks

Trademarks for foodstuffs are registered in different ways. Although many manufacturers have registered word marks, the visual aspect of a mark also plays an important role. Since consumers often encounter products in the supermarket, a product must immediately distinguish itself from all the other products.

Therefore, the Trademark Register is full of registrations of logos, packaging and colours. With these registrations manufacturers hope to prevent competitors from taking advantage of the recognisability and appearance of packaging. It is also possible to register the shape of a product (eg, Wokkel crisps), but this is not easy to achieve. As consumers are not expected to recognise a product immediately by its shape, a shape trademark must be radically different from usual shapes in the market. Coca-Cola recently suffered an important loss in relation to this requirement. The European Court of Justice ruled that Coca-Cola's plastic bottle was not sufficiently different from bottles already on the market. Further, a shape may not have a technical nature. At present, the Kit Kat chocolate bar is subject to legal debate. According to the UK Intellectual Property Office, the fact that the bar can easily be broken into smaller bars means that the mark's shape is necessary to produce a technical result. The UK courts must now rule on this issue.

Extent of protection

A trademark registration is relevant only when a competitor copies the trademark in such a way that there is a likelihood of confusion. In terms of consumers, the overall impression of both products plays a decisive role. This creates an interesting twist for supermarket products. The supermarket is not a place where people make considered purchases; many people choose a product based on just a quick glance

over the shelf. Therefore, it is easier to make a mistake when buying something in the supermarket than in, for example, a car showroom. The rapid decisions made by consumers in the supermarket mean that the likelihood of confusion is assumed quickly. Similar coloured packaging can be enough.

Consumers becoming more critical

There is an increasing trend whereby consumers are looking more critically at foodstuffs. Several certification marks have been introduced aimed at guaranteeing the quality of foodstuffs.

This development is to be welcomed because, in most cases, certification marks guarantee better health, a better environment or better animal welfare. Unfortunately, strict controls are necessary in order to ensure compliance with the rules for the use of certification marks. The misuse of certification marks can mislead consumers or, even worse, pose risks to consumer health.

It is not only the use of certification marks that requires monitoring. The production and processing of foodstuffs must also be controlled. Recent scandals have involved horsemeat, smoked salmon and powdered for babies.

Information on the label

When purchasing products in the supermarket, consumers largely rely on the information presented on the label. It is therefore important that this information is accurate and complete and, more importantly, that it is not misleading. To ensure this, various rules apply to packaging information.

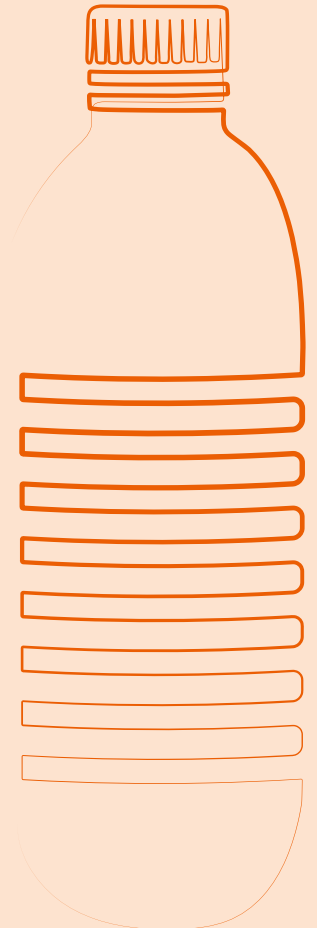
For example, there are rules regarding the use of:

- a geographical location (eg, 'Greek yoghurt' versus 'Greek-style yoghurt');
- certain health claims (eg, 'sugar-free' or 'low salt'); and
- food information (eg, calories, protein or fat).

Some manufacturers have complained that this gives them little space to make their labels attractive, but consumers increasingly attach value to this information.

The supermarket jungle

The weekly trawl through the supermarket involves more than it might appear. Consumers are tempted from all sides to buy different products. At the same time, manufacturers are trying to carve out and defend their own places on the shelves and in consumer minds. However, the fight for consumer attention is also conducted through quality communications and certification marks on the packaging. National legislation and regulations should help consumers and protect them from confusion and misrepresented products. The supermarket is in fact a regulated jungle.



Impartial to partial priorities at the EPO: Enlarged Board of Appeal to decide on fundamental questions

AUTHOR: SHIRI BUREMA

Priority: the right of an applicant to claim the filing date of his first application if, within 12 months, he files another application in respect of the same invention. At the Paris Convention back in 1883, all was set-up in order to help the inventor to protect his ideas. Fast-forward to nowadays, some practices within the European Patent Office (EPO) show that the priority claim may actually backfire on the patentee. This phenomenon in EPO case law has been nicknamed 'poisonous priority'.

'Poisonous priorities'

So how do priorities become toxic? The story begins with the common situation of further technical developments during the priority year, maybe even driven by new insights from the search report received somewhere during that priority year. Tricky situations arise when the later application EP2 claims broader subject-matter than was originally disclosed in the first application EP1. Just consider the following 'AND claim' situation: you have a first application disclosing features 'A, B AND C', what happens if in your subsequent application you claim 'A, B, C AND D'? Or alternatively: first the invention was in a combination of 'A and B', and you later find that a claim on 'A' alone would suffice? In Europe, since G2/98 all is crystal clear: for such 'AND claims', you lose priority. Hands up. Any publications during the priority year could be used against you.

So far, so good. But what if your first application gets published and still discloses embodiments within the scope of your claim? In that case, your first application can destroy the novelty of your subsequently filed claim, being a prior right under Article 54(3) of the European Patent Convention (EPC). This is how priority can be poisonous for the fate of an application.

'Toxic divisional' attack

One way to avoid such toxic priorities is by not making the priority document available as a prior right document. Even then, however, the applicant may still face a similar toxic issue if it files a divisional application with the subject matter found in the priority document. The claims of this divisional application are entitled to priority, as they relate to the same invention as the priority document; but if the parent application had lost priority due to broader claims, the divisional application becomes novelty destroying to its parent. There is no provision in the EPC that prohibits such self-collision between parent and divisional, and under EPO case law a 'toxic divisional' attack can be based on it. Since Decision T1496/11 set the tone, the use of this controversial weapon during opposition and appeal proceedings has increased, much to the concern of practitioners.

The antidote: partial priority, but how?

So the EPO case law allows for poisonous priorities and toxic divisionals, but where is the antidote? In the G2/98 decision, the EPO's Enlarged Board of Appeal tried to provide one by introducing a test for establishing partial priority. If the priority document discloses 'a limited number of clearly defined subject matters', then these would keep their priority date as part of a claim in a later application, even if they were claimed together with extensions to the subject-matter introduced at the later filing, as long as the resulting claim also contains 'a limited number of clearly defined alternative subject-matters'. Such claim would hence have multiple effective filing dates.

At the time, the legislator envisaged to allow partial priority for an 'OR claim' situation, e.g. if the priority document discloses 'A' and the subsequent application claims 'A OR B', then feature A would enjoy priority and feature B would get the filing date. The legislator also suggested allowing multiple effective filing dates for the situation where a species is disclosed in the priority document and its genus is subsequently claimed, as long as that genus encompasses 'a limited number of clearly defined alternatives', e.g. the priority document discloses 'rat' and the subsequent application claims 'rodents', then 'rat' would enjoy priority and the other rodent species (a limited number and arguably clearly defined alternatives) would get the filing date.

And there is the twist: when is a subject-matter clearly defined? Does the priority document have to explicitly spell out the alternative embodiments, e.g. literally mention all other rodent species except for rats? Or would it be sufficient that these alternative embodiments may be conceptually identified on the basis of the priority document? In other words, would it be sufficient that the skilled person may 'directly and unambiguously' derive these alternatives from the priority document?

A chronological circle for interpreting G2/98

Years ago, T665/00 took a brave interpretation of G2/98 and set the stage for the discussion on this issue. The situation: the priority document discloses an example in which microspheres are used with a specific mass of 0.04 g/cm³; the subsequent application claims microspheres with a specific mass of < 0.1 g/cm³. Thus, a single point value (0.04 g/cm³) is used to claim priority for a whole range which contains an infinite amount of possible values (< 0.1 g/cm³): how limited and clearly defined is that?

Strictly speaking and according to the G2/98 test, such priority claim is invalid. Consequently, the subsequent application would get the filing date, rendering the priority document toxic as Article 54(3) EPC prior art. Despite the priority claim being invalid in T665/00, the Board decided that the example in the priority document could not be used as an anticipation against the claim in the subsequent application. The Board has fit the issue into the EPC's legislative framework by saying that there would have been a valid priority claim only for this exact example. In the context of G2/98, the Board reasoned that the ensemble of microspheres with a specific mass of < 0.1 g/cm³ is to be seen as a claimed genus, a pool of embodiments out of which only the single point value of the 0.04 g/cm³ species would enjoy priority because it was disclosed in (the example of) the priority document. All other microspheres with a specific mass of < 0.1 g/cm³ (but ≠ 0.04 g/cm³) would thus be entitled to the filing date. It gave rise for some discussion at that time, but it seemed all was settled.

Time has shown that little was true. A whole line of case law has been created on this point, and Boards appeared divided on the issue. Some Board of Appeal decisions (such as T1127/00, T1443/05, T1877/08, T0476/09) rather followed a narrow interpretation of the G2/98 test, requiring an explicit disclosure of alternatives in order to successfully claim partial priority (e.g. disclosing 'A-B-C-D' is acceptable for claiming all these embodiments, while 'A to D' would only allow priority for explicit embodiments 'A' and 'D'. Or, if in the case of ranges, a range from the priority document (say 1 to 10) would overlap with the subsequently claimed range (say 5 to 15), it would not be possible to claim priority for the overlapping portion (of 5 to 10), because these ranges would be continuums of values and thus not correspond to distinctive alternative embodiments).

That is, until more recently in T1222/11 a Board of Appeal broke with this line of previous case law decisions. It has taken its own, broader, approach to assess partial priority, allowing for the subject-matter of a claim to be fragmented theoretically into the bits from the priority document and extensions upon filing, without even requiring for an explicit identification of every single embodiment in the priority document (e.g. 'A to D' would now also allow priority for all

embodiments 'A-B-C-D'). For establishing whether G2/98's 'limited number of clearly defined subject-matters' is disclosed in the priority document, the Board advocates using the well-known 'directly and unambiguously derivable' test from G3/89, resulting in a more context driven assessment rather than an assessment based on the literal text. Decision T571/10 has then adopted and endorsed this broader approach. So are we going back to taking the 'original' T665/00 perspective which is more in favor of the patentee? One thing is for sure: an inconsistency in the EPO jurisprudence was created.

You can read the whole article on our website:
www.nlo.eu/fortify

The safe road to China

AUTHORS: MARLOUS STAL-HILDERS AND MILCA GRAVER-DE LOOPER

In our contact with clients, we find a great deal of scepticism where trademark protection in China is concerned.

Apparently, protection is not enforceable. But we see that a bit differently. It's not just about enforceability, but particularly about accessing the market in an uncomplicated way. Here are three key conditions:

- Without protection, production in China can be stopped and exports banned if a third party has laid claim to your trademark in China.
- Without protection, you may not sell your products on the Chinese market if a third party has laid claim to your trademark in China.
- Chinese webshops often demand trademark registration.

These key values are sufficient reasons to protect your trademark – even defensively. However, you have to do it properly.

In China, the "first-to-file rule" applies. First come, first served. An accurately conducted registration in the national register gives the best chance of the strongest possible registration. This is because the Chinese procedure differs considerably from that in Europe. If you already have registrations in China, you should investigate whether your trademarks are sufficiently protected.

What do you need to look out for?

Is the trademark also registered in the right Chinese translation? This prevents hijacking of the trademark in Chinese characters. Are the right products or services included in the application? Besides the familiar classification, China also has sub-classes of products and services. It is very important that these descriptions comply with national regulations: a faulty classification can lead to the entire application being rejected. The examination only has one modification round. If the classification is then judged not to be satisfactory, the whole application fails. It is therefore recommended that you apply for a separate registration per class instead of several classes in one application.

Use of the trademark

Three years after registration, the registration may expire if it is not used in China. So make sure you systematically record the use of the trademark as proof of use. How is the trademark used in business? If capital letters are used, the registration must also be in capitals, otherwise there is also a risk of expiry due to lack of use. You must therefore be extra alert with regard to both applying for registration and using your trademark in China and you must continue to monitor how the Chinese public pronounces your trademark. Does this correspond with your chosen Chinese translation?

In practice, we see that Western companies often become involved in legal proceedings aimed at cancelling the registration of their trademarks by Chinese companies. These western companies do so with varying success.

The famous basketball player Michael Jordan was unfortunately unsuccessful. Michael Jordan discovered that his surname, the name of his sons, his Jumpman logo and his back number 23 had been registered as a trademark by a Chinese company selling sports products. Beijing Higher People's Court rejected Jordan's claims, among others because the Chinese company had been using the trademarks for many years. Jordan had acted too late.

Fortunately, positive results are achieved in increasing numbers of cases. Heinz, known in China for baby food, opposed an application by the Chinese equivalent of its trademark for feeding bottles. Eventually Beijing Higher People's Court was convinced of the familiarity of the Chinese brand HEINZ based on the big market share, extensive sales area and the long-term promotion of HEINZ baby food.

Kate Moss was also able to terminate the trademark registration of her name by a third party. Although Kate Moss has not proved that her name was well known in China, Beijing Higher Court felt that her name had been used unfairly for commercial purposes.

In recent years, there have been many developments in trademark legislation in China. The Chinese authorities are doing a great deal to bring an end to the reputation that protection is not enforceable.

Taking into account the do's and don'ts, the road to China is becoming much safer. Registration of a trademark, its use, monitoring the market and taking swift and effective action in the case of violation are the key conditions.





Column

Fair is fair

Vincent van den Eijnde is director of Pictoright (www.pictoright.nl). Pictoright has agreements with numerous parties about the use of images and illustrations, distributes collective rights payments and promotes the interests of the image makers.

Images are currently being uploaded on an unrivalled scale, while the income of the makers of these images continues to fall. Pictoright, the copyright organisation for over 80,000 artists, photographers and illustrators, feels that this situation needs to be changed and may have a solution.

Platforms like YouTube and Facebook largely derive their right to survival from *user generated content*: all the information and images originate from their users, who freely share stories, photos and video clips with the world. Meanwhile, the platforms themselves earn a lot of money from the advertisements which are placed alongside that content. But what about the copyright on uploaded texts and images owned by third parties?

Over the past five years, digital use of images has grown exponentially. Every day, more than a billion images are uploaded to Facebook, Snapchat, Instagram, Flickr and Whatsapp. Meanwhile, a wide discussion has apparently started about the desirability of reforming or modernising copyright. Regular pleas for new exceptions to copyright are heard. Often these views are argued from the perspective of the individual consumer rather than the copyright holder.

Last summer, the European Commission even talked about so-called freedom of panorama and before that about an exception to user generated content. This might include a videoclip of a dance performance or a photo of an exhibit in a museum, made and uploaded by the user of the platform. If the possibilities of exempting such use from permission by the dancers or image makers are being discussed at European level, it is also time to bring the platforms into the discussion.

Users often don't know the terms and conditions to which they are agreeing when they upload content. In practice, they are obviously not entitled to copyright over the works of others which appear in their uploaded contributions. But to make each individual user on such a platform pay the rightholders is virtually unfeasible. A good solution would be to force those who earn a lot of money from the collected content – the platforms themselves – to make a reasonable contribution. Instead of exempting this use in general, it seems more obvious to charge those who earn most from the posted content.

Thus rightholders do not have to enforce their rights themselves each time. And if they do, and this leads to frustrating situations, then it is not so much the image makers who are to blame but failing regulations. The solution to that can be simpler than many think.

New advisors

In 2015 and 2016 NLO has welcomed many new advisors. Due to the opening of our new Belgian office, NLO has been strengthened with multiple Belgian patent attorneys. (You can read more about the opening of our office in Ghent on page 33.) Also a large number of trainee patent attorneys joined our various teams. Are you curious to see all the new faces of NLO? The Advisors Guide of 2016 provides an overview of all the advisors and their expertise. Ask for the new Advisors Guide at your own NLO or NLO Shieldmark contact person or visit www.nlo.eu

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7

Stephan van den Brink (l) and Bob Vlemmix (r)
are demonstrating the Manus VR



NO NEED FOR A KEYBOARD OR MOUSE

Control your virtual world intuitively

It's easier to experience what virtual reality is than to describe it. Halfway through the interview with Stephan van den Brink, co-founder and CEO of Manus VR from Eindhoven (the Netherlands), he provides a couple of demos for his guests. It's a question of putting on the headset, pulling on the gloves, a quick calibration and suddenly you're being attacked from all sides by flying aliens.

That interaction between the real and the virtual world, so ensuring that pointing a finger results in splattered aliens on a screen, is managed by the Manus. The Manus is the first 'data glove' specially developed for virtual reality applications, and games in particular. The Manus is packed with sensors which track all the hand's movements and communicate them via Bluetooth to the headset. So, gamers no longer have to give commands by means of a keyboard, mouse or joystick. They can now control their virtual world fully intuitively using the Manus. "In the past, telephones had a rotary dial or buttons; now they have a touchscreen. We want gamers to be able to make the same huge progress."

How did Manus VR start?

"Our story starts in mid-2014. Facebook had just taken over Oculus VR, the maker of the Rift headset. When a big company like Facebook gets involved in virtual reality, you know that something's about to happen in that world. Bob [Vlemmix, ed.], a friend from secondary school and now our PR man, came up with an idea for creating something for the interaction between hand and virtual reality. That soon produced an idea for a glove. We brought in Maarten [Witteveen, the current CTO, ed.], who I've known since primary school, and the three of us elaborated a proof of concept. At the time, it still looked like a ski glove with a load of wires and electronics on it, but it worked."

What happened after your proof of concept?

"We tried to raise money via crowd funding for the further development, but we quickly cancelled that because we couldn't show anyone any real plans. However, we did get some media attention and we were invited to take part in Startup bootcamp HighTechXL, an accelerator for hardware start-ups. We passed the selection of over 10 thousand candidates and took part with eleven other teams. That was really against all expectations, because we'd only existed for a couple of months. Then you're given 15 thousand euros in pizza money and three months to elaborate a plan. The bootcamp is totally aimed at getting ready to attract your first investors."

Why were you able to take part in the bootcamp?

"It's all about two things: your vision, and whether you have a team that can fulfil that vision."

What made your team good?

"Diversity, and we're all very driven, extremely driven. We are all essentially entrepreneurs. You have to be, because you start with nothing. No one knows how it works, you need problem-solving skills. During the bootcamp, you're supported by experienced sparring partners. They can sometimes immediately say whether an idea's going to work or not, but you have to find out everything yourselves. You can

do market research via Google, but we also went out on the street in Eindhoven. We took up positions by the University and near the railway station and asked people whether they liked our glove, whether they would try it and what they felt it was worth."

And what was your vision?

"That's already changed, but our vision then was to facilitate direct contact between your hands and the digital world, without needing a keyboard or a mouse or other device. We had several ideas on how to achieve this. Converting sign language into speech, for example. A great idea and socially very relevant of course. During the bootcamp, we explored that idea further but unfortunately it isn't possible. Theoretically it is, but sign language is different all over the world so the market is very fragmented and not suitable for the beachhead market. We also thought about applications in surgery, about controlling drones. That's all fun and interesting, but you have to choose, because it all works. Finally we returned to our first idea, the gaming market."

Why the gaming market?

"Everyone in our team is a gamer. In the past more than now, but we are still interested in games and new innovations. We know how that market works and we have an affinity with it. That's different for the medical market, for example. Furthermore, it's a consumer market with huge potential. There's a reason why players like Sony, Google, HTC and Microsoft also focus on it. A hype has been created around virtual reality and now that so many big players are involved, it's not likely that the hype will die down again. So much money is being invested in that market that it mustn't fail. So the timing was good. Three years ago, our idea probably wouldn't have got anywhere. Now the technology is far enough evolved to offer a great virtual reality experience."

What can you guys offer as a start-up that all those big players can't?

"We want to create virtual reality on the input side, which is not something which those big players are really engaged in. You can see that in their own controllers, which are just joysticks with a tracker. And it would have been much harder for us to make a typical hardware product. But with our product, a combination of hardware and software integrated in textile, we've placed ourselves in an area which those big players don't really know much about."

What was your pitch to investors at the end of the

bootcamp?

"Our key message was that in future, the virtual world will

be controlled with our smart glove. We used the example of the telephone in our pitch: in the past, telephones had a rotary dial or buttons, now they have a touchscreen. We want gamers to be able to make the same huge progress. Control via our glove is much more intuitive than using a keyboard or a mouse."

The pitch must have gone well.

"I was in the audience at the time. Halfway through our pitch, Bob came and told me that I had to go downstairs with him at once. A Chinese investor wanted to invest the rest of the money we needed. We'd clearly said that we needed six hundred thousand euros. 'That's been taken care of', someone from the bootcamp organisation said. I only had to say yes. At the end of the presentation, we had an agreement in principle on a napkin and a handshake. When it ended, we were cheering on the stage, it was amazing. Ultimately, we didn't do business together. We didn't fit with this investor, because of where we currently were. Within a week, however, we'd made a good deal with two angel investors from this region."

In negotiations with investors, IP protection is often a subject of discussion. What had you claimed or protected at that moment?

"The first data gloves date from the 1980s and the basic patents had expired long ago. We had a freedom to operate analysis conducted. This showed that we were free to launch our product on the market without violating anyone's rights, and that's important for investors too. Furthermore, our glove mainly consists of existing components which we use in the way they were intended, so that's not innovative. We have meanwhile submitted a patent application relating to the sensors in the fingers of the glove. We've thought up an innovative way of positioning the sensor-strips in the glove as one nicely integrated system. We've submitted a European application for that. We now have a priority date, which luckily gives us enough time to decide the countries for which we might want to apply for patents. For a start-up, that's very important. We don't yet have the financial resources to protect our invention very extensively. But technology is developing so fast that the sensors we are now using may become outdated in a couple of years. The best protection for us is therefore not our IP position, but the speed which we work with. Once we're about to launch the consumer version of the Manus on the market, the protection of the design will be important. At the moment, that's still changing so often that it's too early to protect anything in that field."

What happened after signing the deal with your investors?

"That was in March 2015. We immediately made a very good



plan to profile our company and our product and let the world know that we existed. In June, we wanted to exhibit at the E3 [Electronic Entertainment Expo, ed.] in Los Angeles, which is a huge show where all the big players present their new games to the media. It was nerve-wracking trying to get a glove ready in time to give demos and we fought hard not to let ourselves be hidden away in a corner. Eventually, our 18 square metre stand was located exactly between the gigantic stands of Nintendo and Oculus."

What was your experience at such a show?

"When the show opened at 10.00 a.m., we immediately had four camera crews at our stand, including one from the BBC. It was crazy, and it just didn't stop."

What feedback did you get?

"It was very instructive. We were there with a prototype that we'd somehow managed to get to a certain level, but then you're judged from the consumer's viewpoint. Most visitors were amazed by our demo. You put on a glove and it just works. Nothing like that had ever been shown at a show before. Fortunately, a number of important sites presented it as 'very promising'. We weren't totally there, but we knew that already."

So enough positive reactions to continue.

"Yes, that was very important to us. In theory, our business plan stopped after the E3. There was no sense in planning

anything for afterwards because we didn't know what the reactions would be. If your product doesn't appeal to consumers, you need to take a completely different direction. After the show, we analysed all the feedback with the team and our investors, learned our lessons and sketched out a new path. The plan is to make a limited production run of around ten thousand pairs of gloves and to get them to developers. We need to convince them that our system is nicer, finer and better than controllers from other manufacturers. It's the game developers who ultimately need to make the content that the consumer wants to use and for which they will buy the Manus."

Shouldn't you also make games yourself?

"We will! We've entered into a partnership with Peter Kortenhoeven, one of the animators for the famous Overlord games. Together, we're now building a game environment in which a little character called Pillow has to find a way through a playhouse. This requires all kinds of hand interactions: they have to hold things, push things away, perform combinations with two hands, play on a magic piano etc. By being personally involved in that game development, we get the content in which the hand interaction really has added value, so we can see exactly what our product can do. In the virtual reality market it's like this: your demo is your pitch. You can promise heaven and earth, but investors don't appreciate stories or numbers. They want to see a demo and experience for themselves whether something's cool. Then

they'll invest, otherwise they won't. "

You've just said that a thousand pairs of gloves is a limited number. But still, you're talking about a turnover of a couple of million euros.

"Well, ten thousand isn't that many. The idea is that we sell a couple of million gloves in a few years' time. Virtual reality will become a new platform just as television was in the 1950s. The market first needs to develop, but if we design a good product that consumers want to use, then our market is enormous. The potential volume equals the number of headsets that are sold. At the end of 2015, HTC said that they want to sell a billion headsets in the coming eight years. That's ambitious, but those are the figures we're talking about. "

So your ambition is to make Manus VR a world player!

"That's exactly what we're aiming at. TomTom is a great example for us. They also developed something technological and launched it worldwide. But with our current team, we won't be able to run a company that serves a global market. You need to upscale, but we can't do that ourselves. So we are now looking for an investor who knows what steps we need to take and who has the expertise and the contacts. "

Shouldn't you be in Silicon Valley?

"We should, because they know how this works. In March, we'll be at the Game Developers Conference in San Francisco with our new demo. In the end, we'll stay in the right environment to find investors with whom we can enter the next phase of our company. "





New European rules for trademarks

AUTHOR: YVONNE NOORLANDER

On December 15, 2015 the European Parliament adopted the new European Trademark Regulation and Directive, which concerns both national and EU trademarks. These new rules came into force on March 2016. Below is a summary of the most important changes.

- Costs per class
- The requirement of graphic representability
- Specification of goods and services
- Opposition deadline for EU designations in International Registrations
- Invalidity procedures at national offices

More information

Do you want more information about the changes and what practical implications they may have for you? Contact your trademark attorney at NLO Shieldmark.

Read the full article at

http://www.nloshieldmark.eu/en/news_and_publications/news_viewer/620/New-European-rules-for-trademarks



Image: Ikea

Supreme Court in Indonesia bars use of IKEA, by Ikea.

Could that happen in the EU as well?

AUTHOR: BART TEN DOESCHATE

The Swedish furniture giant Ikea has recently suffered a difficult loss in Indonesia. The Indonesian Supreme Court has judged that the trademark IKEA is legally registered by another company, PT Ratania, giving the company sole rights over the trademark IKEA.

No use, no rights

Ikea registered the trademark back in 2010. In 2013, PT Ratania registered its own trademark for the word mark IKEA, the letters being an acronym formed from Intan Khatulistiwa Esa Abadi, a reference to the rattan industry. The case went up to the Supreme Court, which judged that although Ikea has an older registration, it had not used it for three years. For that reason, it could no longer invoke the registration.

What about in Europe?

In Europe too, there is a requirement to use a trademark. If a trademark has not been used for five consecutive years, it may be cancelled and the right to that trademark may no longer be invoked. The fame of Ikea – whose catalogue has apparently been printed more times than the Bible – would make it virtually impossible for a third party to win a case in Europe like the one in Indonesia.



NLO seminar Ghent was a great success!

On Monday March 14th the official opening seminar of NLO's new offices in Ghent took place. We look back at a very enjoyable afternoon.

At the seminar 'Innovation & IP as key drivers for growth' multiple speakers talked about innovation and IP. Peter Hinssen, global thought leader on business innovation and disruption, gave an inspiring presentation with the title 'The Network Always Wins', about how to survive the Age of Uncertainty; with the rise of new digital markets and the consequent network-ization of our environment, the digital world is changing faster than ever.

Geert Glas, head of International IP Group and partner at Allen & Overy LLP, followed with a presentation about IP as a growing asset in innovative companies. Paul Clarkson, NLO, and Koos Rasser, Rasser|De Haan, talked about IP in the largest market; US. Emil Pot, NLO, and Frank Landolt, Ablynx, gave the final presentation about contribution of innovation & IP to the economic growth in Flanders.



Personnel

NLO and NLO Shieldmark are proud to announce that several attorneys have recently successfully completed their training programmes.



Aleidus van 't Hof

Dutch and European patent attorney



Thea van der Wijk

Dutch and European patent attorney



Sanne Pfeifer

Dutch patent attorney



Yvonne Noorlander

European trademark & design attorney and legal advisor



Peter Simonis

European trademark & design attorney and legal advisor



Daan Wijn Nobel

Benelux trademark & design attorney and legal advisor

Last updates on the EU patent package

Already many decades ago, the idea of a patent that would be valid in all member states of the European Union appeared for the first time. Since then, several proposals have seen the light, but the only system that has actually entered into force is the well-known and successful European patent application system, in which the procedure up to grant is centralized, and after grant the patent is split up into a 'bundle' of national patents.

AUTHORS: ROLF SUURMOND AND MIRIAM VÁZQUEZ VÁZQUEZ

Recent developments are paving the way to a completely centralized European patent system. But, where are we? How close is this EU patent package to become a reality?

The EU patent package consists of two major pieces: the Unitary patent and the Unified Patent Court.

The Unitary patent, officially known as the "European patent with unitary effect", is a European patent to which unitary effect is given in all of the participating member states. Up until grant, European patent applications are treated by the EPO following the same procedures of the European Patent Convention that we have become used to in the last decades. In the new system, the patent proprietor can request, free of charge, unitary effect for the European patent. It will thus not be necessary any more to validate the patent separately in each country. This means that the payment of renewal fees is simplified, as they only need to be paid to the EPO, instead of to all the designated Contracting States, and translation costs are reduced, because only one human translation in any language of choice needs to be filed. Besides that, human-made translations are no longer necessary thanks to the introduction of an advanced automated translation system, which translates the patents into the languages of the member states.

One important change that the Unitary patent will bring, are the renewal fees. With European patents, renewal fees need to be paid in all the designated Contracting States separately in order to keep the patent in force. This is a rather bothersome and expensive process, and for that reason the renewal fees system will be improved with the Unitary patent, being especially beneficial for large validations.

True Top 4

The task of establishing the renewal fees is carried out by the Select Committee, created to supervise the EPO activities related to the Unitary patent. After several proposed models, the selected proposal is the so-called "True Top 4". This price structure establishes that the renewal fees for the Unitary patent will be about equal to the sum of the renewal fees of the four most frequently validated EU states (Germany, France, UK and the Netherlands). This represents an important cost reduction for patent proprietors wishing to validate in a large number of states.

The second piece of the EU patent package, the Unified Patent Court (UPC), is a common patent court that aims at centralizing patent litigation procedures for both Unitary patents and traditional European 'bundle' patents. Currently, invalidity and infringement actions in respect of European patents are dealt with in each country separately by national courts, posing an inconvenience for patent proprietors and third parties due to the different legislations and procedures in the different countries. The UPC will simplify these litigation procedures, as a decision made by the UPC will have effect in all the participating member states.

Agreements

In the past, both Italy and Spain have actively opposed the EU patent package, and the Court of Justice of the European Union has not long ago dismissed the last challenge presented by Spain against the Unitary patent. Italy has subsequently reconsidered its position and requested to the European Commission the entry in the enhanced cooperation, which was confirmed officially last September.

Since Poland decided not to join the patent package, and Croatia was not yet an EU member state at the time the agreements were established, a Unitary patent will have unitary effect in potentially 25 member states. This also depends on the ratification of the UPC Agreement.

In order for the UPC to enter into force, the UPC Agreement needs to be ratified by at least 13 states, including France, Germany and the United Kingdom. Currently 9 countries have officially ratified the Agreement: Austria, France, Sweden, Belgium, Denmark, Malta, Luxembourg, Portugal and Finland.

With the ratification of already 9 states in place, there are only 4 additional ratifications needed, including the “mandatory ratifications” of Germany and United Kingdom. The process in the UK appears to be on track, since the location of the local division of the UPC in London has recently been announced, and the UK government has recently published draft legislation to amend the UK Patents Act to allow the Unitary patent and Unified Patent Court in the UK. It seems however unlikely that the ratification will take place before the upcoming referendum about the “Brexit”, since any discussion of legal powers being centralised could be used in the political game. The process in Germany has also started, as last February the Federal Ministry of Justice has published proposals to ratify the Unified Patent Court and to change the German patent law to be adapted to the Unitary patent.

Also The Netherlands has its ratification process ongoing, concurrently with a proposal for a revision of the Dutch patent law to adapt it to the Unitary patent, and this revision is likely to be adopted by Parliament together with the ratification by The Netherlands of the Agreement on a UPC. This, together with the confirmation that The Netherlands will have a local division of the UPC, is especially relevant for Dutch companies, and prepares The Netherlands for the EU patent package.

Rules of procedure

A Preparatory Committee created to supervise and coordinate the work related to the UPC until the Court is completely established is in charge of, among other tasks, setting up court fees and recoverable costs and creating rules of procedure.

The rules of procedure prescribe how litigation before the Unified Patent Court will be conducted. The final ‘Rules on Court fees and recoverable costs’ were published in February. The Preparatory Committee had in May last year

performed a consultation on the rules on court fees for the UPC, including two alternative proposals for fee reductions: alternative 1 considered a reimbursement of 20%-60% of the fees where actions were withdrawn, settled or heard by a single judge, and alternative 2 considered exemption from value-based fees for SMEs, non-profit organizations, universities and public research organizations. In the final version we can find a compromise between these two proposals: a reimbursement of the fees will be available where actions are withdrawn, settled, or heard by a single judge, as in alternative 1, and micro and small enterprises will have to pay court fees (fixed and value-based), but will be entitled to a 40% reduction.

Continuous progress

The final version of the ‘Rules on Court fees and recoverable costs’ furthermore establishes that there will be no official fee for the application and withdrawal of the opt-out of the jurisdiction of the UPC. The opt-out allows a patent owner to choose that patent disputes are dealt with by national courts and not by the UPC. This decision of not establishing an opt-out fee will take away some concerns of the users of the patent system.

There is therefore a continuous progress in the EU patent package, and maybe the first Unitary patents could be granted by the beginning of 2017. Therefore, it is time that users of the patent system start to prepare themselves, so that they can make optimal use of the new possibilities. NLO keeps you up-to-date about the latest developments on the website www.nlo.eu, in an electronic mailing list, and during informative events. Of course we will contact you in the future about the new possibilities when they become relevant for your patent portfolio. Should you have questions about these important developments, please contact your NLO account manager.

Be prepared for the new system!

The introduction of the new system provides important choices you can make for your existing patents and patent applications. The choices you have to make:

- To opt-in or opt-out
- If you want to have a Unitary patent then you may need to actively delay prosecution of your pending applications.

In case you would like more information or if you would like us to take action, please contact your NLO representative.



Another one well registered

NLO Shieldmark is proud to have been voted 'Benelux - Firm of the Year for Trade Mark Prosecution' by the highly respected Managing IP magazine. The award was presented on Thursday 10 March 2016 in London. We wish to thank our clients and fellow professionals for their positive feedback and for believing in our quality and service. We assure you that we will continue to improve its services with the aim of developing our relationship even further in the years to come. We look forward to continuing our cooperation.