Welcome to a brand new publication from Awapatent. We hope that AWA IP Review will be a valuable source of comment and analysis relating to the very latest developments in IP law. All the articles are written by IP specialists at Awapatent who have extensive experience in a number of key fields.

AWA IP Review is published four times a year to keep you and your colleagues within the IP field fully up-to-date. Our aim is to share useful insights into relevant issues and provide you with in-depth knowledge wherever it is needed.

Magnus Hallin
CEO Awapatent AB

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An invention relating to computer games faces the unpleasant challenge of overcoming not one but two exceptions listed in Article 52(2) EPC, namely computer programs and rules for playing games. Nevertheless, in a decision issued last year, the Technical Board of Appeal of the EPO found such computer game software to be patentable.

The application in suit related to a game of the type where a player navigates a character in a gaming environment, and randomly encounters other characters with whom the player interacts. The invention concerned a novel way to make the random appearances of characters more unpredictable, by making the probability of appearance dependent on a time factor. The game machine thus included a clock, and a program for varying the probability based on whether the time of the clock is within a time zone.

The Examining Division considered the invention to be a standard implementation of non-technical (albeit novel) features, and thus found lack of inventive step. As prior art, the Examining Division cited several well known computer games, such as Pokémon, Pac Man and Frogger.

The Board, however, did not agree, and referred to decision T336/07, where a gaming rule is defined as “the regulatory framework agreed between [or with] players concerning conduct, conventions and conditions that are meaningful only in a gaming context”. The novel way to vary the probability of appearance was not considered to be a gaming rule according to this definition, but rather a solution to the technical problem of increasing the unpredictability of an already established gaming rule (i.e. that the characters appear randomly).

The decision shows that even under the strict current practice of the Board, an invention clearly relating to one or several of the exceptions listed in Article 52(2) may still be patentable. The deciding factor is whether the invention provides a solution to a technical problem. It is another matter that the Boards do not seem to agree on how to determine this. For example, it is likely that a similarly technical solution in a computer-implemented business method would encounter far greater problems.
Enlarged Board of Appeal decisions – past and future

The Enlarged Board of Appeal at the EPO had a busy week in the middle of February 2010: three new decisions were issued. These decisions were reported in Awapatent Newsflashes on 17, 18 and 23 February respectively.

Two of the decisions (G1/07 and G2/08) relate to the exception to patentability according to Article 53(c) EPC, i.e. that European patents shall not be granted in respect of methods for treatment of the human or animal body by surgery or therapy and diagnostic methods practiced on the human or animal body. The third decision (G4/08) clarifies that the language of the proceedings used before the EPO cannot be changed.

There seems to be no particular reason as to why three decisions were issued almost simultaneously. However, it can be recognized that decisions G1/07 and G2/08 relate to the same point of law, and also that oral proceedings were held in these cases at approximately the same time, more particularly at the beginning of November 2009.

Presently, there are three pending referrals before the Enlarged Board of Appeal:

- Case G1/09, which is to decide whether a refused application is still pending for the purposes of filing a divisional application during the period for filing a notice of appeal, when no appeal has been filed.
- Case G3/08, which concerns the limits of patentability of programs for computers within the meaning of Article 52(2)(c) EPC, stating that programs for computers shall not be regarded as inventions, and Article 52(3) EPC, stating that patentability is excluded “only to the extent to which such a European patent application or European patent relates to such subject matter [...] as such”.
- Cases G2/07 and G1/08 (considered in consolidated proceedings), which are to clarify the extent of the exception to patentability according to Article 53(b) EPC, i.e. that European patents shall not be granted in respect of essentially biological processes for the production of plants or animals.

It is not known when decisions can be expected in the cases currently pending before the Enlarged Board of Appeal. It can, however, be noted that oral proceedings are to be held in the cases G2/07 and G1/08 on 20–21 July 2010, so a decision may be issued late in 2010.

Use of meta tags and key words on the internet – new case law brings further guidance

The Issue
Marketing on the internet is an important aspect of modern business. The use of search engines such as Alta Vista, Yahoo and Google has exploded and the possibility to reach billions of viewers is an important factor in any modern marketing strategy.

In order to be noticed in the search result of internet based search engines like these, the use of meta tags and sponsored links is important. Meta tags are searchable words embedded in the “invisible” html code, containing all the instructions for the browser to properly render the website contents. Sponsored links, on the other hand, use defined words (key words) that, when searched for, will render a so called sponsored link to the website of the sponsor, in close proximity to the ordinary search result.

Use of a trademark is naturally encouraged in order to attract customers, as are generic terms describing products or services offered by the particular business. There are usually no concerns regarding this kind of use.

The questions start to arise when someone decides to use a word which is identical to or similar to a trademark owned by someone else, in particular a competitor. As will be seen, there is some uncertainty if and under what circumstances a company may use other companies’ trademarks as meta tags or key words.

The Legal View
Within the European Union, it is clear that the owner of a trademark has the right to decide when, how and by whom the trademark may be used. There are certain exceptions to this exclusive right. The most common exceptions are the use of generic terms, use for the purposes of indicating the intended purpose of a product or service (notably spare parts) and use in comparative advertising (under certain conditions), provided that such use is in accordance with honest practices. It is also normally permissible to use a trademark in relation to goods which have been put on the market in the EU with the consent of the trademark owner.

There is no specific regulation for using trademarks on the Internet per se. The normal rules governing the use of trademarks apply equally to use on the Internet. However, the use of meta tags and key words has not been specifically addressed by the legislature and must be further developed by the courts. The European Court of Justice (ECJ) is the highest court for all matters concerning EU law and its decisions define the case law of the EU. However, the topics of meta tags and key words have thus far only been tried by the ECJ once. Except for that very recent case, which will be addressed below, certain case law from some national courts within the EU may give an idea of the opinions of national courts thus far.

In France, three different cases have found their way to the ECJ, all involving the search company Google. The core issue in these cases is whether or not Google can be held responsible for allowing third parties to use other entities’ trademarks as key words. The French lower courts have held Google responsible, but all three cases have been appealed to the French Supreme Court, which referred the questions to the ECJ. It is these three cases that have now been decided by the ECJ.

In the United Kingdom, existing case law has so far been rather liberal. It has been stated by the courts that the general public would not be confused by the appearance of sponsored links or the content of search results and that, when browsing, the trademark in this context is used only by the person browsing the Internet, not the business responsible for the key word or meta tag. In the latest case from the United Kingdom concerning use of protected trademarks as key words, questions have been referred to the ECJ.

Case law from the German courts indicates that use of a competitor’s trademark as a key word is permissible whereas use as a meta tag is prohibited. The key reasoning by the courts is that the average internet user would be able to separate sponsored links from the natural search results, whereas a meta tag use may confuse the Internet user as to the origin of the web site appearing in the natural search result. In a third case that concerns a lawsuit against a competitor that bought a trademark as a key word, the German court has referred the questions to the ECJ.

Finally, in Denmark, a court has ruled that use of a competitor’s trademark as part of a comparative statement in meta tags is permissible, whereas use of the trademark alone as a meta tag constitutes infringement. Regarding the former use, the court stated that although it was not clear from the context of the search result that the meta tag included a comparative statement, this was not a strong enough argument to make an exception to the general rule on comparative advertising when used on the internet. However, the court stated that, even if the meta tag does appear in the visible text on the website and is being used for a permitted
purpose, the defendant must still show that the use is in accordance with honest practice.

The Ruling of the ECJ
On March 23, 2010, the ECJ delivered its ruling in the three joint cases referred by the Supreme Court of France. First and foremost, the questions referred concerned 1) whether or not the provider of a paid search service (in this case Google) shall be deemed to be using a specific key word as a trademark when it allows advertisers to use the trademark of another entity as a key word, and 2) whether or not use by an advertiser of a key word which is identical to or similar to another entity’s trademark is prohibited.

The ECJ answered the first question in the negative. The ECJ held that when a search service provider makes available trademarks as key words for use by advertisers, it does not use the trademark itself within the meaning of applicable law. It is the customer, the advertiser, who uses the mark, not the search service provider. Thus, Google cannot be held responsible for allowing someone to use a competitor’s trademark as a key word.

Concerning the second question, the ECJ stated that use of another entity’s trademark as a key word is prohibited if the use is of such a nature as to make it difficult for the average internet user to determine whether the goods/services referred to in the sponsored link originate from the holder of the trademark (or an undertaking economically linked with the holder) or from a third party. Whether or not this is the case will depend upon the circumstances in each individual instance.

So, What Now?
It is our belief that on the internet, as in any other instance, use of another entity’s trademark must always be viewed in the specific circumstances. The core issue is this: what right am I invoking to use someone else's trademark?

If any of the exceptions to the general rule of exclusivity to the trademark applies (as discussed above), such use should normally be permitted even on the Internet. As far as comparative advertising visible only in the meta tags is concerned, we would, however, advise against following the decision by the Danish court, as there is a risk that such use will ultimately become prohibited with reference to the concept of “honest practices”.

Where there is any suspicion that the use of another trademark (notably that of a competitor) is an attempt to draw attention to your own trademark, such use will run the risk of being considered dishonest and thus be prohibited. One example of this is the ruling in the Danish case, where the court also held that use of a trademark alone as a meta tag constitutes infringement. Basically, if you cannot give a very good reason for why you should be allowed to use another entity’s trademark, such use will be suspected of free riding on the goodwill of the trademark in question, something that is not normally acceptable.

The ruling of the ECJ could at first glance be interpreted as a carte blanche to use your competitor’s trademark to attract customers to your own website. One could very well argue that the average internet user easily understands that the sponsored link has nothing to do with the proprietor of the trademark. However, whether or not a specific use is permitted or prohibited depends largely on the circumstances of the use. This will be assessed by national courts, and national discrepancies can be expected. Uncertainty will most likely continue to prevail until sufficient national case law has clarified the situation.

To sum up, we would recommend caution when using trademarks or other protected names (or variations thereof) in meta tags and sponsored links. This recommendation stands despite the ruling of the ECJ. If you succumb to the temptation to attract attention to your own business by inserting the trademark of the competition in your meta tags or key words for sponsored links, you are skating on thin ice. It may hold, but if it breaks, you risk finding yourself up to your neck in problems and with no safe haven to swim to.

1 C-236/08 Google France v. Louis Vuitton Malletier
C-237/08 Google France v. Viaticum, Luteceiel
C-238/08 Google France v. CNR HH
3 Interflora Inc & Anor v. Marks & Spencer Plc & ANOR [2009] EWHC 1095 (Ch) (22 May 2009)
4 Beta Layout I ZR 30/07, Impuls I ZR 183/03. Oberlandesgericht Frankfurt am Main, case 6 W 17/08, 26 February 2008.
5 HD case 36/2001 Coffilter International ved Jørgen Byrial Petersen v. Melitta SystemService Aromateknik

Report by Mattias Karlsson, Attorney at Law, Gothenburg office and Janine Andersson Hollink, Attorney at Law, Stockholm office
Will mediation solve your IP dispute in Europe?

The European Parliament and the Council of the European Union have adopted a directive on certain aspects of mediation in civil and commercial matters. The objective of the Directive is to facilitate and regulate access to alternative dispute resolution (ADR) and encourage the amicable settlement of disputes by the use of mediation. Fundamental principles include guaranteeing a well-balanced relationship between mediation and ongoing judicial proceedings, to ensure that deadlines, prescription periods et cetera will not fall due during ongoing mediation, and to guarantee confidentiality with respect to the mediation, unless otherwise agreed between the parties.

The Directive has bearing primarily on cross-border disputes but may also be applied in member states’ national mediation regulations. Resulting agreements will be enforceable in member states. Implementation or enforcement of an agreement may, of course, require that the confidentiality is broken.

Mediation under the Directive may only concern matters that are at the parties’ disposal, i.e. matters that are amenable to out-of-court settlement. This entails that a cross-border court action concerning a declaration that a patent is invalid or infringed may (in many jurisdictions) not be settled through mediation. An action brought to recover damages for an infringement, on the other hand, falls under the Directive.

A court before which an action is brought may invite the parties to use mediation to attempt to solve the dispute. Participation in mediation under the directive is, however, never compulsory. The Directive does not mention the parties as the ones taking the initiative to mediation, but that would in all likelihood not pose a real problem.

It should be noted that Denmark has no part in this Directive and is not bound by it. The remaining member states are under the obligation to amend or bring into force the laws and regulations that are necessary to comply with this directive by 21 May 2011.

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2 A dispute in which at least one of the parties is domiciled or habitually resident in a member state other than that of any other party

Report by Lars Pettersson, Attorney at Law, Söderhamn office.
New EPC regulations change the way we make amendments

The EPO Administrative Council’s initiative “raising the bar” amends the EPC Implementing Regulations substantially, in an attempt to improve the grant procedure. While changes to the rules that affect the possibility to file divisional applications have been given a lot of attention, there are other important changes that need attention too, and that have been discussed a lot less. In particular, the timing for submitting amendments has been changed.

It will no longer always be possible to postpone amendments until the first Examination Report is received. International Search Reports, ISRs, International Preliminary Examination Reports, IPERs, and European Search Reports, ESRs, all contain written opinions, and new regulations require responses to those opinions, often including amendments.

In EURO-PCT cases, the written opinion of the ISR or IPER must be responded to under new Rule 161, but only if the ISR or IPER was drawn up by the EPO. The Rule 161 communication is usually issued shortly after regional entry and has a very short term, only one month, for filing a reply. This may be a challenge to some applicants. While it would be possible to escape the new mandatory Rule 161 response by not using the EPO during the international phase, we do not generally recommend this. EPO ISRs are usually of excellent quality and may be a great asset in a subsequent national or regional prosecution. Additionally, prosecution of a patent application at the EPO is considerably simplified if the EPO has already acted as ISA and IPEA. Instead, prepare the response in advance, at regional entry or even earlier. The Rule 161 communication itself does not contain any additional information needed for the response.

The written opinion accompanying the ESR must be responded to when confirming the maintenance of the application under Rule 70. This term is longer, so this will not usually be a problem. Essentially, but not formally, the ESR written opinion now becomes the first examination report.

It should be emphasized that any amendments filed in connection with Rule 70 or Rule 161 communication responses will count as the applicant’s one and only opportunity to voluntarily amend the application under new Rule 137(3). Further amendments require the consent of the examiner.

Another important change is that the EPO will begin to formally request, under new Rule 137(4), that the basis in the originally filed application for all amendments must be indicated in the response. The EPO will otherwise issue a communication with a short response term inviting the applicant to do this. Therefore, as a routine, always tag every amendment with an indication of its basis.

In conclusion, the changes to the EPC regulations will require amendments to be introduced earlier. Support for amendments must be clearly indicated. Be prepared!

New initiatives have been taken for the creation of a European Union Patent and the EEUPC

Summary
In a draft regulation on a European Union Patent it is suggested that the European Union accedes to the European Patent Convention (EPC) as a designated state in order to create a unitary patent which has equal effect throughout the European Union. The European Patent Office will resume responsibility for examination and grant of European Union Patents. The Council of the European Union has also completed a draft agreement on the establishment of a European and European Union Patents Court (EEUPC) with exclusive jurisdiction over the European Union Patent and over European Patents.

European Union Patent
A draft Council regulation stipulates the entry into force of a European Union Patent to enable uniform protection with uniform effects throughout the European Union. It is proposed that the European Union accedes to the EPC as a territory for which a unitary patent can be granted. The European Union Patent contrasts with a European Patent by virtue of its unitary character as a single patent that covers the whole territory of the European Union, while European patents are national rights that are granted in a common process before the European Patent Office.

The Lisbon Agreement has provided for a possibility of enactment of unitary intellectual property titles within the European Union by a qualified majority decision. The establishment of a European Union patent is thus less complicated, politically speaking. However, decisions regarding languages with respect to such intellectual property titles require unanimity. A separate regulation governing the translation arrangements for the European Union Patent may therefore be needed.

The draft agreement on the European Union Patent contains a set of regulations concerning mainly post grant issues such as the right to prevent direct and indirect use of the invention, limitations of the effect of the European Union Patent, rights of prior use, and grounds for revocation.

In particular it is noted that, after grant of the European Union patent, any national patent will be ineffective to the extent that it covers the same invention for the same territory as the European Union Patent. Loss of the national patent may be complete or partial and will take place after termination of opposition proceedings, or in the event that no opposition is filed after the opposition period has ended. A lapse of the European Union Patent after a loss of a national patent has taken place will not revive the national patent.

European and European Union Patents Court
The European and European Union Patents Court will have exclusive jurisdiction on matters relating to validity and infringement on European and European Union Patents.

Structure of the European and European Union Patents Court
The court will include a first instance with a local division, or alternatively a regional division, a central division, and a second instance with a court of appeal.

A local division is established in a member state while a regional division is established for a group of member states. Local divisions hearing more than 50 cases per year should have panels composed of two national legally qualified judges and one judge from a central pool of judges. For local divisions hearing less than 50 cases per year, the panels should be composed of one national judge and two legally qualified judges from a central pool of judges. Optionally, countries with less than 50 cases per year may form a regional division that fulfills the requirement of hearing at least 50 cases per year. Regional divisions will have panels composed of two regional legally qualified judges and one judge from the pool of judges.

Direct actions for revocation of patents must be brought before the central division. However, a counterclaim for revocation following an infringement action can be brought before a local or regional division. The local or regional division may proceed with the counterclaim for revocation or refer the counterclaim to the central division and either proceed with the infringement action or stay those proceedings. Alternatively the local or regional division may, with the agreement of the parties concerned, refer the whole case for decision by the central division.

An additional technical judge should be appointed to a local or regional panel in the case of a counterclaim for revocation or, in the case of an action for infringement, when requested by one of the parties. The panels of the central division should be composed of two legally qualified and one technically qualified judge. This means that matters of validity and infringement are considered to be different in nature, with validity proceedings regarded as being more technical in nature than infringement proceedings.
Language of proceedings
The language of proceedings before any local or regional division shall be the official language(s) of the state or states hosting the division, or any official language designated by the states that share a regional division. However, a contracting state may designate one or more of the official languages of the European Patent Office as the language of proceedings of its local or regional division. In the event a division so approves, parties may agree on the use of the language in which the patent was granted as the language of proceedings. If the division concerned does not approve the parties’ choice of language, the parties may request that the case be referred to the central division. At the request of one of the parties and after having heard the other party or parties, or alternatively with the agreement of the parties, a panel may decide to use the language in which the patent was granted as language of proceedings.

The language of proceedings before the Court of Appeal shall be the language of proceedings before the first instance. Alternatively, parties may agree on the use of the language in which the patent was granted as the language of proceedings.

It should be recalled here that the panels have a multinational composition. Hence the use of national languages may become a problem, even though a training program for the judges is to be established that includes training in language skills. It may therefore be assumed that the use of the language of the granted patent may become an attractive alternative.

The language of proceedings before the central division should be the language of the granted patent.

Representation
Parties shall be represented by lawyers authorized to practice before a court of a contracting state, or alternatively by a European Patent Attorney who has an additional European Union Litigation Certificate. It should thus be noted that the current draft amendment implies that representation is compulsory.

Territorial effect of decisions
Decisions of the court shall have effect for the whole territory of the European Union in the case of a European Union patent, and for the territory of those contracting states for which the European patent has taken effect in the case of a European patent.

Financing of the court
The court should bear its own costs through the use of court fees.

Conclusions
Since the court shall have exclusive jurisdiction in respect of actions relating to European and European Union patents and patent applications, and considering the fact that national patents covering the same invention will cease to have effect in the event that a European Union Patent is granted, one can assume that national courts will have jurisdiction only for a very limited number of patents. However, quality and predictability for transnational litigation will probably be improved, since the establishment of a pool of judges means that experienced judges will be available in all jurisdictions. In addition, the agreement establishing the Court together with the statutes and rules governing its implementation will have a substantial harmonizing effect for patent litigation in Europe.

The proposed system will herald a general improvement to the present system, which involves a risk of divergent decisions in different European countries and the need to conduct litigation in multiple European jurisdictions.

An entry into effect of the proposal will thus lead to an increased value of IPR in Europe as an effect of generally reduced costs for pan-European litigation. Return on investment in new competitive technologies may, when supported by an adequate IPR policy, be increased for companies that are leaders in or highly competitive in a specific field of technology. Seen against this background of a potential for an increased return on investments in research and development, the proposal should therefore support economic growth by stimulating innovation.

We therefore look forward to the opinion from the European Court of Justice on the conformity of the proposal with European Union Law, which is expected within the next few months.

Business method applications at the EPO

In two recent Board of Appeal (the Board) cases at the European Patent Office, T1000/08 and T588/05, the Board refused applications for lacking inventive step without citing any closest prior art document. Both applications related to commercial systems, where data sent to an end-user was adapted to interests of that end-user.

T1000/08 related to a content-providing system for distributing content containing advertisement information to an end-user. It aimed at maximizing matching of advertisement information based on subscriber profile data.

T588/05 related to computer-assisted telemarketing. During a primary telemarketing transaction (conducted, for example, over the Internet), a computer system attempts in real time to find a best possible secondary transaction option for a customer who has just bought a different product or service in a primary transaction.

Not surprisingly, the Examining Division (ED) found that there was not much technical matter claimed except for programming (or operating) a computer system. However, since the claim involved operating a computer system, the method involved technical means and was, as such, within the patentable area.

Instead, both applications were refused for lacking an inventive step. For achieving inventive step there has to be an inventive technical solution. Since all other features of the claims are non-technical, the ED decided to refuse the applications due to lack of inventive step in view of common technical knowledge. No closest prior art document was cited.

In T588/05, the Board stated that inventive technical contribution might only exist at an implementation level, i.e. dealing with processing, storing and outputting data. The Board concluded that, if the real time operation of a database was to be understood to have a technical meaning implying inventive step, the application would need to be enabling for carrying out that operation. Without a detailed disclosure, that real time operation is either not sufficiently disclosed or simply routine matter not providing inventive step.

In 1000/08, the Board confirmed the ED’s finding that the invention was a straightforward implementation of a business or administrative procedure.

“It appears in fact to the Board that a businessman getting the idea to select advertisement according to the requirement of commercial sponsors, content providers and individual subscribers, would hardly have turned to a programmer for developing this concept… The notional person skilled in the art of computer programming need not know anything about audiovisual contents, advertisements or human nature.”

Conclusions

Do not focus too much on Article 52 (Patentable subject matter) when it comes to business-related software inventions. Article 56 (Inventive step) may be a much higher barrier.

Means-plus-function claims – an endangered species finding a sanctuary in Europe

Under US law, claim elements expressed in a means-plus-function format are given a special interpretation, in that they are deemed to cover the corresponding structure, material or acts described in the specification and equivalents thereof. [35 USC§112 para 6]

This interpretation rule applies both during prosecution and during litigation. [in re Donaldson]

With a description listing only one or very few alternative structures, materials or acts which correspond to a means-plus-function claim element, such a claim may thus be given a very narrow interpretation in infringement litigation.

Hence, in US practice, the trend appears to be moving away from the use of means-plus-function claims.

In Europe, however, the situation is different.

For starters, the European Patent Convention does not treat means-plus-function type claim elements any differently than other claim elements: during prosecution, all claim elements are given their broadest possible interpretation.

Hence, a “means for rocking a cradle” may very well be the hand, and not merely an electric motor as the description could have stated.

Now, if you are prosecuting a means-plus-function claim, and get anticipated by something that seems far-fetched in light of your description, but which nevertheless fulfils the function, you will need to look for support for a narrowing amendment.

Here, the amendment practice under the European Patent Convention may pose another challenge: you cannot make a generalization unless there is a basis in the application. Hence, you will want to make sure that your application contains as much structure as possible, but also language providing support for generalizations that cover that structure.

In this context, it is important to note that the amendment practice under the European Patent Convention uses the same standard for assessing amendments as it does for assessing the right to priority.

Hence, if your application did not contain means-plus-function language on its filing date, you cannot count on being able to introduce it later.

Similarly, if your priority application did not contain means-plus-function language, you cannot count on maintaining your priority if the means-plus-function language was introduced upon filing a subsequent, priority-claiming application.

For cases where means-plus-function language may be suitable, it is thus important that the means-plus-function language be included at the drafting stage, along with all the structure, generalizations and intermediate generalizations needed to succeed under, for example, US law.

So, in Europe, the challenge of the means-plus-function claim is getting through the prosecution phase and/or a nullity action.

When getting into litigation in Europe, a means-plus-function type claim element may very well turn out to be a jackpot, since it is interpreted broadly and does not suffer from the drawbacks that it would suffer from under US law.