PATENTS – TRADEMARKS – DESIGNS – EUROPEAN AND GERMAN CASE LAW

PATENTS

Oral Proceedings before the Examination Division of the European Patent Office (EPO) to be held via videoconference

According to the Decision of the President of the EPO dated April 1, 2020, in view of the current COVID-19 situation, oral proceedings before the Examination Divisions of the EPO will continue to be held by videoconference.

Upon request, oral proceedings may be held on the premises of the European Patent Office if there are serious reasons against holding the oral proceedings by video- conference such as, in particular, the need to take evidence directly. If, however, the request to hold oral proceedings on the premises of the European Patent Office is refused, such a refusal is not separately appealable.
Decision of the President

Plants and animals exclusively obtained by essentially biological processes – not patentable

According to opinion G 3/19 (Pepper) of the Enlarged Board of Appeal (EBA) of the EPO, issued on May 14, 2020, the EBA adopted a "dynamic interpretation" of the exception to patentability under Article 53(b) EPC.

The EBA held that the non-patentability of essentially biological processes for the production of plants or animals also extends to plant or animal products that are exclusively obtained by means of an essentially biological process.

This opinion of the EBA diverges from the previous decision G 2/12 and G 2/13 according to which, the non-patentability of essentially biological processes, such as crossing and selection, for the production of plants or animals under Article 53(b) EPC did not extend to products that are exclusively obtained by means of an essentially biological process.
Opinion G 3/19

Method for forecasting a value of a weather-based structured financial product – not technical

According to the Decision T 1798/13 of the Technical Board of Appeal of the EPO, the "weather" is not a technical system that the skilled person can improve, or even simulate with the purpose of trying to improve it.

The modelling of the weather is rather a discovery or a scientific theory, which are excluded under Article 52(2)(a) EPC and thus do not contribute to the technical character of the invention.

The Board acknowledges that specific knowledge about the structured financial product may be required when implementing the invention, i.e. about the structural parameters, but this knowledge is part of the business specification and is not sufficient for a method to have technical character.
Decision T 1798/13

Decisions of the Boards of Appeal of the EPO during the prosecution of a European patent application are not binding for subsequent nullity proceedings of a branched-off Utility Model.

In the Decision X ZB 5/18 of the Federal Court of Justice (FCJ) of Germany (Bundesgerichtshof), an appeal on a point of law has been rejected. The appeal was filed against a decision of the German Federal Patent Court in nullity proceedings of a utility model branched off the European patent application.

In its decision, the Federal Court of Justice emphasized that the decision of the Federal Patent Court is in conformity with Article 103 of the German Constitution, according to which, in the courts, every person shall be entitled to a hearing in accordance with law.

In particular, according the FCJ, Decisions of the Boards of Appeal of the European Patent Office, are not binding for the German Federal Patent Court, and divergence of the Opinion of the Federal Patent Court does not necessary mean that the arguments of the Board of Appeal of the EPO have not been taken into account.
Decision X ZB 5/18

Patent attorney is not supposed to ask an attorney-at-law to let him use the attorney's post-box.

In the Decision X ZR 60/19, the Federal Court of Justice allowed a reinstatement into the time limit for filing a patent nullity action. In this case, the patent attorney used a telefax for submitting the reasonings of the nullity, wherein some pages of the reasoning have been transmitted only after the time limit, due to technical issues.

The Federal Court of Justice stated inter alia that according to the case law, legal time limits may be stretched to the boundaries by the parties. Under normal circumstances, the remaining time of one hour would have been enough to transmit the whole document without problem.

A patent attorney who does not have a special attorney post-box is not obliged, shortly before the expiry of the deadline, to seek an attorney-at-law to let him use the attorney's post-box.
Decision X ZR 60/19

TRADEMARK LAW

"Storing" of goods is not "stocking" for offering them or putting them on the market.

The Preliminary Ruling C-567/18 Coty Germany GmbH v Amazon Services Europe Sàrl of the Court of Justice (CJEU) concerns the question whether an e-commerce platform can be deemed liable for storing goods infringing an EU trademark.

Coty Germany, a distributor of perfumes, holds a licence for the registered EU trademark 'DAVIDOFF'. Amazon Services Europe enables third-party sellers to place offers for sale on the 'Amazon-Marketplace'. Those sellers may also benefit from the 'Fulfilment by Amazon' scheme, which allows them to have their goods *stored* by Amazon group companies, including Amazon FC Graben, operating a warehouse.

The CJEU concluded that *storing infringing goods* on behalf of a third party, by a subject unaware of the infringement, does not infringe trademark rights.
Judgement C-567/18

No ex-tunc releaf for infringers of a trademark revoked for non-use

In Case C-622/18 AR v Cooper International Spirits LLC and others, Court of Justice (CJEU) had to clarify whether the proprietor of a trade mark that had been revoked for non-use could seek compensation for alleged use by a third party during the five-year period prior to revocation.

The French Court of Cassation referred to the Court of Justice for a preliminary ruling on the interpretation of Articles 5(1), 10 and 12 of Directive 2008/95/EC, in particular, to decide whether a proprietor who *had never used his trade mark* and whose rights were revoked on expiry of the grace period, can obtain compensation for injury caused by infringement before the date on which the revocation took effect.

The Court of Justice, in conformity with previous decisions, held that the proprietor of a trademark enjoys a grace period to begin to make a genuine use of it, during which he may rely on the exclusive rights, *without having to demonstrate such use*. The Court of Justice added also that, from the expiration of the grace period, the extent of such exclusive rights might be affected by the fact that the proprietor had not yet begun to make genuine use of his mark. Therein the Member States may determine the date on which revocation takes effect.
Judgement C-622/18