

**MASTER PROGRAMME
EUROPEAN
INTELLECTUAL PROPERTY LAW
MODULE 1
2008**

HOME EXAM

Answers can be written in the following languages: Danish, English, French, German or Swedish.

You are not supposed to have special knowledge of national law for the purpose of the exam. You should, thus, give your answers with references to European directives and regulations and, if relevant, to European and international conventions/treaties.

**Send the assignment to Aron Verständig
by mail or fax
before 9:00 am (Swedish time)
on 8 April 2008.**

Name the file after your last name!
Mail: aron.verstandig@juridicum.su.se
Fax : +46 8 612 41 09

Master Programme in European Intellectual Property Law 2008
Stockholm University
Module 1

Your task

Your task is to write a memorandum of law that identifies the legally significant facts and legal issues, references the relevant sources of law, applies the law to the relevant operative facts, and draws logical and well-documented conclusions.

The memorandum should cover the questions emphasised in italics, be objective and should identify both the strengths and weaknesses of your conclusions. Any further legally relevant observation is welcome! Each issue should be treated separately. Excessive overlapping of thought in the discussion indicates that you have not identified the issues with sufficient precision.

The teaching staff will take into consideration both the substantive treatment of the facts and issues as well as the more formal aspects of the memo, namely, the correct treatment of sources, the use of clear and concise legal language and brevity. Do not exceed 5000 words!

Good luck!

Marianne Levin
Stockholm, 3 April 2008

The French company *KIWI* has in 2005 developed a new mobile phone that allows you to make a call by simply pointing your finger at a name or number in your address book. The new interface is based on a large multi-touch display and innovative software that lets you control everything through your fingers. The interface was invented by *KIWI*'s disgruntled employee, *Mr. Miso*, who leaves the company shortly thereafter threatening to take all the company's secrets with him.

The phone's other innovative features includes the most advanced web browser ever on a portable device, which allows you to carry Internet in your pocket. Indeed, this phone features the most revolutionary user interface since the mouse. So no wonder *KIWI* hurries to the European Patent Office to make sure of its protection on all the most relevant European markets, *i.e.* Denmark, Germany, Finland, France, Italy, United Kingdom and Sweden, and also applies for a patent in the U.S. "We have to disregard cost for protecting our most important IPRs", explained *KIWI*'s CEO in a press release. "It is a question of our company's life or death". The patent was rejected by the EPO Board of Appeal in March 2007 due to lack of technical effect but granted by the U.S. Patent and Trademark Office in March 2007.

Aside from the innovative technology, the phone features a sleek creative new design, which is sure to be a big hit. In January 2007, *KIWI* also applied for a Community Trade Mark "*iCell*" for its new phone. Applications are filed for the wording as well as the design.

Sure enough the *iCell*-phone is a huge success on the market. Shortly after its release, in September of 2007, however, *NUKA Oy*, the market leader for this type of technology, contacts *KIWI* and alleges that the advanced web browser featured on the phone infringes at least four of its EPO-patents valid in all EU Member States and demands *KIWI* to enter into a license agreement with it. *KIWI* considers the advantages of joining the market leader and benefit from the repelling effects on other competitors this would have. But after reviewing the agreement, *KIWI* found the extremely high price of the license to be unreasonable and unfair. Moreover, *KIWI* believes that some of these patents are invalid.

Also, the Italian company *M&M Electronics SpA* has claimed that the *iCell*'s design was copied from its own mobile phone. The president of *M&M* stated in a press conference: "We consider that *KIWI* copied our phone after our design was unveiled when it was presented in the *iF Design Award* and won the prize for the Best Mobile Design in 2005." On its website www.m-m.com *M&M* places a flash advertisement featuring a green kiwifruit next to one of *M&M*'s own mobile phones, accompanied by an inscription: "Take the true design leader!" The advert is followed by a table juxtaposing different models *KIWI* and *M&M* mobile phones, identified by their model numbers, with *M&M*'s lower prices printed in bold. The same advert is also shown on the special website that *M&M* maintains for France www.m-m.fr.

Furthermore, *Telestaat Inc.* now has contacted *KIWI* and claims that *KIWI* is infringing its rights to the *iCell* trademark. *Telestaat* registered the trademark *iCella* in the U.S. in 2000 for its mobile phone which was a huge flop on the market. *Telestaat* ceased selling the phone the following year but had been looking into developing a new phone which could be released under the old trademark. *iCella* was therefore also registered in Europe as a Community Trade Mark in 2002 but because of the big

flop in the U.S., the phone was never marketed in Europe, and as a consequence the company did not monitor the registrations in Europe and did not oppose the *iCell* registration when it was published in July 2007.

To make matters worse, *Mr. Miso* has started up a new company selling handheld computers featuring a multi-touch display, which *KIWI* believes is exploiting its rights. Also, *KIWI* has recently received a number of complaints from its exclusive distributors in Europe. A budget retailer has been purchasing the phones on the U.S. market and undercutting the somewhat higher priced phones in Europe. Moreover, as the budget retailer does not invest any money on advertising or marketing, it is able to ride on the coat tails of *KIWI*'s European retailers.

What are the possible claims that may be raised against the various persons involved and what are the possible defences? In which jurisdictions are the persons amenable to suit and what are the advantages and disadvantages to suing in the various jurisdictions?