

GENERAL INFORMATION ABOUT THE PROGRAMME

Background and programme objectives

Intellectual property law has historically been an international discipline as opposed to what is the case with other traditional areas of law. In today's interdependent world, there is hardly any field of law that has not been affected by internationalisation. Nevertheless, intellectual property law maintains its unique position as an international discipline. A recent internationalising factor is the gradual development of an EC intellectual property law. This new body of law will gradually have a unifying effect on the national laws. The process takes time however. Those who are knowledgeable today in the field of EC intellectual property law have the opportunity to influence the development tomorrow.

Intellectual property law has not only great political and economic significance but also great cultural significance. Internet and other forms of international telecommunications clearly demonstrate that intellectual property recognises no national borders. These new forms of communications have also made us realise our own dependence on intellectual property law.

There is no doubt that intellectual property has become more important in the modern business world and companies are more and more aware of the valuable assets in their intellectual property. This awareness has made companies argue for and succeed in the creation of stronger exclusive rights, and new forms of protection have emerged. But more and stronger rights also call for new precautions and respect for third parties rights.

The considerable technological development of the last decades has brought quite dramatic effects on intellectual property as a whole, as well as on the various legal modalities included. Similar to earlier technological paradigms intellectual property rights are directly involved and play an important role. But this direct involvement in the technological developments also means new and considerable challenges. We have seen debates on for example: "patents on life?", on patents precluding needy people from receiving medicine they need, on indigenous peoples fearing of being robbed of their traditional properties and on copyright justifications in a world where those who would never dream of stealing a pen in the bookstore have no problems downloading illegal copyrighted materials from the Internet. And also in the European Union, intellectual property law is territorially limited, which means sometimes complicated decisions on choice of law and jurisdiction.

Other challenges to the traditional intellectual property system are the new technologies' impact on the traditional intellectual property structure. The system as such has become more complex. Modern developments have led to the convergence of the various modalities of intellectual property law, which creates new situations that have to be handled skilfully by intellectual property lawyers, for which the demand is constantly increasing.

Last but not least one should mention the new focus on intellectual property rights and equality/world democracy in on-going negotiations in the World Health Organization (WHO) concerning *inter alia* public health and access to medicine for the least developed economies with effects on patent rights, as well as the related inter-governmental discussions in World Intellectual Property Organization (WIPO) on traditional knowledge and folklore. These discussions have together with other topics concerning presently collapsed revisions of the World Trade Organization (WTO), and especially the Agreement on Trade-related Aspects of Intellectual Property Law (TRIPS), made intellectual property a part of world politics in a previously totally unknown way.

All this will be discussed during the course from a particularly European perspective.

Syllabus

The Programme in European Intellectual Property Law encompasses a total of 60 ECTS; whereof 30 ECTS shall be a Master thesis. The Programme is set up so as to enable distance learning to the greatest extent possible. Teaching is concentrated into blocks of lectures and seminars to be given at intervals of two to four weeks, usually at the end of the respective week (Friday-Saturday). Note, however, that there are Thursday sessions on the 21st of January, 25th of February, 18th of March (Module 1), 8 of April (Module 3) and 6th of May (Module 2).

The study of intellectual property law is structured into three modules as follows:

MODULE 1 - Advanced Intellectual Property Law, 15 points,
MODULE 2 - Specialisation: three, respectively two 7.5-point courses,
MODULE 3 - Legal Method and Thesis, 30 points.

Module 1

The first part of the Programme (21 January – 30 March 2010) lays down the general foundations for the remainder of the Programme. All students are required to follow this 10-week course. Module 1 covers at an advanced level all fundamental areas of intellectual property law as well as other neighbouring areas. Lectures will be given during six weekend blocks (generally Friday-Saturday) that are spread out over the ten-week period. In addition to the lectures, five seminars will be held on individual IP topics where students will be required to prepare and present short summaries (1-2 pages) focusing on a specific intellectual property problem and discuss this problem with the rest of the class.

In order for students to improve their writing skills, a seminar in Legal English will be held during Module 1, on Saturday the 30 of January 2010.

Module 2

During the second part of the Programme (9 April – 4 June 2010) students are given the opportunity to specialise in specific areas of intellectual property law by choosing two elective (7,5 ECTS) courses from the altogether six elective courses offered. The first three courses (**Module 2 a**) run from 9 April to 6 May 2010. The next three courses (**Module 2 b**) start on 7 May and end on 4 June 2010. The courses in module 2 are each organised into two weekend sessions (Friday-Saturday). The first session comprises lectures and seminars aiming to provide in-depth knowledge in the respective area of Intellectual Property law. The second session is normally devoted to presentation and discussion of student papers. In-between these sessions students will be required to submit and discuss shorter assignments via e-mail. Each course ends with an examination.

Information about the elective courses will be provided shortly on the web site. Students are required to communicate their preference for elective courses to the course administrator **by the end of Module 1, but no later than February 26th 2010.**

Module 3

Module 3 consists of independent work on the Master Thesis under supervision of one of the teachers in the course, supported by seminars. Students are urged to start considering possible topics for their thesis as early as possible! At the start of the programme students will be provided with a list of possible thesis topics. Students are encouraged to choose one of these proposed topics, but are of course also free to propose an appropriate topic themselves, subject to the approval of a supervisor.

A social gathering is scheduled for 20 March 2009 (4-6 pm, Lunch room, floor 7 C-house). At this gathering students will have the opportunity to meet lecturers and potential supervisors and consult them as to appropriate topics for the Master Theses. Do not hesitate to discuss your ideas and queries with the teaching staff in advance, the Master Thesis being among the most important components of the programme.

To support students in regard to general questions of *theory, method and writing technique*, three sessions of lectures and seminars are planned for: Thursday, 8 April 2010, Saturday, 5 June 2010.

The aim of the introductory lectures on 8 April is to provide the students with a basic knowledge of legal method, to discuss alternative methods for interpreting and analyzing law and legal policy and give an overview of various sources of law, focusing in particular on EC law and the sources of Intellectual Property Law. Students will be asked to study different legal texts in order to provide a basis for discussion on legal method. After completing this part of the Programme, students should be prepared to choose the legal method most suitable for their own Thesis.

The session on 5 June will be devoted to the students' own thesis projects. Everybody is expected to have submitted, in advance, a short project description (outline) and a tentative bibliography. Several groups will be formed according to subject-matter and method. Within these groups students and teachers will discuss the projects, giving structured comments and constructive criticism.

At the seminar on 8 April students will be given a task of composing a memorandum regarding what method to apply when writing their Master Theses. The memorandum, which should comprise approximately three pages, should be submitted on 9 June 2010 at the latest and will be reviewed and discussed at the 2-day session on 11-12 June, when additional teaching on thesis writing will be given.

The students are required to submit a first draft of their Theses on Monday, 16 August 2010. After about one week students will get relevant feedback on their drafts. The Master Theses should be completed and submitted to the supervisors *no later* than Monday, 22 November 2010.

Finally, Friday and Saturday, 10-11 December 2010 are devoted to student presentations of, and oppositions on, the final master theses. Every student will be given an opportunity to orally present his/her thesis in front of the whole class. Each student will also be given the task of acting as opponent on another student's thesis. After all theses have been submitted, students will be informed on what thesis they will have to discuss and on the order of presentation and opposition. In addition, this weekend will give one final opportunity to "get together" and reassess the experience from the whole programme. More information about time, place and organisation of the seminars will be given at a later stage. Please note that attendance, along with presentation and opposition, is mandatory.

Literature and reading material

A list of recommended literature is provided below. In addition students are required to purchase two volumes of the most important international and European statutory instruments. This compilation of statutory texts is by no means comprehensive but is intended to serve as a basis for the teaching throughout the Master Programme.

Abundant legal material on intellectual property is nowadays accessible on the Internet. Developing skills in conducting effective specialised legal search in a modern environment is one of the programme's objectives. Students are accordingly encouraged to individually search, systematise and study such material.

Attendance, participation, etc.

The programme is based on an interactive approach that requires active participation on the part of the students. Students are expected to prepare for and to actively participate not only in the seminars but also in the lectures. At the web site of the programme there will be reading materials

and reading instructions for most of the lectures in Module 1, which will be available at least a few days before the lecture under the link "Schedule". Please **consult regularly this link for possible up-dates and changes** and study carefully the material suggested by the lecturers. It is particularly desirable that students could share their knowledge about and experience of the legal developments in their own country. This will allow all participants to benefit from the truly international character of the programme.

Attendance at the **five seminars** in Module 1 involving student presentations of summaries **is compulsory**. The same applies to the **seminars with paper presentations** in the 7.5-point courses in Module 2 and in Module 3. Attendance at the lectures in Modules 1, 2 and 3 is not mandatory but is strongly encouraged. Needless to say all seminar assignments must be submitted within the specified time limit. Failures to attend a seminar or to submit an assignment in due time will negatively affect **the final grade** for the respective course and/or may give rise to **additional assignments**. In case of serious impediment to fulfil any of the requirements of the course be sure to contact promptly the course administrator or the respective teacher. Please note that excessive or unexpected work load is not an acceptable excuse for failing to meet a deadline or other requirement.

Examination

Examination for the 15-point course in **Module 1** will be in the form of a take-home exam that the students will have four days to complete. The assignment will be communicated via the programme's web site at 9 am in the morning of Friday, 26th March 2010 and has to be handed in (e-mailed) to the course administrator on Friday, 30 April 2010 at the latest.

Unless otherwise provided by the respective course director, examination for the 7.5-point courses in **Module 2** will be in the form of a paper on a specific topic to be presented at a final seminar at the end of the course. More details on this examination will be provided by those in charge of the courses. The **thesis** must be submitted by **the end of November 2010 at the latest**. Students are, however, strongly encouraged to finalise their master thesis already this year and to participate in the presentation weekend in December 2010.

The grading system for the examinations and the thesis are according to the European grading system (A, B, C, D, E, Fx and F). You will only be able to, at most, get an E if you earlier have received the grade Fx.

Degree awarded

Students who have successfully completed the programme will be awarded a Swedish "*Juris magisterexamen i immaterialrätt med europeisk inriktning*"- degree, which is translated to Degree of Masters of Laws (one year) in European Intellectual Property Law.

Fees

Participation in the Programme does not involve tuition fees. However, all students are required to become members of the Stockholm University Students' Union and the Law Students' Association. Fees for membership in the above organisations amount to 450 SEK (approximately 55 Euro).

Homepage of the Master Programme in EIPL

http://www.juridicum.su.se/jurweb/utbildning/master/master_of_european_intellectual_property_law/index.asp?lang=eng

RECOMMENDED LITERATURE

Basic books

- Annand R. and Norman, H., *Blackstone's Guide to the Community Trade Mark*, 1998.
- Bently, Lionel and Sherman, Brad, *Intellectual Property Law*, Oxford: Oxford University Press, 2008.
- Cornish, W. and Llewelyn, D., *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, 2007.
- Garnett K., Mummery J. and James J.R. (ed.), *Copinger and Skone James on Copyright*, vol. 1 and 2, 2005
- Hugenholtz, P. B., *Copyright and Electronic Commerce*, 2000.
- Kelleher, D. and Murray, K., *IT Law in the European Union*, 2005.
- Paterson, G., *The European Patent System*, London 2001.
- Singer and Stauder, *The European Patent Convention*, Vol. 1 and 2, 2003.
- Sterling, J.A.L., *World Copyright Law*, 2003.
- Suthersanen, U., *Design Law in Europe*, 2000.
- Tritton, G., *Intellectual Property in Europe*, 2006.
- Wadlow, C, *Enforcement of Intellectual Property in European and International Law*, 1998.

Recommended Websites

International organisations

- <http://www.wipo.org>
- <http://www.wto.org>
- <http://www.european-patent-office.org>
- <http://www.un.org>

European Union websites

- <http://europa.eu.int> (EU official homepage)
- <http://www.curia.eu.int> (judgements and decisions from the European Court of Justice)
- http://europa.eu.int/eur-lex/en/lif/reg/en_register_1720.html (Eur-Lex: Intellectual Property Law)
- http://europa.eu.int/comm/competition/index_en.html (European Commission, DG Competition)
- http://europa.eu.int/comm/internal_market/en/index.htm (European Commission, DG Internal Market, Intellectual and Industrial Property)
- <http://oami.eu.int> (OHIM - Office for Harmonization in the Internal Market)

Other national and international IP and related websites

- <http://www.casetrack.com> (Patents Court and Court of Appeal in England.

Username: FREE990, Password: STOCKHOLM)

- <http://www.usdoj.gov/atr/> (US Department of Justice, Antitrust Division)

- <http://www.intellecprop.mpg.de/Enhanced/Deutsch/Homepage.HTM>

(Max-

Planck Institute for Intellectual Property, Competition and Tax Law, Munich)

- <http://www.sims.berkeley.edu/~pam/> (Prof. Pamela Samuelson's homepage)

- <http://www.aipla.org> (website of the American Intellectual Property Association (links)

- http://books.nap.edu/html/digital_dilemma/committee.html (report by the Committee on Intellectual Property Rights on the emerging information infrastructure)

- <http://www.eblida.org/ecup/> (European Copyright Users Platform)

- <http://www.ivir.nl/index-english.html> (Institute for Information Law, Faculty of Law, Amsterdam University)

TEACHING STAFF

ML	<u>Marianne Levin</u> , LLD, Ph.D h.c., Professor in Private Law, Stockholm University, Director of the Programme.
AB	<u>Antonina Bakardjieva-Engelbrekt</u> , LLD, Professor in European Integration Law, Stockholm University
AK	<u>Annette Kur</u> , LLD, Professor at Stockholm University, Head of Department at Max Plank Institute for Intellectual Property, Competition and Taxation Law, Munich
CG	<u>Claes Granmar</u> , LLM, Doctoral Candidate, Stockholm University
FP	<u>Frantzeska Papadopoulou</u> , LLM, Doctoral Candidate, Stockholm University
GG	<u>Gustavo Ghidini</u> , LLD, Professor of industrial law, LUISS University
HO	<u>Henry Olsson</u> , LLD h.c., Special Advisor to the Swedish Government, former Director of Copyright at WIPO
JA	<u>Johan Axhamn</u> , LLM & MSc, Doctoral Candidate, Stockholm University
JS	<u>Jens Schovsbo</u> , Professor. University of Copenhagen
KR	<u>Katarina Renman Claesson</u> , Doctoral Student in Private Law, Stockholm University
LL	<u>Lydia Lundstedt</u> , LLM, U.S. Juris Doctor, Doctoral Candidate, Stockholm University
MN	<u>Marcus Norrgård</u> , LLD, Professor, Hanken Swedish School of Economics and Business Administration, Helsinki
PJN	<u>Per Jonas Nordell</u> , LLD, Professor in Private Law, Stockholm University
RW	<u>Richard Wessman</u> , LLD, Lecturer, Uppsala University
SA	<u>Steven Anderman</u> , LLD, Professor in European Integration Law, Stockholm University
SW	<u>Sanna Wolk</u> , LLD, Stockholm University
TKO	<u>Tarja Koskisen Olsson</u> , Counsel, Honorary President of IFRRO, Former CEO of KOPIOSTO
ÅH	<u>Åsa Hellstadius</u> , LLM, Doctoral Candidate, Stockholm University

PRACTICAL INFORMATION REGARDING SUMMARY ASSIGNMENTS 1-5,

MODULE 1

Module 1 contains the following five seminars where students are required to write a summary on a specific topic of intellectual property law.

<i>Seminar 1</i> Copyright Law	12/2	Per-Jonas Nordell/ Katarina Renman Claesson / Johan Axhamn
<i>Seminar 2</i> Patent Law	27/2	Åsa Hellstadius/ Frantzeska Papadopoulou
<i>Seminar 3</i> Trademark Law	6/3	Claes Granmar/ Per-Jonas Nordell
<i>Seminar 4</i> Private International Law	18/3	Marcus Norrgård/ Lydia Lundstedt
<i>Seminar 5</i> Competition Law	19/3	Claes Granmar/ Vladimir Bastidas/ Jens Schovsbo

Each seminar assignment comprises six questions. Note, however, that you are required to write a summary on only **one** of these questions. The questions have been distributed among the students at random. To check the question you will have to discuss in your summary, please consult the list of students that will be posted on the web site a few days after the introduction day. The number that is indicated against your name corresponds to the number of the summary question you will have to prepare for each seminar. For example, if you find the number 2 against your name then you will have to write a summary on question No. 2 at all the five seminars.

The summary shall be in the form of a **two-page memo** corresponding to accepted academic standards with all sources identified in the footnotes.¹ Do not simply answer the questions but write a memo with a short introduction, headings where needed, etc, and discuss the issues generally. An important aim with the seminar (and with the Masters Programme) is to teach you to become acquainted with searching for

¹ Please apply the following standard: 12p. font size, simple line-space and 2.5 margins and footnotes 10 p. font size.

materials, both on the web and in the library. While the students are encouraged to share materials with each other, the memos should be independently written.

A copy of your summary **must be sent by e-mail to the course administrator** Henning Albertsson (henning.albertsson@juridicum.su.se) who will forward it to the responsible teachers and upload all the assignments to the Master Programme's home page (under the link Summaries). **You must also name the file after your last name and the number of the question (for instance: "albertsson_1.pdf")**. From the home page all seminar participants should be able to access all summaries. The deadline for each seminar is evident from the assignments below. If you submit your summary after the dead line has expired, it is your own responsibility to make sure that the teachers and your fellow students receive your summary. **The students who are writing about the same seminar question are expected to cooperate with each other in order to present the issue at the seminar to the other students.** In other words, you and your fellow classmates have the responsibility for leading the seminars. The total presentation should be about 15 minutes.

The audience should be prepared to critically discuss and analyze the issues presented. All students are encouraged to read all the memos but **must read at least two memos from each seminar question.**

A reminder: attendance at the seminars are mandatory.

SEMINAR 1 – COPYRIGHT LAW

Responsible for summary:

Per Jonas Nordell, Katarina Renman Claesson and Johan Axhamn

Time and place of seminar

12/2 2010, 10-17 (E306)

Deadline for handling in the summary:

8/2 2010, 9 am

Summary questions

1. Identify and describe the *justification for the granting of rights* according to the 'copyright tradition' (Anglo-Saxon view) and the 'author's right tradition' (continental view) and point out the major differences. Have these traditions had impact on the harmonized European copyright laws?
2. To bring copyright law into play, an "*original*" work of authorship is required. Discuss the concept of "originality" in light of basic copyright philosophy, international conventions and EU directives. Discuss also in this context the scope of protection, including the distinction between, on the one hand, expression and, on the other, ideas, principles, etc.
3. Under the copyright laws, authors are granted "*exclusive economic rights*" to the created work. Discuss the content and classification of these rights with reference to international conventions and EU directives.
4. Under most copyright laws, authors are granted "*moral rights*". Discuss the content and classification of these rights with reference to international conventions and EU directives. In what ways do they differ from the exclusive economic rights?
5. The copyright system presupposes a *balancing act* between authors' rights and considerations of public interest/policy. Legislators retain a possibility to lay down limitations/exceptions to the exercise of rights within the copyright regime (cf. U.S., fair use). Discuss in the context of international conventions the options left open to prescribe such limitations/exceptions and how these options are reflected in the EU directives.
6. The *initial beneficiaries* of protection in laws on copyright are traditionally the authors of a work. Give some examples of national regulations that have initial beneficiaries other than the individual author? There are different approaches to the beneficiaries of protection of employees' works and commissioned works. What are the differences?

SEMINAR 2 – PATENT LAW

Responsible for summary:

Åsa Hellstadius, Frantzeska Papadopoulou

Time and place of seminar

27/2 2010, 9-17 (A5137)

Deadline for handing in the summary:

23/2 2010, 9 am

Summary questions:

1. The patentability of computer programs has for long been debated in Europe, especially with regard to the exclusion of computer programs as such from patentability according to Article 52(2)(c) EPC. Analyse EPO case-law in order to describe the development of patentability of computer-implemented inventions, and define the meaning of "technical effect" with regard to computer-implemented inventions.
2. According to Article 53(a) EPC, patents shall not be granted for inventions the commercial exploitation of which would be contrary to "ordre public" or morality. Analyse EPO case-law in order to define the meaning of these concepts. Also, is there an impact of Directive 98/44/EC to EPC and/or EPO case law with regard to this provision?
3. The priority principle makes it possible for the patent applicant to apply for patent protection in a number of different jurisdictions during the period of 12 months since the day of the first patent application. What are the complications that can occur when the first application handed in is a US patent application? What are the impacts of a first PCT application?
4. The standard of the "person skilled in the art" is of major importance in patent law. With respect to the examination of "inventive step" in Article 56 EPC, analyse relevant EPO case-law that illustrates the determination of the "person skilled in the art". Also, what is the so-called "indicators" and how may they influence the inventive step examination?
5. A patent for a glue composed by substances A and B might be infringed by a person who supplies either A or B to a person who then manufactures the glue. Which are the elements that constitute indirect infringement? How have these been interpreted in relevant case-law? What are the particularities of indirect infringement in the digital environment?
6. Patent rights are not absolute rights. In most European states, third parties are allowed to experiment on a patented invention under a so-called experimental use exception. Nevertheless, the scope of the said exception varies in different jurisdictions. Analyse the scope of the experimental exception in one of the major European jurisdictions for this field (Germany, UK, or Belgium) and compare with the legislation of your home country. The analysis should also take relevant case-law into account.

SEMINAR 3– TRADEMARK LAW

Responsible for summary:

Claes Granmar & Per-Jonas Nordell

Time and place of seminar

6/3 2010, 9-17 (A 5137)

Deadline for handling in the summary:

2/3 2010, 9 am

Summary questions

- 1) Describe, in the light of the case-law of the ECJ, the relationship between the concepts of *distinctiveness and confusion*. Traditionally, the questions of distinctiveness has been a central question when determining whether a trade mark should be registered or not, while the question of confusion, or the likelihood of confusion to be more precise, has been a central question when determining the scope of protection. Now, after the Directive and the subsequent case-law of the ECJ, the concepts seem to be very much related. Explore this relationship!
- 2) As seen from the question regarding the relationship between the concepts of distinctiveness and confusion, the question of whether a trade mark is distinctive or not (or the degree of distinctiveness in a particular case) is a central issue in the area of trade mark law. A related problem concerns the possibility to register a trade mark which is, at least to some extent, *technical or functional*. In this context, several cases relating to LEGO and Philips come to mind (right now, legal issues regarding these marks are being handled both by OHIM and by courts in the member states; a question regarding Philips has been answered by the ECJ). Naturally, trade mark law should not be used to protect technical or functional matter which is to be handled under the rules of Patent law. Though, sometimes the line between what is a commercial sign and what is a technical idea is very fine. Discuss this distinction, between distinctive commercial signs and technical, functional ideas, in the light of the recent European development.
- 3) Should three stripes be a trade mark? Investigate the case law from OHIM and the European Courts on the possibility to protect *shapes* as trade marks in Europe. Many shapes measure up to a time limited design right and others do not. What are the pros and cons for affording shapes covered by design rights and shapes that are not a potentially perpetual trade mark protection? Put the doctrine on secondary meaning by use in juxtaposition with the emerging doctrine on the need to keep expressions free. An analysis of the market effects is required. Inspiration can be found in cases concerning infringement of rights conferred, such as those regarding the Adidas trade mark.
- 4) In order to maintain the trade mark rights the expression must be *genuinely used* within a certain period of time. Investigate what is meant by “genuine use”; who needs to use the trade mark, in what way must it be used and how often really? The definition of “genuine use” determines the extension in time of the trade mark rights conferred, and an analysis of the market effects of a broadly and narrowly defined notion of “genuine use” respectively is required.

- 5) In what way does the protection for reputed trade marks harmonised by *Article 5(2) of the trade mark directive* extend the rights conferred on the proprietor beyond likelihood of confusion? In other words, when does the use by a third party of a sign without due cause take unfair advantage of, or cause detriment to, the distinctive character or the repute of the trade mark without there being a likelihood of confusion? Explain particularly in the light of the three cases concerning the Adidas trade mark the limitation in applicability of Article 5(2) to situations where product similarity is not at stake.
- 6) A popular way of attracting custom in e-commerce is by means of ad-words. Particular problems may occur when a third party uses an ad-word which is identical with or similar to the proprietor's trade mark. For instance a retailer of proprietary goods may use the trade mark to direct the relevant public from a search engine to its own web site. Does this practice or other unsolicited uses constitute an infringement under Art. 5(1)(a) or (b) TMD resp. Art. 9(1)(a) or (b)? What are the decisive criteria for establishing whether such a conduct constitutes an infringement under Art. 5(1)(a) or (b) TMD resp. Art. 9(1)(a) or (b)?

SEMINAR 4 PRIVATE INTERNATIONAL LAW

Responsible for summary:

Lydia Lundstedt & Marcus Norrgård

Time and place of the seminar

March 18, 2010 10-18 (A5137)

Deadline for handing in the summary:

March 14, 2010 9 am

Seminar questions:

1. Explain and discuss the general structure and underlying aims of the Brussels Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Which provisions of this instrument come into play when litigating and enforcing intellectual property claims? How have these provisions been interpreted by the ECJ and by national courts in connection with intellectual property claims?
2. The rules on jurisdiction laid out in the Community trade mark regulation deviate somewhat from the rules laid out in the Brussels Regulation. How do the rules deviate and what are the reasons underlying this?
3. The 1999 draft Hague Convention on jurisdiction and enforcement of judgements failed to achieve a consensus, and the attempt failed. Explain and discuss the difficulties in reaching a consensus on the international level with regard to the treatment of intellectual property disputes. In the end, a consensus was achieved on a much narrower scale, namely, the 2005 Choice of Court Convention. How does this Convention treat IP disputes?
4. There are two legal instruments of the European Union dealing with choice of law that are of interest in intellectual property disputes: Rome I Regulation (593/2008) and Rome II regulation (864/2007/EC). In what IP cases does (a) Rome I and (b) Rome II apply? Explain the provisions on applicable law as to infringement of intellectual property rights. Is the applicable law the same in cases of unfair competition? If there is an IP infringement in several countries, how is the applicable law determined?
5. The remedies applicable in intellectual property infringement disputes are regulated not only in national law but also in the TRIPS Agreement and in the Enforcement Directive. Discuss the similarities and differences between the enforcement provisions in TRIPS and the Enforcement Directive. Discuss also how the Directive has been implemented in Europe (choose at least two countries). Has there been any problems in the implementation? Has the Directive changed anything in national law?
6. TRIPS and the Enforcement Directive include some provisions that facilitate the gathering of evidence of IP infringements. Explain the content of these provisions (including any ECJ case law). How do they relate to each other (are there overlaps or gaps between them)?

SEMINAR 5 – COMPETITION LAW

Responsible for summary:

Claes Granmar, Vladimir Bastidas Jens Schovsbo

Time and place of seminar

19/3 2009, 9-17 (A5137)

Deadline for handing in the summary:

15/3 2009, 9 am

Summary questions:

- 1) According to Article 28 and 29 EC all measures having an effect equivalent to quantitative restrictions on exports and imports shall be prohibited between the Member States. An exception is made in Article 30 EC first sentence for among other things protection of national industrial and commercial property. According to the second sentence of that provision, however, the protection of such property shall not constitute a means for arbitrary discrimination or a disguised restriction on trade between Member States. Nevertheless, to invoke intellectual property rights to prevent unsolicited cross border trade in products covered by the intellectual property rights rarely constitutes arbitrary discrimination or a disguised restriction on trade. Instead the effects on trade follows from the very nature of the right and, thus, another point of balance between the principle of free movement of goods and services and the exclusive rights needed to be elaborated.

Read in particular Case 78/70, Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Grossmärkte GmbH & Co. KG, and Case C-355/96 Silhouette International Schmied GmbH & Co. KG v. Hartlauer Handelsgesellschaft mbH. Read also Cases 15/74, Centrafarm BV and de Peijper v. Sterling Drug Inc., Case 16/74, Centrafarm BV et Adriaan de Peijper v. Winthrop BV, joined Cases 55 and 57/80, Musik-Vertrieb Membran GmbH et K-tel International v. GEMA, and Case 270/80, Polydor Limited and RSO Records Inc. v. Harlequin Records Shops Ltd and Simons Records Ltd.

Explain the principle of Community wide *exhaustion* of intellectual property rights. Within the geographical scope of exhaustion the proprietor of intellectual property rights still enjoys protection for the *specific subject matter* of the exclusive rights under Article 30 EC. What is the specific subject matter of patent rights, trade mark rights and copyrights? Explain the relation between the specific subject matter of the right and the *parallel trade* phenomenon.

- 2) The proprietor of intellectual property rights often seeks to exploit those rights within the Community by extending them to other undertakings for production or distribution purposes. Habitually the rights are extended by means of various kinds of licensing agreements. However, contractual arrangements of the kind may sometimes constitute disguised restrictions on cross border trade within the Community in conflict with Article 30 EC. They may also trigger the competition law machinery laid down in the EC Treaty. If the arrangement has as its object or effect to distort Community relevant competition, Article 81(1) EC applies, unless there are any grounds for exceptions under Article 81(3) EC.

Read in particular Case 258/78, LG Nungesser KG and Kurt Eisele v. Commission. Read also Case 262/81 Coditel SA, Compagnie Générale pour la Diffusion de la Télévision v. Ciné.Vog Films SA (Coditel II) and Case 27/87 Erauw-Jacquéry Sprl v. La Hesbignonne Société Co-opérative. Compare with Commission Regulation (EC) No 2790/1999 of 22 December 1999 (OJ L336/21) Commission Regulation 2790/1999 on Vertical Restraints (OJ L336/21), and Commission Regulation 772/2004 on Technology Transfer Agreements (OJ L123/11).

Explain how an *exclusive distribution license* may distort competition in conflict with Article 81(1) EC. What *distinguishes* an infringing agreement of the kind from a non-infringing one? What difference does it make that the agreement introduces *new technology* in a region? Do the same *principles* apply to all kinds of intellectual property rights and to all kinds of products?

- 3) Some products are more suitable for parallel trade than others. In particular cross border parallel trade in pharmaceuticals has proved to be a lucrative business. The pharmaceuticals are easy to transport and the price differences resulting from national regulation offer great business opportunities for unsolicited traders to purchase the goods in low price countries and sell them in high price countries. Innovation constitutes the determining parameter for inter-brand (as opposed to intra-brand) competition in this sector of trade. As the patent rights cannot be invoked to prevent parallel trade within the Community, the proprietors often seek to reduce such intra-brand competition by other means.

Read in particular joined Cases C-468/06 – C-478/06 Sot. Lélos Kai Sia EE et al v. GlaxoSmithKline AVEE Farmakeftikon Proïonto, and Case T-168/01 GlaxoSmithKline Unlimited v. Commission. Read also Case 24/67 Parke Davis & Co. v. Probel, and Commission decision COMP/A.37.507/F3 AstraZeneca (OJ L332/24, appealed to the Court of First Instance as Case T-321/05).

Under what conditions does *price fixing arrangements* with a view to prevent parallel trade infringe Article 81 EC? Can the patent right constitute a *dominant position* within a Member State? Under what conditions do *limitations in supply* with a view to prevent parallel trade infringe Article 82 EC? Can the patent system be used to block or delay the entry of generic competitors or parallel trade in conflict with Article 82 EC? Explain the *trade-off* between inter-brand competition and intra-brand competition in the pharmaceuticals sector of trade.

- 4) Other state measures relating to trade marks than the protection of trade mark rights may have an effect equivalent to quantitative restrictions on exports and imports within the Community. National rules on advertising and market communication may serve the interests of consumers not to be misled but at the same time effectively bar foreign traders from entering the market. Consequently such rules may conflict with Article 28 EC. Then again, the measures may be justified on ground of e.g. public policy under Article 30 EC

as long as they do not constitute arbitrary discriminations or disguised restrictions on trade. The cases concerning trade mark use in market communication form part of an emerging field of EC consumer law.

Read in particular joined Cases C-267/91 and C-268/91 Criminal Proceedings against Bernard Keck and Daniel Mithouard, and Case C-315/92 Verband Sozialer Wettbewerb eV v. Clinique Laboratories SNC Estée Lauder Cosmetics GmbH. Read also Case 8/74 Procureur du Roi v. Benoît and Gustave Dassonville, Case 120/78, Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein. (Cassis de Dijon), Case C-313/94 F.lli Graffone v. Ditta Frans, Case C-112/99 Toshiba Europe GmbH v. Katun Germany GmbH., Case C-44/01 Pippig Augenoptik GmbH & Co. KG. v. Hartlauer Handelsgesellschaft mbh Verlassenschft nach dem verstorbenen Franz Joseph Hartlauer.

Explain the concept of the *European consumer*. What qualifies as a *selling arrangement* and what difference does it make whether the state measure targets such an arrangement or not? Explain why the ECJ seems to prefer *labelling* as a remedy against the use of allegedly misleading signs in market communication rather than prohibiting trade under the signs.

- 5) Commercial conducts involving intellectual property rights may amount to an abuse of a dominant position actionable under Article 82 EC also in cases not concerning parallel trade. One particular problem results from the proprietor's right at the outset to refuse other undertakings access to the exclusive right when it constitutes an essential facility for trade. The ECJ has in a series of cases elaborated on the possibility to apply Article 82 EC in cases of that kind.

Read in particular Case C-418/01 IMS Health GmbH & Co OHG v. NDC Health GmbH & Co KG. Read also Case 53/87 CICCRA and Maxicar v. Renault, Case 238/87 Volvo AB v. Eric Veng, joined Cases C-241/91 P and C-242/91 P Radio Telefis Eireann (RTE) and Independent Televisions Publications Ltd (ITP) v. Commission (Magill), and Case C-7/97 Oscar Bronner GmbH & Co. v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG. et al.

Explain in what way an intellectual property right may constitute an *essential facility*. Is it the exclusive right per se that constitutes the *dominant position* in the meaning of Article 82 EC? Under what *conditions* may the refusal to grant access to the intellectual property rights constitute an abuse of a dominant position? Do the same *principles* apply to all intellectual property rights? What are *remedies* if the refusal would amount to an actionable abuse?

- 6) Besides collusion and abuse of an existing dominant market position, also concentrations of market power, where two undertakings merge or one undertaking acquires another, may conflict with EC competition law. Mergers and acquisitions are since the late 1980:s regulated in secondary EC law. There are three archetypes of mergers. So called horizontal mergers involve two or more undertakings on the same level in the chain of distribution of the same kind of product. Vertical mergers involve undertakings on different levels

in the chain of distribution of the same kind of product. Conglomerate mergers involve undertakings dealing in different kinds of products. In the latter case the market power of one or more undertakings is leveraged from one sector of trade into another.

Read in particular Case T-114/02 BaByliss SA v. Commission, and Case T-119/02 Royal Philips Electronics NV v. Commission. Read also Commission Decision in Case IV/M190 Nestlé/Perrier (OJ L356/1), and Commission Decision in Case IV/M833 Coca-Cola Co/Carlsberg (OJ L145/41). Compare with Council Regulation 139/2004 on the control of concentrations between undertakings (OJ L24/1).

How does the trade mark affect the definition of the *relevant market*? Explain the role of reputation represented by trade marks for the assessment of the *leveraging* of market power. What is the relation between the notion of *brand strength* and reputation in this view?