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may allow the rightholder to demand payment for any usage of his work. In fact, although the reasoning behind the two views is very different, the outcomes of the economic approach which emphasizes the beneficial effects of property rights – and which appears to be expressed in the Copyright Directive – and of the *droit d'auteur* view on copyright are very much the same. The Directive therefore fits well in the *droit d'auteur* perception which regards it to be a natural right for the author to harvest fully what he has sown. Therefore, it would be premature to speak of a paradigm shift in European copyright law.

Reports

*Pierre Véron**

ECJ Restores Torpedo Power

On December 9, 2003, the European Court of Justice ("ECJ") handed down a judgment in the case *Gasser v. Misat* (C-116/02) which could revive the Italian and Belgian torpedoes in patent litigation.

According to this ruling of the full Court, the court seized with the infringement action cannot refuse to stay its proceedings for the mere reason that a previous action for declaration of non-infringement has been brought in a court established in a State in which the proceedings are usually very long.

For every practitioner in the field of patent litigation in Europe, a torpedo is no longer an electric fish or a submarine-propelled bomb: it is the nickname given to the various actions initiated by a potential defendant to a patent infringement action with a view to *torpedo* this action.[1]

More specifically a torpedo action is an action for declaration of non-infringement of a patent – or an action for patent invalidation – which is initiated by a company having reason to believe that it will be shortly sued for infringement of this patent.

Such an action can be brought with a view to consolidate the case before a single court: a defendant may consider that justice will be better served if the decision whether or not its product infringes its competitor's patent is made

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1 PIERRE VÉRON, "Thirty years of Experience with the Brussels Convention in patent infringement litigation", 84 Journal of the Patent and Trademark Office Society 449 (2002), also in French, "Trente ans d'application de la Convention de Bruxelles à l'action en contrefaçon de brevet d'invention", 2001 Journal du Droit International (Clunet) 823.

by a single court for all European countries covered by the patent, rather than by several courts conducting parallel and separate actions with the consequent duplication of costs.

In some cases, a torpedo action has no other purpose than to pre-empt the jurisdiction of a court other than the court before which the patentee would like to bring its infringement action.

Usually the patentee would prefer to bring a European infringement case before the Dutch, English, French and German Courts (in alphabetical order!), which are known at various degrees for their swift and efficient infringement proceedings (including granting preliminary injunctions pending the proceedings on the merits and/or expedited proceedings on the merits).

Conversely, the potential defendant will consider bringing a torpedo action in courts whose heavy workload and limited human resources do not allow quick proceedings, such as the Belgian and Italian courts.

The legal basis upon which the torpedo action lies is Art. 21 of the Convention of September 27, 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ("The Brussels Convention") which has been replaced, effective March 1, 2002, by Regulation (EC) No. 44/2001 of December 22, 2000. This article provides for the following solution to *lis pendens* situations:

> Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.
>
> Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favour of that court.

In the specific field of patent litigation, this article means that

- when an action is launched in a Belgian or Italian court, seeking a declaration of non-infringement of various national parts of a given European patent,
- any other court, for example, Dutch, English, French or German, seized with an action for infringement of the same European patent must stay its proceedings until such time as the jurisdiction of the Belgian or Italian court is established.

As it may well happen that the final rendering of a decision regarding the jurisdiction of a Belgian or Italian court takes two or three years, this means, from a pragmatic stand point, that a defendant to a possible patent infringement action may buy a two-to-three-year freeze in these proceedings just by starting a torpedo action in a Belgian or Italian court, even though it has no

reasonable hope that this court will eventually accept jurisdiction for this action.

Some have advocated against such a system which they find unfair to the patentee and almost insulting to the courts involved (the "torpedoing" court because money is made from its workload; the "torpedoed" court because it is paralysed by a mere manoeuvre by the defendant who has been quick enough to "shoot first").

Other voices noted that such a situation was the predictable result accepted by the draftsmen of both the European Patent Convention (who preferred to create a "bundle" of national patents rather than a genuine unitary European patent) and the Brussels Convention (who failed to provide that negative declaratory actions have no pre-emptive effect, contrary to what other international conventions provide).

Roughly speaking, the German courts accepted this strict view and stayed their infringement proceedings – sometimes with regrets – when actions for declaration of non-infringement had been previously filed in Belgium or Italy.[2]

The French lower courts have adopted a different view in two cases: they found that an "abuse of proceedings" had occurred where an action for declaration of non-infringement had been filed in Italy, and refused to stay the infringement proceedings pending the determination of jurisdiction by the Italian courts over such action.[3]

As the Belgian courts expressed their displeasure at being "used" for their slow proceedings and decided rather promptly that they had no jurisdiction over the action for declaration of non-infringement for the non-Belgian part of the European patent at issue, many observers thought that the torpedo was disarmed.[4]

The ECJ ruling in the *Gasser* case sheds new light on the problem.

The case was referred to the Luxembourg court by the *Oberlandesgericht* (Court of Appeals) Innsbruck in a very ordinary case of debt collection.

Gasser, an Austrian manufacturer of clothes, had sold children's clothing to Misat, of Rome. After a dispute between the parties, Misat took the lead and started proceedings in Italy, in order to obtain a declaration that it had not failed to perform the contract.

2 Klaus Grabinski, "Angst vor den Zitterrochen? – Zur Verfahrensaussetzung nach Art. 27, 28 VO (EG) Nr. 44/2001 in Patentverletzungsstreitigkeiten vor deutschen Gerichten", in: "Festschrift für Winfried Tilmann".

3 Tribunal de Grande Instance, Paris, 28 April 2000, 33 IIC 68 (2002) – *The General Hospital/Bracco*; Paris District Court, March 9, 2001, 33 IIC 225 (2002) – *Scherrer/Fadis*.

4 Remco de Ranitz, "The Belgian torpedo disarmed", Managing Intellectual Property – IP Litigation Yearbook 2000.

Gasser sued Misat some months later before the *Landesgericht* (District Court) Feldkirch, Austria, relying on a contractual clause conferring jurisdiction on this court, in order to obtain payment of outstanding invoices.

Misat appeared before the Austrian courts and requested a stay of the proceedings by virtue of Art. 21 of the Brussels Convention until such time as the Italian court decided the question of jurisdiction.

Gasser objected to the stay and submitted, *inter alia*, that the "excessive and generalised slowness of legal proceedings" in Italy should affect the application of Art. 21 of the Brussels Convention.

The Innsbruck Court of Appeals referred this question to the European Court of Justice for a preliminary ruling.

The findings of the Court are self-explanatory:

> 70. As has been observed by the Commission and by the Advocate General in points 88 and 89 of his Opinion, an interpretation of Article 21 of the Brussels Convention whereby the application of that article should be set aside where the court first seized belongs to a Member State in whose courts there are, in general, excessive delays in dealing with cases would be manifestly contrary both to the letter and spirit and to the aim of the Convention.
> 71. First, the Convention contains no provision under which its articles, and in particular Article 21, cease to apply because of the length of proceedings before the courts of the Contracting State concerned.
> 72. Second, it must be borne in mind that the Brussels Convention is necessarily based on the trust which the Contracting States accord to each other's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments. It is also common ground that the Convention thereby seeks to ensure legal certainty by allowing individuals to foresee with sufficient certainty which court will have jurisdiction.
> 73. In view of the foregoing, the answer to the third question must be that Article 21 of the Brussels Convention must be interpreted as meaning that it cannot be derogated from where, in general, the duration of proceedings before the courts of the Contracting State in which the court first seized is established is excessively long.

In the field of patent litigation, this ruling clearly means that the court seized with the infringement action cannot refuse to stay its proceedings for the mere reason that a previous action for declaration of non-infringement has been brought in a court established in a State in which the proceedings are usually very long.

However, with great judicial wisdom, the ECJ did not exclude the possibility of another holding for particular situations (note "*in general*" in the ruling!).

The scope of this exception remains to be seen.

It also remains to be seen whether circumstances other than the slowness of the proceedings before the court first seized could permit a refusal to stay the proceedings by the court seized in a subsequent action.

Torpedo actions will certainly remain a source of excitement for patent litigators for a while.

*Katharina von Bassewitz**

Hard Times for Paparazzi: Two Landmark Decisions Concerning Privacy Rights Stir Up the German and English Media

In a media landscape dictated by hard competition for market share and where journalism is increasingly seeking to satisfy the public craving for sensation, celebrities can hardly leave their homes without being hunted by photographers. The critical question about necessary restrictions on paparazzi photography and possible reinforcement of the protection of privacy was intensely discussed all over Europe after the accident that cost Princess Diana her life.[1] The principle that "there is ... no law against taking a photograph"[2] has often made it difficult for individuals in England to prevent the taking and publication of photographs. English law recognises neither a right to one's image nor a general right to privacy (or personality right). In contrast, German law contains both concepts. However, through the notion of the "absolute figure of contemporary society", as developed by the courts, those rights have become rather toothless instruments for public figures and celebrities who seek protection against paparazzi.

Now two important decisions in the field of privacy protection strengthen the position of celebrities in Germany, England and possibly also in other jurisdictions. One is the ruling of the European Court of Human Rights (ECHR) against Germany in the Princess Caroline of Hannover case,[3] the other a decision of the House of Lords in favour of supermodel Naomi

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1 *See* PRINZ, "Der Schutz vor Verletzungen der Privatsphäre", 2000 ZPR 138, 139; *see also* Resolution 11665 (1998) of the Parliamentary Assembly of the Council of Europe on the right to privacy.

2 *Bernstein of Leigh (Baron) v. Skyviews & General Ltd.* [1978] Q.B. 479, 488 per Griffiths J.

3 *Von Hannover v. Germany*, Application No. 59320/00, June 24, 2004, published in this issue, at 672. Princess Caroline of Hannover, the daughter of Prince Rainier III of Monaco, is also still known as Caroline of Monaco.