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### ECTA Gazette

If you would like to publish an Article in ECTA's Gazette, please note that the deadline for submission for the next publication is August 15, 2008. Articles should be sent to Sandrine Peters at: [sandrine.peters@ecta.org](mailto:sandrine.peters@ecta.org).

### 22nd OHIM-Link meeting

The 22nd ECTA-OHIM Link meeting will take place in Alicante on September 29, 2008.

Should you have any issues to be raised at this meeting, would you please send an e-mail asap, to João Pereira da Cruz, Chair of the OHIM-Link Committee at [joaopcruz@jpcruz.pt](mailto:joaopcruz@jpcruz.pt) and/or Sandrine Peters, ECTA Legal Coordinator at: [sandrine.peters@ecta.org](mailto:sandrine.peters@ecta.org) by July 31, 2008.

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**▶ 1-1 Enforcement**

**ACTA Stakeholders Consultation Meeting, European Commission, DG Trade, Brussels, 23 June 2008**

As ECTA Flash readers are undoubtedly aware, ACTA is one of the major recent global initiatives which aims to dynamically fill the gaps that have not been addressed by existing international anti-counterfeiting and anti-piracy agreements.

The existing international measures have proved to be far from effective and sufficient, and so the European Union, the United States, Japan, South Korea, Canada, Switzerland, Mexico and New Zealand have come together on a voluntary basis to create ACTA. In Australia, the government has initiated a public discussion about whether or not the country should become an ACTA signatory. Other countries, especially developing countries, who tend to be the "victims" of counterfeiters and pirates, have been invited to join the negotiations.

ACTA's objective is to provide a new international legal framework to combat counterfeit trade marks and pirated copyright products and to reinforce intellectual property rights (IPR). ACTA's 'signatories-to-be' are working together to create new harmonised international standards, and to develop better communication and co-operation between the authorities charged with the protection of intellectual property.

Though the ACTA negotiations so far have been secret, some of its content has leaked out on the Internet.

This content can be summarised as follows:

ACTA would:

- strengthen the role of Customs as 'protectors' of IPR;
- include civil and criminal enforcement measures;
- propose new sanctions and remedies against Internet intermediaries who contribute to IPR infringements;
- focus on the creation of rules and regulations regarding IPR infringements, in particular as regards private copying and copyright law;
- set up its own governing body, controlled by a committee of signatory representatives.

Although the initiative as a whole, and particularly the cloak-and-dagger negotiations, have been criticised, ACTA may well be a more efficient means of combating counterfeiting and piracy than existing international agreements such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

On 23 June 2008, the European Commission's DG Trade held a Consultation Meeting aimed to give (representatives of) intellectual property rights holders the opportunity to share their concerns and points of view on the ACTA negotiations with the European Union. Over 90 associations or rights holders attended this meeting. ECTA was represented by Annick Mottet-Haugaard, Marius Schneider and Olivier Vrins. ECTA's Anti-Counterfeiting Committee had submitted a Position Paper in advance of this meeting on 19 June, and copies can be downloaded from [www.ecta.org](http://www.ecta.org).

The meeting was chaired by a DG Trade representative, though the new DG Markt's Enforcement Unit as well as DG Taxud were also represented. The Chairman opened the meeting by stressing that it aimed to enable stakeholders to specify the issues which they would like ACTA to address, rather than to allow the European Commission ('EC') to disclose information on the contents and status of the negotiations. This did not go down well with the audience, who insisted that the EC reveal its negotiating positions in the different rounds of negotiations. The EC representatives reacted by agreeing to reveal some of the EC's positions, but, for understandable reasons, refused to reveal the stance of the EU's contractual partners. So far, the EC has received a negotiation mandate from the European Council and the negotiations at the first session in Geneva on 3 June 2008 focused on IPR enforcement at the borders. No other topic has been addressed yet. The next session will be held from 16 to 18 July of this year. No text is available for review at this stage, and it is unlikely that any texts will be made public before the negotiations are completed.

The non-EC representatives at the meeting stressed that ACTA would be pointless if it did not specify criminal sanctions against offenders. The EC agreed that harmonised international criminal penalty standards were urgently needed, however, as enforcement falls under the so-called 'Third Pillar', the EU Member States would have to be involved in the negotiations, which would probably slow down the discussions and make them more complex. The EC is anxious that ACTA should not become a – direct or indirect – forum for solving the issues which have already arisen in this area between EU Member States (cf. the draft Directive on criminal sanctions). The EC also stressed that enforcement issues were already being addressed whenever possible in the framework of the EU's bilateral trade negotiations. DG Trade also pointed out that ACTA would not bring any significant improvements with it to the existing EU legal regime on IPR enforcement. Instead, one of the EC's main objectives was to 'export' the standards of EU law from a regional level to an international level and to 'sell' these standards to its contracting partners.

Specifically, DG Taxud pointed out that, during the first negotiation round, it had presented the external border check standards in EC Regulation 1383/2003 as 'best practice' which could be included in ACTA. As the EU Member States' Customs officers do have the authority to seize goods suspected of infringing IPR even ex officio and when being trans-shipped or placed in transit or under any other suspensive procedures (e.g. placed in free-trade zones and customs warehouses), there is no reason why non-EU countries could not give their Customs officers similar powers. DG Trade revealed that, in general terms, only a few diverging views had been expressed during the first round, without providing any more details.

ECTA observed that, while it was certainly appropriate to have Customs Authorities act against counterfeit goods in transit or trans-shipment worldwide – a position shared by many other rights holders, including Unilever – as long as these goods were not legally recognized as infringing IPR 'as such' (cf. the ECJ's decision in the Montex case), the added value of such Customs actions would remain very limited. Both DG Trade and DG Taxud answered that this should not be a concern for Customs, because they already had this authority to act under Regulation 1383/2003, so nothing should

prevent the negotiations on this point from succeeding, despite the unfortunate 'Montex issue'. On the other hand, DG Taxud admitted that Regulation 1383/2003 probably needed to be upgraded to take account of the latest developments in the trade in counterfeit goods.

Another issue which was unanimously considered crucial by the stakeholders – and, once again, by the EC – was the trade in counterfeit goods over the Internet. DG Trade considered that the intermediaries should be tackled as an urgent priority, but admitted that ACTA had not discussed the online environment yet. Again, the EC would like the *acquis communautaire* to serve as a starting point for discussions, whilst joking that, here again, 'the sky's the limit !' The French 'Union Des Fabricants' offered to submit a concrete proposal for a proper enforcement system for the Internet trade.

The Foundation for a Free Information Infrastructure (FFII) suggested looking into the possibility of freezing bank accounts.

A representative of GI-protected foodstuffs advocated that ACTA should deal with all types of infringements of all types of IPR, including geographical indications, for example. Again, the EC agreed with this and made it clear that patent infringements would also be included in the scope of ACTA.

According to DG Trade, yet another fundamental aspect which ought to be dealt with by ACTA was co-operation between enforcement authorities. The existing co-operation schemes between the EU and the USA (e.g. the Joint EU-USA 'Infrastructure' Operation) or between the EU and Japan, could serve as models for ACTA, although the EC did not think that rigid legal provisions had to be adopted in this area.

As regards the timing of the negotiations, the EC said that the USA's expressed hope that ACTA could be ready before the end of 2008 was unrealistic and that the EU favoured high quality over high speed.

Last, but not least, AIM drew the attention of the audience to the fact that, at the WCO level, the Mercosur countries had taken concrete steps to 'kill' the SECURE project (which was strongly supported by the European Commission's DG Taxud), challenging WCO's mandate in this respect before the WCO Council (read more on this here: <http://www.ip-watch.org/weblog/index.php?p=1117>). The reason for this was that, if adopted, the SECURE standards framework would be a precedent to ACTA, which the Mercosur countries do not want to succeed.

[http://ec.europa.eu/trade/issues/sectoral/intell\\_property/acta\\_en.htm](http://ec.europa.eu/trade/issues/sectoral/intell_property/acta_en.htm)

Reported by Olivier Vrins, Member of the Anti-Counterfeiting Committee, Altius, BE

### **Implementation of Enforcement Directive in Germany**

The German Bundesrat (Upper House of the German Parliament) has passed the "law for the improvement of the enforcement of IP rights" on May 23, 2008 (text see: [http://www.bundesrat.de/cln\\_099/SharedDocs/Drucksachen/2008/0201-300/279-08,templateId=raw,property=publicationFile.pdf/279-08.pdf](http://www.bundesrat.de/cln_099/SharedDocs/Drucksachen/2008/0201-300/279-08,templateId=raw,property=publicationFile.pdf/279-08.pdf))

The main objective of the act is to implement the IP Rights Enforcement Directive 2004/48/EC. It has already been passed by the German Parliament on April 11, 2008 (more links concerning the bill before the "Bundestag" can be found on:

([http://www.bundestag.de/bic/a\\_prot/2008/ap16155.html](http://www.bundestag.de/bic/a_prot/2008/ap16155.html) - see „Tagesordnungspunkt 23“)

The act is now expected to be signed by the German President and should come into force on August 1, 2008. The Enforcement Directive should already have been implemented by the Member States till latest April 29, 2006. Thus, Germany is in delay for more than two years.

In view of the objective of the Enforcement Directive "to ensure a high, equivalent and homogeneous level of protection of IP" concerning the enforcement of the respective substantive law, important parts of the Directive did not need to be implemented in Germany since the German law already showed a relatively high protective standard (e.g. Art 9 of the Directive: provisional and precautionary measures, especially provisions on interlocutory injunctions including seizure orders; blocking of accounts).

Technically, the implementation was done by amending the existing specific substantive IP laws (mainly in the field of patent, copyright, trade mark, design but not related to unfair competition) instead of introducing a new general uniform procedural law on the enforcement of IP rights.

The main changes of the new act are as follows:

- Concerning the right to obtain evidence in pending court proceedings (Art 6 of Directive) or to preserve evidence before initiating such court proceedings (Art 7 of Directive) – such as physical seizure – the main features were already possible under the General Civil Law (§ 809 German Civil Code) and in the Courts' practise in IP ("Faxkarte"). However, new are:
  - the codification of the existing practise including the precondition of the claim in form of an "evident" infringement of an IP-right in the IP-related substantive law (e.g. § 19a Trademark Code);
  - the extension of the right to obtain evidence in cases of an infringement on a commercial scale to the communication of banking, financial or commercial documents – also in injunction proceedings;
- Most importantly, the right of information was extended – beyond the infringer - to third parties (such as provider, transporting company) subject to a pending court proceeding and even prior to it in the context of an interim measure provided that the infringement is "evident" ("offensichtliche Rechtsverletzung") and the third party as well as the infringer have acted on a commercial scale;
  - with regard to the extent of the information disclosure: for the first time the price obtained for the infringing goods can be claimed;
  - specific personal data ("Verkehrsdaten" in the sense of § 3 Nr. 30 TKG, Law on Telecommunication) might only be obtained after judicial approval;
- Concerning damage compensation the existing practice for determining the amount of damages (including the calculation on the basis of potential royalties/fees apart from unfair profits or loss of earnings of the rightholder) was integrated into the respective legal IP provisions (whereas punitive damages are still excluded);
- Publication of court decisions (on the costs of the infringer) newly introduced in most of IP related laws (so far only known in copyright- and design law, almost no legal practise);
- Recall and definitive removal from the channels of commerce of infringing goods or implements (apart from destruction) are newly introduced as corrective measures (however, details of the enforceability of the recall claim are doubtful and have to be clarified by future case-law);
- Implementation of the simplified procedure (Article 11 of the Border Seizure Regulation 1383/2003) for the destruction of counterfeits (fiction of approval, formal serving through customs; however, details such as the deadlines and the form of the serving, both of the seizure order and with regard to the request of the rightholder, are still unclear).

Florian Schwab, Attorney-at-law, Member of the Anti-Counterfeiting Committee, Boehmert&Boehmert, DE

## 1-2 Trade marks

### Community Trade Marks Fees

The Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, adopted by the Commission on June 18 provides, on page 13, that:

“the Commission will make the Community Trade Mark system more accessible, in particular by significantly reducing Community Trade Mark fees as part of a comprehensive solution to the financial perspectives of the Office of Harmonization for the Internal Market (OHIM)”.

Full document can be found at: [http://ec.europa.eu/enterprise/entrepreneurship/docs/sba/com\\_2008\\_394\\_sba.pdf](http://ec.europa.eu/enterprise/entrepreneurship/docs/sba/com_2008_394_sba.pdf)

### Ratification by the Kingdom of Denmark of the Singapore Treaty

According to WIPO Singapore Notification No. 6, the Government of the Kingdom of Denmark has deposited its instrument of ratification of the Singapore Treaty on the Law of Trademarks on June 24, 2008.

For further details on the Singapore Treaty please see ECTA Flashes 27-05, 07-06 and 08-06

## 2. Office Practice

### 2-1 OHIM

#### OHIM New website

Today OHIM launched its new [website](#). The development is intended to make the site more user-friendly for both professionals and newcomers and to provide better visibility for the tools needed to register trade marks and designs.

One of the changes that users may notice is that there is now no intermediary page devoted to choosing the language used. In future, users will go directly to the home page, and the default language is automatically detected based on the browser settings. If users wish to select a different language out of the five supported by the Office, they can do so and have this choice stored in a “cookie”.

The OHIM provides you with:

- a Video tour outlining the main features of the new website:

[http://oami.europa.eu/EN/userscorner/pdf/capture/site\\_demo\\_en.htm](http://oami.europa.eu/EN/userscorner/pdf/capture/site_demo_en.htm)

- Under “What happened to my favourites?” OHIM provides for the new links to the main pages of the previous website:

<http://oami.europa.eu/EN/userscorner/pdf/Favourites.doc>

#### Alicante news

The OHIM has released issue #06-2008 of the Alicante News which includes the following items:

- an article explaining the new features of the new website.
- Country overview: United Kingdom.
- Report on an interesting trade mark case “PRIVATE” and a design case “inverter generators.
- The standard Case law Review.

2-2 Domain Name

GNSO Improvements Report

ECTA Internet Committee has submitted comments on the GNSO Improvements Report to ICANN.

ECTA paper can be found at: [http://www.ecta.eu/position\\_papers/2008-06-ICANN.pdf](http://www.ecta.eu/position_papers/2008-06-ICANN.pdf)

3- Case Law

3-1 Court of First Instance of the European Court of Justice

On relative grounds for refusal

- 1. Case: **T -420/03, 17 June 2008, El Corte Inglés, SA v José Matías Abril Sánchez and Pedro Ricote Saugar**  
( contested decision : Case R 88/2003-2 of 1 October 2003 )

Trade mark:



|                                   |                                                |
|-----------------------------------|------------------------------------------------|
|                                   |                                                |
| <p><b>Earlier trade marks</b></p> | <p><b>Community trade mark applied for</b></p> |

classes: 8, 11, 16, 18, 25, 38 and 41

Decision:

It is a long decision (111 paragraphs) with little legal interest. The Court mainly discuss the evidence provided in order to establish the existence of the earlier rights.


Regarding the similarity of the goods and services, the Court considers that the goods of classes 8, 11, 16, 15 and 25 are different to the services of classes 38 and 41, which is obvious (para. 99 and 100).

The Court also note that opponent did not prove that the marks have a reputation (para. 79 to 83 ) or are well-known ( para. 108 to 110 )

The Board of Appeal’s decision is upheld.

**2. Case: T -175/06, 18 June 2008, The Coca-Cola Company v San Polo Srl**  
 ( contested decision : R 99/2005-1 of 5 April 2006 )

**Trade mark:**

|                            |                                                                                     |
|----------------------------|-------------------------------------------------------------------------------------|
| <b>MEZZO<br/>MEZZOMIX</b>  |  |
| <b>Earlier trade marks</b> | <b>Community trade mark<br/>applied for</b>                                         |

**classes:** 32 and 33

**Decision:**

1. Similarity of the trade marks

The trade marks are visually (para. 30 to 37) and aurally (para.38 to 41) similar. No conceptual comparison can be made (para. 42 to 43). Overall, there is average similarity between the trade marks (para. 44 to 47).

2. Similarity of the goods

There is no similarity between "wines" and, on the one hand "beers" (para. 63 to 70 and 96) and, on the other hand, "mineral and aerated waters and other non-alcoholic drinks, syrups and other preparations for making beverages and mixed lemonade-based drinks" (para. 79 to 91).

3. Likelihood of confusion

There is no likelihood of confusion (para. 102 to 109).

The Board of Appeal's decision is upheld.

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3. Case: T -93/06, 19 June 2008, Spa Monopole, compagnie fermière de Spa SA/NV v Mülhens GmbH & Co. KG
 (contested decision : R 825/2004-2 of 11 January 2006)

Trade mark:

SPA	MINERAL SPA
Earlier trade mark	Community trade mark applied for

classes: 3 and 32

Decision:

The Court decides on an opposition filed on basis of article 8(5) CTMR (trade mark with a reputation).

The earlier trade mark is the Benelux word mark "SPA" registered for: "mineral water and aerated waters and other non-alcoholic beverages, syrups and other preparations to make beverages" in Class 32.

The opposition is upheld.

1. The trade mark «SPA» has a reputation, which is, at the very least, very significant in the Benelux for mineral water (para.33 to 36).
2. The two marks have a degree of similarity at a visual and aural level since the word 'spa' is common to both (para. 30). They are also relatively similar at a conceptual level (para. 31).

As a consequence, there is a link between the two marks (para. 32).

3. The risk that the image of the mark with a reputation or the characteristics which it projects are transferred to the goods covered by the mark applied for, with the result that the marketing of those goods is made easier by that association with the earlier mark with a reputation, is established. (para. 40).

First, the relevant public for the trade mark applied for, that is to say the general public in the Benelux, may be the same as that targeted by the earlier trade mark (para. 41).

Second, the goods covered by the trade mark applied for are not so different from those covered by the earlier trade mark. Thermal waters, cosmetic products, soaps and essential oils can be used together for skin and beauty treatments. In addition, mineral waters and mineral salts can be used in the production of soaps, other cosmetic products and preparations for the hair. Furthermore, mineral water operators sometimes sell cosmetic products comprising mineral water (para. 42).

Third, the image of the earlier trade mark and the message that it conveys relate to health, beauty, purity and richness in minerals. That image and that message can apply also to the goods in respect of which registration was sought by the applicant, since they are used to preserve and improve health or beauty. Therefore, the applicant could take unfair advantage of the image of the earlier trade mark and the message conveyed by it in that the goods covered by the trade mark applied for would be perceived by the relevant public as bringing health, beauty and purity. Accordingly, the risk of a free-riding transfer of the advertising effort made by the proprietor of the earlier mark to the mark applied for has been established.

The Board of Appeal's decision is upheld

4. Case: T -36/07, 25 June 2008, Zipcar Inc v Canary Islands Car, SL
(contested decision : R 122/2006-2 of 30 November 2006)

Trade mark:

CICAR	ZIPCAR
Earlier trade mark	Community trade mark applied for

classes: 39

Decision:

1. Similarity of the trade marks

Visually, the trade marks are not similar (para. 40). Aurally, they are highly similar (para.41 to 44). As regards the conceptual aspect, since the conflicting marks were composed of terms which do not exist in Spanish and which therefore have no conceptual content for the relevant public in this case, no conceptual comparison of the marks can be made (para. 45).

2. Similarity of the services

The services 'vehicle rental', 'arrangement of rental of vehicles', 'scheduling, planning, organising, managing and providing the temporary use of motor vehicles' and 'information, advisory and consultancy services relating to the foregoing', are very similar to the services 'vehicle rental reservation services' Essentially, they relate to the rental of vehicles (para. 37).

The services 'arrangement of travel and transportation; transportation reservation services; motor vehicle sharing services' are not materially different from the services "vehicle rental reservation services' since they may come from the same undertakings and are complementary to the rental of vehicles

3. Likelihood of confusion



While there is no doubt that the services in question may be chosen by sight, it is equally undeniable that a not insignificant proportion of car rental contracts are negotiated orally. Moreover, car rental suppliers are recommended and chosen orally in a significant number of cases. Consequently, while it is true that the potential customer of the services in question may encounter the visual representation of the mark first, the phonetic element may play a decisive role in his choosing the services in question, in particular as regards services, amongst those covered by the mark applied for, which are not limited to car rental in the strict sense (para. 49) .

There is a likelihood of confusion (para. 50).

The Board of Appeal's decision is upheld.

5. Case: T -224/06, 25 June 2008, Otto GmbH v L'Altra Moda Spa
 (contested decision : R 793/2005-2 of 16 June 2006)

Trade mark:

	
Earlier trade mark	Community trade mark applied for

classes: 25

Decision:

The terms "alba" and "l'Altra" are the dominant elements of the trade marks in suit (para. 34 and 35).

The trade marks are visually (para. 37 to 40), aurally (para. 41 to 43) and conceptually different (para. 44 and 45).



Overall, they are different (para. 46).

The Board of Appeal's decision is upheld.

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**6. Case: T -79/07, 26 June 2008, SHS Polar Sistemas Informaticos, SL / OHIM - Polaris Software Lab Ltd**  
 ( contested decision : R 658/2006-2191/2002-2 of 8 January 2007 )

**Trade mark:**

|                                                                                     |                                                                                       |
|-------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------|
|  |  |
| <b>Earlier trade mark</b>                                                           | <b>Community trade mark applied for</b>                                               |

**class:** 9

**Decision:**

The trade marks are visually (para. 40) and aurally (para. 41 and 42) different. Conceptually, there is little or no similarity (para. 43 to 47).

Overall, the trade marks are different for a very attentive consumer (para. 48).

The Board of Appeal's decision is upheld

**7. Case: T -328/05, 1 July 2008, Apple Computer v TKS-Teknosoft**  
 ( contested decision : R 416/2004-4 of 27 April 2005 )

**Trade mark:**

|                           |                                         |
|---------------------------|-----------------------------------------|
| <b>QUARTZ</b>             | <b>QUARTZ</b>                           |
| <b>Earlier trade mark</b> | <b>Community trade mark applied for</b> |

**class:** 9

**Decision:**

1. Similarity of the trade marks

Visually, the trade marks are highly similar (para. 28 to 32). Aurally and conceptually, they are identical (para. 33). Overall, they are quasi-identical (para. 34).

2. Similarity of the goods.

*A computer operating system functionality specifically intended for use by IT developers with the aim of improving and accelerating the reproduction of digital images in application programs, except those products intended for the banking sector*

Is similar to


*Packets of programs for banking*

(para. 39 to 48).

3. Likelihood of confusion

There is a likelihood of confusion (para. 55 to 64).

The Board of Appeal’s decision is upheld.

|                                                                                     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
|-------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|  | <p>To find the full text of the trade mark decisions reported in the ECTA Flashes, please search the ECTA Info Database including the free Darts-ip Europe Case Law database available on ECTA’s website in the members’ only section. ECTA offers its members free access to Darts-ip search functions limited to ECJ and CFI decisions as well as for national decisions reported in ECTA Flashes.</p> <p>If you are interested in having full access to the 55,000 pan-European case law documents in darts-ip, additional information can be found on <a href="http://www.darts-ip.com">www.darts-ip.com</a>.</p> |
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## ▶ 4- ECTA News

### ▶ 4-1 WIPO - Nice Classification

The first ad hoc working Group on the Nice Union will take place in Geneva, at WIPO on 3 and 4 July 2008.

ECTA will be represented by Jan Wrede, Member of the Law Committee.

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