



KADOR & PARTNER

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# NEWSLETTER

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November 2002

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## I. ABOUT US

### 1. "Capital additions" at Kador & Partner

We are pleased to inform you of our new support in the field of European and International trade mark and patent matters:

**Ms. Janette Küntscher, LL.M.**, joined our team in March 2002. She studied law at the Universities of Dresden and Exeter, UK, and is admitted to the Regional Court I of Munich. Ms. Küntscher took part in the Masters of Law programme ("International Business Legal Studies") of the University of Exeter and specialized in Intellectual Property Law. For her dissertation submitted towards the Masters of Law degree she concentrated on "Utility Models – The UK and German approaches in the light of the proposed EC Directive". Ms. Küntscher has already gained work experience at a lawyer's office in Nuremberg and at a Ministry in Dresden. Furthermore, she is fluent in English and speaks some French and Russian.

**Ms. Barbara Regensburger** completed her law studies at the University of Innsbruck/Austria and joined us in October 2001. She has specialized in German, European and International trade mark matters and supports our trade mark team. Ms. Regensburger is fluent in English and speaks some Italian and Dutch.

**Mr. Chris Hamer** is joining our firm in November to mainly support our patent team. Mr. Hamer is of Canadian/British nationality. He is a British Chartered Patent Attorney and European Patent Attorney with a chemical background. Before joining our team, Mr. Hamer worked several years as a patent agent in a British IP firm. Apart from speaking English as his native language, Mr. Hamer has a working knowledge of French, Spanish and Italian.

Additionally, we proudly announce that **Dr. Bernhard Pillep** finished his exams with great success and has been an authorized European Trade Mark Attorney and German Patent Attorney since June 2002.

### 2. Lecture activities in U.S.A.

On a business trip to the U.S.A. in autumn 2002, Mrs. Corinna Probst, trade mark attorney at Kador & Partner, and Dr. Bernhard Pillep held a lecture about "Recent developments in European Patent and Trade Mark Law".

Also in autumn 2002, Dr. Kador held a lecture at the Colorado Bar Association in Denver concerning the new European Community Design (see also our Newsletter of December 2001 on this topic).

### 3. INTA'S Annual Meeting in AMSTERDAM

INTA's 125<sup>th</sup> Anniversary Annual Meeting will take place in Amsterdam from May 3 - May 7, 2003. Kador & Partner will be represented by Dr. Kador and his team of trade mark attorneys. This meeting attracts over 6,000 participants and is therefore a capable platform for networking opportunities and intensive discussions. We are looking forward to meeting our clients from all over the world at this special event.

### 4. CTM Advisory Initiative

In the context of the above-mentioned INTA meeting in Amsterdam our CTM Advisory Initiative ([www.community-trade-mark.org](http://www.community-trade-mark.org)), an association of several experienced Munich attorneys founded in 2000 for promoting the knowledge of the Community Trade Mark, is planning a special event for our clients. The detailed activities will be advertised on the above-mentioned homepage in due time.

### 5. Non-U.S. INTA Roundtables in 2002/2003

In 2002 Kador & Partner hosted four INTA Roundtables concerning the topics "Recent developments regarding trade marks in the European Community" held by Dr. Roland Knaak, "Trade marks for retail services: A challenge for trade mark harmonization in Europe?" by Ms. Marianne Grabrucker, judge of the Federal Patent Court, "Trade mark infringement cases and the role of the infringement courts in Germany" by Chief Justice Pecher, and "Trade marks in Eastern Europe and Inner Asia" by Dr.

Alexander von Fünér. A fifth INTA Roundtable is scheduled on November 21, 2002, about “Legal representation before the Court of First Instance of the European Community – Practical Experiences” held by Baron Wedig von der Osten-Sacken L.L.M. and Alexandra Spranger, two attorneys at law.

In 2003 Kador & Partner is pleased to host four further INTA Roundtables on its premises in Munich. These special meetings are an ideal way to meet colleagues and keep up with trade mark issues. All speakers are leading authorities in their fields.

## II. GERMAN PATENT LAW

### 1. Scope of Protection - New Decisions of the German Supreme Court

In five new decisions issued on March 12, 2002, the German Supreme Court has commented on the scope of protection conferred by claims including features expressed as numerical ranges. In these decisions the Court had to rule on the question of whether the scope of protection of such claims also covers embodiments with a feature having a numerical value which is outside the claimed range.

The Court first emphasised that the basic principles for the determination of the scope of protection as developed under the amended German Patent Act 1980 also apply to claims including numerical ranges. The Court further stated that numerical limits may in principle also be interpreted accordingly (so that a given numerical range may also include values which are not within the claimed range e.g. in case they have to be regarded as being within the accuracy of a measurement).

However, the Court then made clear that features with numerical limits were usually recognized by the skilled person to have a higher degree of reliability and clarity than verbally described features. Thus, numerical limits in a claim have to be regarded in general as strictly defining the numerical values embraced by that claim. Furthermore, it was stated that numerical limits restricted the scope of protection of a claim, irrespective of the purpose of

their introduction into a claim. This was different in the Jurisdiction of the Court before 1980, where numerical features which were not considered to be an essential feature of the invention were regarded as a mere orientation for the skilled person but not as a true restriction of the claim.

Furthermore, in the decisions the Court also considered a possible extension of the scope of protection of claims including numerical limits under the Doctrine of Equivalents and once again outlined the requirements for such an extension:

a) The problem underlying the invention must be solved with equivalent means having the same effect as the means as claimed,

b) the skilled person must have been able to find these equivalent means using his expert knowledge, and

c) the equivalent means must have been found by the skilled person due to considerations having their basis in the contents of the claims.

However, the Court further expressed its view that an unambiguous numerical limit given in a claim determines and limits the protected subject matter. Thus, an extension of a numerical range given in a claim is usually not possible under the Doctrine of Equivalents. Consequently, an embodiment showing a numerical value exceeding such a limit is usually not covered by the scope of protection of such a claim.

An exception to this rule may be given where it is clear for the skilled person that a (small) deviation from a numerical value in a claim does not affect the effect and functionality of the claimed subject matter. For example, where an angle of 90° is claimed as an expression for “perpendicular” the claim may also cover embodiments with small deviations from that angle if it is immediately clear to the skilled person that it is not necessary to strictly adhere to the value of 90°.

In essence, it can be said that the new decisions make unmistakably clear that the time when numerical limits in claims were regarded merely as an

orientation for the skilled person but not as a true restriction of the scope of protection of a claim is over in Germany. This ruling forces the patent professional to draft patent claims including numerical limits even more carefully, as the scope of such claims may not or only to a very small extent be extended by the Doctrine of Equivalents.

On the other hand, these decisions are a big step forward toward a European harmonization of the Jurisdiction of the Highest National Courts concerning the scope of protection of patent claims, as this ruling now closely corresponds to the more restrictive jurisdiction in the United Kingdom concerning the Doctrine of Equivalents which was hitherto regarded as being the opposite pole to the liberal German approach.

## **2. Changes in German Patent Law effective as of 2002**

On the occasion of the conversion to the EURO system, a German Act on official fees was established to become effective on January 1, 2002. With this change, a great number of procedural amendments also took place primarily targeted to reduce the Examiners' workload. The new Act contains all regulations necessary for modernising the administration of intellectual property rights before the German Patent and Trade Mark Office. Furthermore, the new Act provides provisions for preparing the electronic publication.

In the following the essential amendments are listed:

1) In line with the European Patent Office there is now a possibility of "further processing" if a time limit set by the Patent Office is missed. The time period for lodging such a request for further processing is one month and a payment of € 100 has to be effected.

2) Renewal fees can be paid without a surcharge within two months after the due date. In case this time period is missed, a four-month period of late payment with a fine follows (the fine being standardized at € 50 regardless of the amount of annu-

ity to be paid). Hence, similar to the European procedure the German Patent and Trade Mark Office now offers a six-month period for late payment of an annuity. According to the new Act, the German Patent and Trade Mark Office is not obliged to inform the applicant or proprietor of the expiration of the two-month term for paying the renewal fee. However, as in the EPC procedure, there will normally be an informal reminder for payment with a fine, but the six-month period provided by law will expire regardless of whether or not such a reminder was issued or received.

3) The new Act eliminates a second instance for patent opposition proceedings temporarily (limited to three years until 2005). Before 2002 an opposition had to be filed with the German Patent and Trade Mark Office and the German Federal Patent Court acted as the appeal instance. Now, with the beginning of this year, the German Federal Patent Court is the only substantive instance for oppositions. Hence, no substantive appeal can be filed from this first-instance decision. This decision can only be appealed on a point of law to the Federal Supreme Court. Moreover, the opposition now carries a fee of € 200.

## **III. EUROPEAN PATENT LAW**

### **1. Recent Decisions on Disclaimers**

A very important and interesting decision is Decision T323/97 handed down very recently. The decision is very important because it comes to the conclusion that the practice of permitting disclaimers having no support in the application as filed to make a claimed subject matter novel by delimiting it against an accidental anticipation cannot be maintained in the light of the Enlarged Board of Appeal's Opinion G2/98 (see comments on this decision in our Newsletter of December 2001).

There is a long established case law of the EPO supported by not only a few but indeed a great number of Board of Appeal decisions according to which such disclaimers, if properly formulated, are allowable. This case law started with Decision

T4/80 handed down in 1981, which means that this has been established practice at the EPO for more than 20 years.

The cases where disclaimers are applicable were specified in greater detail in T433/86 which says that when there is an overlap between the prior art and the claimed subject matter defined in generic terms, a specific prior art may be excluded even in the absence of support for the excluded matter in the original documents. Such an exclusion may be achieved by way of a disclaimer or – preferably – in positive terms, if this leads to clearer and more concise language.

In Decision T170/87 the Board established that the disclaimer could render novel an inventive teaching which overlapped the state of the art, but could not impart inventive step to a teaching which was obvious.

In T597/92 the Board confirmed this, stating that there was no basis in the EPC for the substantiation of inventive step by way of a disclaimer. This method might only be used by way of exception for avoiding anticipation, if the subject matter of a claim could not be restricted on the basis of the original disclosure in positive terms.

In Decision T710/92 it is pointed out that unquestionably the limitation by way of disclaimer does not contribute anything to the original teaching of the application as a whole including the claims.

Although disclaimers can be used in exceptional cases to establish novelty only, their use is very common so that this Decision T323/97 is of major interest for a great number of pending patent applications and opposed patents, as well as for future cases.

As this decision is already taken into account by Opposition Divisions in pending opposition cases, it is important to realize its consequences.

It is undisputed that there was and is a continuing need for disclaimers in order to obtain patents for good inventions which otherwise could not have been maintained, because their claim would overlap

with an accidental anticipation. This need cannot be met any more in the future.

The impact of this decision is particularly drastic with regard to all patents containing disclaimers which are opposed or which are in the granting procedure and will be opposed soon. All these patents will have to be revoked, because according to Decision T323/97 the disclaimer violates Art. 123(2) EPC, but the disclaimer cannot be deleted without violating Art. 123(3) EPC as the deletion would lead to an extension of the protection. Therefore, there is no alternative but to decide to revoke these patents.

The drastic effect of the decision suggests a critical analysis thereof.

First, Decision T323/97 deals with facts which are different from those which the Board intends to decide.

The decision deals with a situation where the disclaimer was not introduced to make the claim novel – as it is expressly stated in the decision under point 2.1.:

“It is to be noted that no attack of lack of novelty against the subject matter of the patent in suit was based or could be based on these citations...”

Starting with Decision T170/87 of 1988 it is established case law confirmed by numerous decisions that a disclaimer not intended to make the claim novel is not allowable. Consequently, Decision T323/97 should have followed this established case law by not allowing the disclaimer because it does not establish novelty.

The deciding Board of Appeal was not dealing with a case where the disclaimer was introduced for establishing novelty. It is consequently questionable whether this decision can be regarded as an actual decision on the allowability of a disclaimer establishing novelty, or whether the decision only gives an opinion in this connection.

A further crucial question is whether the principles of the decision of the Enlarged Board of Appeal

G2/98, on which the reasoning of T323/97 relies to a wide extent, have indeed to be applied in deciding the allowability of a disclaimer.

G2/98 is directed to the issue of claiming priority and especially analyses the term “the same invention” referred to in Art. 87(1) EPC.

The Enlarged Board of Appeal analysed the two different views given in two groups of decisions concerning the validity of a priority claim – one view being strict in so far as all features of a claim have to be disclosed in the priority document, the other view being more liberal and saying that those features not related to the function and effect, and hence to the character and nature of the invention, need not have a basis in the priority document.

The Enlarged Board of Appeal held that distinguishing between features related and unrelated to the function and effect would not be consistent with the principle of legal certainty, and therefore concluded that the strict and precise approach of the first group of decisions should be followed.

If a disclaimer is properly used according to the established case law to establish novelty only, the invention remains unchanged. This is the starting point for all decisions dealing with disclaimers, e.g. Decision T170/87:

“The inventive teaching originally specifically disclosed in the application is not changed as a whole merely by delimiting it with respect to the state of the art...”,

or Decision T710/92:

“The latter is also valid in case the disclaimer is introduced for novelty reasons, since the excision, in the form of a disclaimer, of part of a claim cannot change the content of the original teaching.”

It seems, therefore, that for deciding on the allowability of a disclaimer where the invention remains unchanged, the crucial issue of Decision G2/98 of “the same invention” of two different disclosures is not relevant.

In addition, the considerations of G2/98 in respect of features related to the function and effect do not seem to be relevant in deciding on the disclaimer. Questions of function and effect relate to inventive step, not novelty. These features might relate to a situation as decided in Decision T323/97 where the disclaimer was not introduced to establish novelty, but do not seem to be relevant for a correctly applied disclaimer intended to establish novelty.

In view of the fact that a critical analysis of Decision T323/97 as outlined above shows some weak points, and that drastic changes in patent practice in respect of disclaimers would occur following this decision, the question remains whether this decision should be applied at this time by the instances of the EPO. Alternatively to an immediate application, the deciding bodies could await a decision of the Enlarged Board of Appeal on this important question.

In view of the practical importance of disclaimers, the President of the EPO could bring the question of allowance of disclaimers before the Enlarged Board of Appeal according to Art. 112(1)(b) EPC.

Under the above considerations it would seem more appropriate, if the deciding bodies awaited a decision of the Enlarged Board of Appeal on the allowability of disclaimers.

## **2. Important procedural changes in European Patent Law**

**Rule 29(2) EPC**, concerning form and content of claims, was amended and entered into force on January 2, 2002. It applies to all European patent applications in respect of which the EPO had not yet dispatched a communication under Rule 51(4) EPC by that date.

The amendment to Rule 29(2) EPC sets out the principle of “**one independent claim per category**”. The only admissible exceptions to this principle are now explicitly stated in the rule. An applicant wanting more than one independent claim in the same category must, if the EPO objects, convincingly demonstrate that all the additional inde-

pendent claims come under one of the exceptions explicitly given in the rule.

Typical exceptions under Rule 29(2)(a) are plug and socket, transmitter and receiver, intermediate(s) and final product, gene-geneconstruct-host-protein-medicament. Exceptions under Rule 29(2)(b) are also in particular second or further medical uses in the claim format of a second medical-use type claim. Exceptions under Rule 29(2)(c) are further two or more processes for the manufacture of a chemical compound, in inventions relating to a group of new chemical compounds.

**Rule 51 EPC**, concerning the examination procedure, was amended and entered into force on July 1, 2002. It applies to all European patent applications in respect of which the EPO has not yet dispatched a communication under existing Rule 51(4) EPC by July 1, 2002.

Under the revised wording, the previous separate communications under Rule 51(4) and 51(6) EPC are combined. The applicant will immediately be asked to file the translations of the claims and to pay the fees for grant and printing.

Filing of the translations and payment of the fees implies approval of the text for grant. The application will thus no longer be refused in case no express statement of approval is filed. If the applicant does not file the translations and/or does not pay the fees for grant and printing, the application will be deemed to be withdrawn under Art. 97(3) and (5) and Rule 51(8) EPC.

Upon reviewing the proposed text for grant, the applicant may wish to make minor amendments and/or he may discover mistakes. He will have an opportunity to file the amendments or corrections within the period set under Rule 51(4) EPC. If the examining division consents to the amendment or corrections, it can immediately proceed to grant, as the applicant is obliged to file translations of the claims as amended or corrected.

If the examining division does not consent to the requested amendment or corrections, the applicant will be given the opportunity to comment, and

either to withdraw or again to amend those amendments or corrections. In the latter case amended translations of the claims will need to be submitted once more. As such amendments will generally be of a minor nature, this should not involve any substantial burden for the applicant.

If the applicant fails to meet the objections raised, the examining division must refuse the application under Art. 97(1) EPC because it does not meet the requirements of the convention. As the applicant must always pay the fees for grant and printing and any claim fees within the time limit set under Rule 51(4) EPC, a legal basis has been created for their refund if no patent is granted.

### **3. The New Member States of the European Patent Convention**

Bulgaria, the Czech Republic, Estonia and Slovakia became members of the European Patent Organisation on July 1, 2002. This means that the European Patent Office is now able to grant patents for a total of 24 states, namely Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Liechtenstein, Luxemburg, Monaco, The Netherlands, Portugal, Slovakia, Spain, Sweden, Switzerland, Turkey and the United Kingdom. The European Patent Office is continuing the latest development to enlarge its system eastwards. In the near future (probably next year), another six countries will follow, namely Latvia, Lithuania, Poland, Romania, Slovenia and Hungary.

The European Patent will then cover the entire European Economic Area stretching from the Atlantic to the Black Sea. As a consequence of the admission of the new eastern states, patent protection will be much simpler and cheaper and will, therefore, encourage technology transfer and investment.

## IV. TRADE MARK LAW

### 1. Recent Decisions of the European Court of First Instance

#### ”Das Prinzip der Bequemlichkeit“

The Court of First Instance handed down a judgment in an appeal case against a decision of the Community Trade Mark Office. The appeal had been filed against the refusal of the application for registration of the term “DAS PRINZIP DER BEQUEMLICHKEIT” (The principle of comfort) for tools (hand-operated); cutlery (class 8), land vehicles and parts therefore (class 12), household furniture, in particular upholstered furniture, seating, chairs, tables, unit furniture, as well as office furniture (class 20) as a Community trade mark on absolute grounds. The Court annulled the decision of the Office.

The Board of Appeal of the Office had refused registration on the grounds that the sign was devoid of distinctive character and consisted exclusively of signs or indications designating the quality of the goods so that absolute grounds of refusal according to Article (7) (1) (b) and (c) CTMR were given. The Board of Appeal found that the respective trade circles would immediately understand the word combination “DAS PRINZIP DER BEQUEMLICHKEIT”, namely that the goods concerned were designed in accordance with the rules and principles of comfort.

However, the Court of First Instance found that the Board of Appeal incorrectly assessed the trade mark to solely consist of the word “BEQUEMLICHKEIT” (comfort). Instead, the term “PRINZIP DER BEQUEMLICHKEIT” should have been assessed as a whole. The Court pointed out that rules on absolute grounds for refusal apply to the trade mark in its entirety and not only to one of the word elements the mark consists of. With regard to a word mark composed of several elements descriptiveness must be assessed on the basis of all the elements of which the word mark is composed and not on the basis of only one of those elements. When considered on the basis of all its elements and read in its entirety, “DAS PRINZIP DER BE-

QUEMLICHKEIT” cannot be regarded as descriptive according to the Court. The Court held that even if one of the word elements, “BEQUEMLICHKEIT”, designated the quality of the goods, the trade mark as a whole could not be regarded as consisting exclusively of signs or indications which may serve to designate the quality of the goods concerned.

Furthermore, the Board of Appeal noted that the term “DAS PRINZIP DER BEQUEMLICHKEIT” was characterized by the lack of any additional fanciful element. However, according to the Court, the registration cannot be refused for this sole reason. It is also inappropriate to apply to slogans criteria which are stricter than those applicable to other types of signs.

#### ”EUROCOOL”

The Court of First Instance annulled the decision of the Community Trade Mark Office in another appeal case concerning the refusal for registration of the term “EUROCOOL”. The services in respect of which registration was sought were in classes 39 and 42, including “storage and keeping of goods, especially chilled and frozen goods; consultancy and provision of information on the storing of goods...transport of frozen goods” as well as “planning of logistic systems especially for the transport and storage of chilled and frozen goods....”

Again the Board of Appeal held that “EUROCOOL” was devoid of any distinctive character and that it was purely descriptive within the meaning of Article (7)(1)(b) and (c). Moreover, the trade mark was held to lack a fanciful element. The Board of Appeal thus came to the conclusion that “EUROCOOL” consisted solely of a word in everyday usage, namely “cool” which indicated the type of services concerned and the prefix “euro” which denoted the geographical area in which the services were provided.

However, according to the Court of First Instance, this conclusion of the Board of Appeal is not sufficient to justify refusal of the trade mark on absolute



grounds unless the Board is able to prove that such a sign in its entirety would not enable the relevant trade circles to distinguish the services from those of other competitors. Furthermore, according to the Court, the absence of distinctive character cannot arise merely from the finding that the sign at issue lacks an additional fanciful element. A CTM is not necessarily a work of invention and is founded not on any element of originality or fancy but on its ability to distinguish goods or services on the market from goods and services of the same kind offered by competitors. Thus, the Board of Appeal was wrong in finding that the term “EUROCOOL” was devoid of any distinctive character according to the Court’s view.

#### “LITE”

In a further appeal case, the Court of First Instance basically confirmed the decision of the Board of Appeal with respect to the term “LITE” for goods and services in classes 5, 29, 30, 32, 33, 42 as being not registrable.

The Board of Appeal had pointed out that the sign is a descriptive indication of the goods concerned since “LITE” is a general name for foodstuffs whose undesirable ingredients have been removed in order to appeal to food-conscious consumers.

According to the Court, it has to be decided whether the term “LITE” enables the relevant trade circles to distinguish the goods and services in question from those of a different commercial origin. As the nature of the goods and services are foodstuffs and catering service, the goods and services are intended for all consumers. The term “LITE” is currently a generic, usual or commonly-used name, which is created from a phonetic transcription of the English word light, meaning the lightness of the foodstuffs and of the dishes prepared and served in the catering service. “LITE” substances and food products will be regarded as low in calories so that the Board of Appeal was correct in finding that “LITE” was devoid of any distinctive character under Article 7 (1) (b) and (2).

## V. FURTHER RECENT DEVELOPMENTS

### 1. Top Level Domain (TLD) “.eu”

The European Parliament and Council have adopted the Regulation No. 733/2002 of April 22, 2002, in order to implement the legal basis for the TLD “.eu”.

The .eu TLD shall promote the use of and access to the Internet networks and the virtual market place based on the Internet. Moreover, the domain shall improve the interoperability of trans-European networks and the visibility of the Internal Market in the virtual market.

Undertakings, organisations and natural persons within the Community shall be enabled to register in the “.eu” TLD. A registry will be charged with the organisation, administration and management of the “.eu” TLD. Registrars provide domain name registration services to registrants.

However, the Regulation does not lay down the details of the registration proceedings that have to comply with the European provisions on data protection and shall include a provision on the handling of speculative and abusive registrations. The details have to be enacted by the European Commission.

### 2. New Copyright Contract Law in force

On July 1, 2002, the amendments to the German Copyright Act, which were adopted by the German Parliament on January 25, 2002, took effect.

A statutory claim for reasonable compensation, which was left to the discretion of the parties under the previous law, is the central new provision. A reasonable compensation is remunerated, if it would be provided in commercial dealings made in customary fashion and in good faith. Further, an author may seek an ex post fairness adjustment in exceptional cases of a conspicuous disproportion (in contrary to a gross disproportion under the previous law) – so called “Best Seller Clause”.

The new law is applicable to contracts concluded after July 1, 2002. The Best Seller Clause applies to contracts made after March 28, 2002. Moreover, an author may file a claim for reasonable compensation with regard to factual circumstances that have arisen since June 1, 2002. However, the exploitation may not have begun later than March 28, 2002.

### **3. “Obelix vs. Mobilix”**

On July 30, 2002, the Munich Court I held that there exists no likelihood of confusion between the Community trade mark No. 16154 “Obelix” (registered for Asterix comics ) and the German trade mark “Mobilix” which covers computer systems and services.