

Newsletter

IP, Media & Technology

February 2014

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Only a few months have passed since the recent election campaign in Germany, which hardly touched on some of the hottest topics: the future of Europe. What will be the role of the States within Europe on the one hand and what will be Europe's role in the world on the other hand? Just as in the Biedermeier period, there was no focus on pioneering questions of principles, but rather on national aspects that appear almost dinky. Is this a new trend – in legal development, too?

It almost seems as if the German public is tired of hearing the words "Europe" or "worldwide". Perhaps they are associating them with too many negative reports over the past few years, and people instinctively try to avoid the negative. So, are we heading back into a state of isolation?

No, that cannot and will not be a sustainable trend. Europe and the rest of the world are far too important and in discussions will return to the role they are entitled to with full force. 2014 will differ significantly from 2013 in this respect and the European Parliament elections in May 2014 will not be the only event to watch.

The pioneering area is currently data protection. Mr. Snowden is in Russia, the U.S. are listening in on the German chancellor's cell phone calls, and the Internet is to be given a European infrastructure. Here are the fundamental questions: national sovereignty, international connections, European cooperation.

Developments relating to patent law will likely be less spectacular. The unitary European patent was conceived back in December 2012, but we will only learn in 2014 whether and how it will actually be born. If so, what is created would be a revolutionary type of patent baby. Whether it will be successful or not is a different matter. Either way, "Europe" will be back on the agenda. The article "The EU Patent – A Dream or A Nightmare?" shows you a reasonable way to pass the waiting time until then.

In other countries, changes in patent law have already turned into reality. A few years ago, everyone was talking about the "America Invents Act" and we are now seeing the first effects in practice – for example in software patents. In his article "Soft-

Editorial

Revolution or Isolation – Which Route Will Europe Take?



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2014 will become a European year

The unitary European patent

ware Protection”, Sönke Popp discusses the relevance of this law for European companies.

International conventions are often hectic and sometimes it seems that the rules that apply differ from daily business. Melanie Künzel draws attention to the fact that this can also be observed at trade shows with regard to the enforcement of claims in her article entitled “Trade shows as “Scene of the Crime” – A Legal Vacuum?”.

Internet domains and Internet marketplace

There are internationally relevant changes also with regard to the Internet. “New Top-Level Domains Starting Up”, is the title of Dominik Eickemeier’s article. He points out how you can secure your web presence. And Ruben Hofmann shows how you can protect yourself against your own product images being used by competitors at internet marketplaces.

Design naming convention

And while everyone is talking about the unitary European patent, but it is still not a reality, the situation is almost the reverse for the “registered design”. In Germany the wonderfully antiquated term “Geschmacksmuster” is being given up and replaced by the customary international term “design”. Above all, from 2014 on there will be an administrative procedure in order to review the protectability of a design. Correspondingly, such a review of the protectability will then only be possible to a limited extent during infringement proceedings. This may not be an important question of principle worldwide, but it is a clear change nevertheless.

We can still hope that “Europe” and “global” will not only return to the forefront in 2014, but that this will happen with positive signs. Positive, useful, pleasant – we will try to make our own small contribution to this process.

Software solutions have become established in all areas of technology. Software is being used not only for end products but also and specifically in the automation of internal processes, such as in production technology and sales organization. Practice shows that such software solutions can often provide a decisive advantage over competitors by, for example, producing products more quickly and cheaply or by saving on labor cost. It is therefore even more important to protect the software that is being used as well as to be aware of the most up-to-date legal developments in this area.

In the U.S., a liberal approach has been taken with regard to patent protection of software since the 90's (especially since the U.S. Supreme Court's 1998 "State Street Bank" decision). In Germany and the EU on the other hand, the approach is more restrictive in the granting of "software patents", for which the proper legal term is "patents for computer-implemented inventions". The discussion on software patents began back in the 90's and reached a peak in 2005 in the debate on a proposed EU Commission Directive on the introduction of "software patents". This software patent directive was rejected by the European Parliament in July 2005.

The discussion, however, has continued until today. The debate heated up again recently based on an application by several parties to the (former) federal government of Germany. The members of the CDU/CSU, SPD, FDP and Bündnis 90/Die Grünen parties, who were in the Bundestag at that time, requested, among other things, that the federal government should guarantee that "the economic exploitation rights regarding software shall remain protected under copyright law and shall not be undermined by third-party software patents" (Bundestag document 17/13086 of April 16, page 3).

It is often argued that copyright law is available for the protection of software and therefore no patent protection is required. But can you (and above all, should you) rely on copyright protection? Or to put it the other way around: Is copyright protection even

Software Protection

New developments relating to software patents



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Current political discussions

able to guarantee sufficient protection for software? What other intellectual property rights are available in addition to copyright? What are the advantages and disadvantages of these property rights? These are questions that are no longer relevant for software developers alone.

Copyright protection is not enough

The starting point of the current discussion is just right. In principle, “computer programs” are protected by copyright law (Sections 69a - 69g German Copyright Act), whereas patent protection strictly excludes “programs for data processing systems” in accordance with Section 1(3) Patent Act (for Germany) and Article 52(3) EPC (for Europe). The copyright protection arises automatically with the creation of the work, i. e. the programming of the software. An application or registration is not necessary. It is therefore free of charge. In addition, the copyright protection in Germany and most other countries expires 70 years after the death of the author (programmer) while in patent law the protection expires 20 years after the filing of the patent application.

Despite these advantages a company should not, however, rely on copyright protection. The main reason is that copyright protection can be very easily circumvented. Copyright, for example, offers no protection against reverse engineering. In accordance with Section 69e Copyright Act, no infringement has occurred if the reproduction of the code is necessary to obtain the information required to achieve the interoperability of an independently created computer program with other programs.

In principle, it is therefore possible to acquire a protected piece of software, decompile it and analyze it. The information gained in this way can then lead to the programming of an own software in a slightly altered version, but with the same functions, without the copyright holder of the genuine software being able to take any action against it.

In addition, proof of ownership is often difficult and expensive because the copyright is held by the author (programmer) of the software.

You must therefore be able to prove the entire link with the rights owner. These problems do not arise in case of patents because legal ownership is presumed by entry in the patent register (Section 30(3) sentence 2 German Patent Act). This apparently

formal aspect is often worth real money because it can make the difference between winning or losing the case.

In addition, copyright law also differs from patent law in the handling of parallel inventions. In case of independent parallel developments, a company cannot take action against the parallel developer based on copyright law, whereas patent law protection would be available.

However, the scope of copyright protection is even more critical. Copyright law protects the particular form of the source code in accordance with Section 69a Copyright Act. If a programmer, for example, programs in the C++ programming language but a competitor uses another programming language, the original programmer usually cannot take any action.

In summary, it can be stated that companies are well advised to protect their software (at least also) by means of other intellectual property rights. Inter alia, patent law could be an option.

Additional patent protection is recommended

But how is this statement compatible with the above assertion that programs for data processing systems are strictly excluded from patent protection? Both statements are correct. Section 1(3) Patent Act excludes programs for data processing systems from the scope of inventions that can be patented. According to Section 1(4) Patent Act, however, this applies only to data processing programs "as such". If the inventions have a specific technical subject, which goes beyond a simple data processing program "as such", they may be patentable.

According to case law this requirement of "technical character" is met if a computer program for which a patent application has been filed includes features which serve as a solution for a concrete technical problem by technical means (decision by the Federal Court of Justice of April 22, 2010, Case Xa ZB 20/08 – dynamic documentation generation), or to put it more simply: A computer program is specifically technical (and can therefore be patented) if it solves a technical problem in a technical way.

Features, tasks, and effects that are assessed as technical in accordance with case law, are for example effects in the traditional technical areas such as mechanical engineering and electrical engineering, chemistry, etc., but also effects such as the saving of storage space, the increasing of the performance

of computers, processors etc., the saving of energy or the improvement of system components.

**“Trick” –
Technical formulation of patent claims**

When registering software patents in Germany and Europe, therefore, a “trick” is often used. The patent claims are often formulated as “technical”, even mechanical, in order to pass the hurdle of “technical character”. For example, the saving of data in various different storage locations (temporary storage, program data memory, etc.) or in various components (chips, RAM, etc.) is highlighted, in order to make it possible to obtain a patent.

In many cases the consciously technical formulation of the patent claims and the associated abstraction leads to the fact that these patents, however, often also include embodiments for which the underlying software was never intended. This applies above all to older patents, which are sometimes undergoing a renaissance as a result of technological development. The owners of these patents often try to take advantage of this fact and enforce these (“misused”) patents against infringers.

Most recent developments in the USA

This development was also recognized in the U.S. Accordingly, the law amending the US Patent Act (Leahy-Smith America Invents Act - AIA), signed into law by President Obama in September 2011, contains new trial proceedings conducted at the U.S. Patent Office (USPTO) to review the patentability of one or more claims of covered business method patents (§ 18 AIA).

This procedure has been available since September 16, 2012. Up to now, 48 such petitions have been filed (status as of September 3, 2013). A number that could increase quickly in the future because the first decisions have now been issued. Software manufacturer SAP achieved the revocation of U.S. patent 6.553.350 by Versata which protects a procedure for price calculation (decision of June 11, 2013, Case CBM2012-00001). As the primary grounds for its decision, the U.S. Patent Office stated that the patent claims were too abstract. The patent protected a calculation method whose individual steps could also be performed on paper so the computer was not required to implement it.

Some observers consider the decision by the USPTO to be a general renunciation of the granting of software patents in the U.S. We will have to wait and see whether the decision will really have such extensive consequences. On a positive note, companies that consider themselves exposed to a (potential) infringement of a U.S. patent now have the opportunity to have this patent reviewed in office proceedings, without incurring the enormous costs involved in U.S. court proceedings.

Conclusion: Copyright provides free protection for software but is not designed especially for the protection of software, meaning that there are serious gaps in protection. In order to close these gaps a company should also protect software by means of patents which is possible not only in the U.S. but also in Germany and Europe by applying a few tricks.

The EU Patent – A Dream or a Nightmare?

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The coming into force of the EU Patent is up in the air

Make sure you do not miss a thing: Order EU Patent Alerts!

There is no “EU patent” yet. A lot has been written about it, however, and it has even made the daily press. The reason for this is simple: it was promoted by the European Commission in December 2012 with “cost savings of up to 80%”. If it were to come into force, it would have the effect of fundamentally changing the patent system in Europe.

To get to the point: Up to now, it is unclear whether, when, and in which countries the EU patent will come into force. Only one Member State has ratified the “Agreement on a Unified Patent Court” so far, namely Austria. According to Art. 18(2), the EU Directive 1257/2012 will only apply as of the date on which the Agreement comes into effect. Art. 89(1) of the Agreement requires in turn ratification of the Agreement by at least 13 Member States, including the three countries that are the source of the most patent applications (Germany, France, and the United Kingdom).

This is not just a formality. Instead, the planned provisions on the EU Patent have sometimes been very heavily criticized. Fees for the EU patent have not yet been determined. There are legal concerns, and two complaints by Spain to the European Court of Justice have not yet been decided. And last but not least: in the United Kingdom, Prime Minister Cameron has even announced a referendum on whether to remain in the European Union. Do national parliaments want to ratify an agreement under these circumstances? Bearing in mind that according to the Agreement, one of the sections of the new EU patent court is intended to be seated in London, i.e. depending on the outcome of the referendum, the court could be located almost extraterritorially in a country that is soon to be non-EU.

Currently, there is therefore no need to worry about the EU patent yet. To ensure that you do not miss important news, you can rely on our “EU Patent Alerts” mailing list. It is used to send only notifications of really relevant progress on the introduction of the EU patent, for example ratification by other Member States or the adoption of the final version of the Rules of Procedure for court proceedings.

And of course you will also be notified if the project fails or undergoes fundamental changes. A simple email to patent@heuking.de

heuking.de with “EU-Patent Alert Deutsch” or “EU-Patent Alert English” in the subject line is sufficient.

We as patent lawyers of Heuking Kühn Lüer Wojtek are always observing current developments. Our foreign colleagues keep us informed of any ratification by the parliaments of the Member States. In January 2013 we reported on the most important elements of the planned EU patent in several domestic and foreign telephone conferences. In April 2013 we discussed the effects of the EU patent package on traditional EP patents during our seminar “Global Patent Updates”. We will continue to remain alert in the future and keep you informed.

We have also compiled the most important legal texts relating to the EU patent (EU Regulation 1257/2012, Agreement on a Unified Patent Court and the Draft Rules of Procedure) in our textbook “EU Patent”. This textbook also contains an overview in table form, which makes it more accessible. It is a valuable work aid for those who wish to handle the material themselves with reference to the primary texts. An English version is also available. The textbook is available immediately free of charge by sending an email to patent@heuking.de.

If you want to learn even more, for example in order to plan further ahead strategically: Our website www.heuking.de/en/european-unitary-patent summarizes useful information on the planned EU patent. This page is continuously updated and extended.

“EU Patent” textbook is available now

Further information available online

Conclusion: There is no EU patent yet. The necessary ratifications by the Member States are still outstanding, and the project could still fail for a number of reasons. It is therefore very reasonable for companies not to deal with the topic for now, but rather to adopt a wait-and-see attitude until they find out that things are getting serious (for example via our EU Patent Alerts). If you want to find out more even at this stage, you can find all the information in our textbook and on the website www.heuking.de/en/european-unitary-patent.

Defense against the Taking Over of Product Images on Amazon

Use of EAN numbers

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Up to now, the problem of taking over product images on Amazon has not had a great deal of relevance in practice. This is surprising insofar as Amazon is one of the leading online global market places and thousands of items are offered and sold there every day. Of course great importance is attached to the product description and images, which are created by the merchants themselves, so it is amazing to find out that as far as we can tell there have only been a few court decisions issued on this extremely complex legal topic.

Item descriptions on Amazon are stored by EAN numbers or ASIN numbers. EAN numbers are a standardized code for the identification of a product that are issued by GS1 Germany GmbH. ASIN numbers are the corresponding Amazon equivalent. Each product on Amazon can be clearly identified using EAN numbers or ASIN numbers. Amazon has designed its marketplace in such a way that optimally only one EAN or ASIN number can be used for each product because the purpose is that users are able to view various offerings from different merchants at the same time, and therefore also see the different prices. As a consequence of course, the first merchant who set up the corresponding offering is always exposed to the problem that competitors – possibly even with lower prices – rely on that product description and the product images and offer the same product. This becomes particularly critical if product images are included in addition to the product description, which were created by the merchant who first set up the product itself.

Diverging treatment in case law

Up to now, case law gives a more than inconsistent picture. In its 2011 decision (MMR 2011, 588 et seqq.), Nuremberg-Fürth Regional Court differentiated between whether the product images at issue contained a corresponding branding by the merchant in question. Only under these circumstances a claim to cease and desist under copyright law was affirmed. This decision was based on the background that a differentiation is made in the Amazon Terms of Use between whether the photos in question contain branding, trademarks, or company identification by the merchant in question.

It should be noted here that the Amazon Terms of Use are very complex and are not easily understandable because they involve

various sets of rules in which it is not always clear what should apply in each case. This also led to Nuremberg-Fürth Regional Court classifying parts of the Amazon Terms of Use as invalid.

Frankfurt am Main Higher Regional Court decided on another case in 2011 (MMR 2012, 183 et seqq.), which related to trademark law. In this case, a merchant inserted its trademark onto a product image after one and a half years while the products were coexisting (probably also on the basis of the Amazon Terms of Use). When he initiated proceedings against the competitor based on a claim of trademark infringement, Frankfurt am Main Higher Regional Court denied his claims. The reasons the judges gave were that the conduct constituted an abuse of law. In the opinion of Frankfurt am Main Higher Regional Court, after one and a half years of coexistence it was not permissible to just change the product image and then issue a warning about trademark infringement. In any event, Frankfurt am Main Higher Regional Court let it be known that the case could be evaluated in a completely different way if information had been given in advance (and not a formal warning about trademark law).

Frankfurt am Main Regional Court had a completely opposite point of view (it was not the lower court for the aforementioned decision by Frankfurt am Main Higher Regional Court), even considering the inclusion of a trademark in a product image to be a breach of the German Unfair Competition Act (Frankfurt am Main Regional Court, MMR-Aktuell 2011, 321653 (Headnote)). The reason was that including the trademark in the images could be used as a way to avoid competitors that were also using the product presentation. This argument by Frankfurt am Main Regional Court was in no way convincing because each competitor is free to set up its own EAN or ASIN numbers and therefore set up the product itself. On the other hand, it cannot be prohibited of course for a merchant to publish his own trademarks or signs in connection with product images. As a result of the claim being abandoned in the appeals procedure, the judgment by Frankfurt am Main Regional Court was, however, declared ineffective.

It is currently therefore recommended that if a merchant wishes to protect his own product description and in particular also product images, this can be achieved by including trademarks and other branding in the product images. In case of a previous coexistence of items and descriptions with competitors, how-

Handling in practice

ever, before asserting copyright or trademarks, the competitor should be informed that he is infringing third-party rights. In this way the abuse of law mentioned by Frankfurt am Main Higher Regional Court can probably be avoided. It must also be stated that the legal situation can in no way be considered to have been clarified and therefore it is entirely possible that there will be fluctuations in jurisdiction. What makes the situation particularly volatile is that, as far as we can tell, Amazon up to now has taken no steps to increase transparency in this area and in particular has not accordingly adjusted the Terms of Use that the jurisdiction considered defective. Since this topic affects numerous merchants and is sure to end in further disputes, it would be a good idea for Amazon to handle it in a timely manner. Until then, there are legal risks particularly because it is now being circulated in the market that Amazon will be initiating its own proceedings against merchants who incorporate their trademark rights in product images. The grounds for this will also be an alleged breach of the Amazon Terms of Use, which will guarantee that this will remain an explosive topic in the future.

Conclusion: The fact that there is not much or just inconsistent case law means that each case needs to be checked carefully. The current legal situation may provide opportunities for merchants to protect their own product presentations, but Amazon itself is ensuring that efficient protection of rights cannot currently be achieved without incurring risks. There will doubtlessly be new developments in this area in the future.

Trade shows are not only one of the most important occasions for companies to present, offer, and sell their products. They are now becoming an increasingly more important forum for proceeding effectively against competitors' products in a way that also provides good advertising. Over the past few years, companies have also increasingly been using criminal law enforcement authorities to enforce their rights, whether they are entitled to do so or not. Courts are now trying to limit cases of abuse.

According to case law, trade show booths are also considered as business premises. This applies both to German and foreign companies. This means, for example, that a service of process can be made effectively at a trade show booth. A significant advantage that has been exploited many times by both national and international companies is that they are able to have German-language lawsuits and preliminary injunctions served on their foreign competitors at a German trade show booth. Without this opportunity, they would have had to have the corresponding documents translated in advance and have them served with the aid of foreign executing bodies. This not only costs significantly more, but it can also take many months for the relevant measures to be put into effect and to have any results obtained.

During trade shows, it has therefore become customary for process to be served at trade show booths primarily during the first few days of a trade show.

Companies are increasingly using the method of preliminary injunctions. The main focus is on preliminary injunctions based on patent law, trademark and competition law, design rights, and copyrights.

In patent law in particular, there has been frequent use of preliminary injunctions. While courts previously did not have the confidence to assess the complex technical subject matter of patent law cases because of a lack of time, German courts now employ many judges who are specializing in patent law, who are able to familiarize themselves with the technical material within hours, and who generally make thorough decisions.

Trade shows as "Scene of the Crime" – A Legal Vacuum?



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Trade show booths as business premises

Quick enforcement of rights by means of a preliminary injunction

If courts are convinced of the presence of an infringement of rights, they are also willing to take hard, drastic steps against it.

By serving a preliminary injunction at a trade show booth, it is possible to ensure – if you act in a timely manner before or right after the beginning of a trade show – that a competitor is no longer able to display products that infringe patent or other rights and may not distribute related advertising material any longer. The serving of a preliminary injunction at a trade show booth is often under certain circumstances associated with a search of the trade show booth, as well as the securing of infringing products and advertising material found there by a bailiff.

Customers who witness such an act of the service of process are considerably unsettled by this. The serving of a preliminary injunction is therefore an effective advertising tool in fighting against competitors' products that infringe rights.

Criminal seizure of products at trade shows is becoming more popular

When civil courts are involved in preliminary injunction proceedings, in most cases the decision is made by a specialist judge, so that blatantly incorrect decisions are unusual, despite the speed with which the decisions are made. If a company simply wants to disrupt its competitors during a trade show, possibly even without any legal grounds, they will find it difficult to get the civil courts to assist in this.

Over the past few years, some companies have therefore taken to exploiting the criminal law enforcement authorities in cases that would most likely fail or that would not be settled quickly enough in front of civil courts. They rely on the fact that an intentional breach, for example of a trademark or patent, is punishable under criminal law.

A startling example was the comprehensive seizure of products during the International Consumer Electronics Fair (IFA) in Berlin in 2008. In this case, a major royalty collection society involved the local prosecutor, who helped it to have customs officers empty entire trade show rooms of products primarily of Asian suppliers.

One particular feature of this seizure was that the customs officers were entirely unable to assess whether the exhibited products breached the patents in question at that time. They therefore simply took all of the products.

Subsequent to the seizure at that time, in September 2008, the lawyers of Heuking Kühn Lüer Wojtek obtained a decision at the Regional Court of Berlin (Case 523 Qs 112/08), in which the seizure order was considered illegal and was rescinded. The Regional Court of Berlin based its decision on the grounds that the Local Court of Berlin, which ordered the seizure in response to an application by the prosecutor, did not describe precisely enough which items were actually to be seized. The court ascribed the illegal decisions by the Local Court of Berlin, the prosecutor of Berlin and the executing customs officers to their lack of technical expertise.

The Regional Court of Berlin decided that a seizure can only be legally ordered if a person with appropriate specialist knowledge is involved in a technology-oriented case of this kind.

In a decision issued in May 2013, (Regional Court of Cologne, decision of May 06, 2013 - 116 Qs 12/13, 116 Js 788/12), the Regional Court of Cologne handled a similar, even more drastic case. This case involved cribs that potentially breached a patent. During a trade show for children's items in Cologne, police seized cribs that allegedly breached a patent from several trade show booths.

In deciding on this action, the police officers involved relied exclusively on – as it later turned out – unsustainable claims made by the lawyer of a competing company. The police officers failed to obtain a search and seizure warrant from a judge prior to beginning their seizure, although there had been sufficient time to do so. At that time, the responsible Local Court ordered the seizure retroactively, again without any specialist investigation into whether a breach of patent was taking place.

The Regional Court of Cologne granted the complaint against this order. It was the opinion of the court that in the case of a breach of patent that is not obvious, the initial suspicion required for a seizure cannot be presumed simply on the basis of a submission by the patent holder to an official who is not a specialist.

**“Crib” decision –
Reducing the risk of arbitrary police actions**

In such cases, it must always be taken into account that the patent holder may be motivated by improper self-interest in requesting the seizure. In any case, according to the Regional Court of Cologne, it cannot be assumed that there was a case of imminent danger because the police officers should have obtained the necessary court order prior to beginning their actions and would have had no problem in doing so.

Conclusion: Despite their strategic importance with regard to measures against competitors, even trade shows are not a legal vacuum. Civil courts are generally reliable in preventing the risk of obviously incorrect decisions because they use judges who are specializing in the individual areas of intellectual property rights. The decisions described above show that courts also make an effort to avoid arbitrary actions under criminal law during trade shows. The future will show whether criminal law enforcement authorities and criminal courts will base their actions on the decisions that have been issued and involve specialists when necessary.

Effective January 1, 2014, several changes in the German law relating to registered designs have come into force. At the same time, the law has also changed its name from “Geschmacksmustergesetz” to “Designgesetz”. Correspondingly, the official term for the IP right in question has been changed from “Geschmacksmuster” to “Design”.

The most significant changes include the introduction of an invalidity procedure involving the German Patent and Trade Mark Office, in which third parties can now assert the invalidity of a registered design (in particular as a result of a lack of novelty or individual character) within official proceedings aimed at the deletion of the design in the same way that has always been possible in patent and trademark law.

Until now, reviewing the validity of a German registered design was only possible by means of an invalidity claim in the civil courts (or incidentally by means of a corresponding objection within the infringement process). In principle, the possibility of making a claim for invalidity before a court still exists. In the future, however, this will only be permitted as a counterclaim in infringement proceedings initiated by the design holder. It will no longer be possible to assert the invalidity of the opponent’s design as a simple objection against infringement claims asserted by the holder of the design. Instead, this will only be possible by filing a counterclaim for invalidity within the infringement process or by the submission of an invalidity application to the German Patent and Trade Mark Office (which may result in the suspension of the design infringement proceedings).

Developments in the Law Relating to Registered Designs



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Developments in Competition Law

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Since the beginning of October 2013, significant legal conditions have changed, which must be taken into account by all advertisers. These do not fundamentally call into question previous marketing strategies, but give occasion to review current marketing methods.

On October 9, 2013, the German Act against Dubious Business Practices entered into force. Among other things, this law increased the fine for breaches of the prohibition on telephone calls to consumers who have not expressly consented to receiving such telephone calls to a maximum of EUR 300,000.00. This heavy fine is in addition to other third-party claims under competition law, for example claims to cease and desist, for information, compensation for damages, and the refunding of reminder costs.

With regard to practical implementation therefore the following should be adhered to:

- Avoid calls to consumers who have not given their prior express consent,
- make sure that it is possible to prove consent by the consumer in case of doubt,
- ensure ability to prove consent in practice by means of express written or electronic granting of consent by the consumer,
- prepare corresponding file notes in physical or electronic files about verbally granted consent obtained by an employee and the names of the employee and the consumer,
- regular training of employees on all organizational and legal matters,
- passing on of this obligation in a legally watertight manner within contracts with call center operators with indemnification from liability.

Since December 24, 2013, companies can, in the “sunrise period”, pre-reserve their trademarks for top-level domain names such as .carreers, .recipes, .photos, .shoes, .domain, .company or .computer.

It is not sufficient to hold the trademark rights, but you must also have them registered in advance with the “Trademark Clearinghouse (TMCH)”. If you want to see your company under the top-level domain name .shoes (for example: [your trademark].shoes), you need to document your trademark rights with the TMCH, quickly. You can do this directly or through registered agents. Many other, perhaps even more interesting, top-level domain names will follow over the next few months, such as .hotels, .shop, .store, .market, .deals, .mobile, etc. The registration of domain names under these top-levels will always require pre-registration with the TMCH.

The registration of trademarks with the TMCH has another positive effect: if others wish to register their own trademarks as a domain name under a top-level domain, the trademark holder will be notified thereof in advance. This will presumably avoid many disputes. The simple registration fees for the TMCH are \$150 for one year, \$435 for three years, and \$725 for five years.

The securing of trademark rights through the TMCH will surely not mean that all domain name disputes can be avoided. In particular, registration with the TMCH only helps in case of almost identical domain names. Deviations in single characters within a word cannot be prevented. Nevertheless, this is an initiative that is to be welcomed because the important cases where a third-party trademark is used identically can often be avoided this way. International domain name law already provides for out-of-court dispute resolution proceedings in many cases, but these often cost the trademark holder money because they usually do not provide for the refunding of costs for the winner of the case. Many domain name disputes that go to arbitration end up with the complaint being submitted and the domain grabber making no contribution to the proceedings.

In many cases (e.g., in the UDRP proceedings of the WIPO or of the Czech Court of Arbitration or in .eu-domain name disputes), the domain name is then transferred to the complainant. The complainant, however, still has to pay procedural costs and

New Top-Level Domains Starting Up

Should Trade Mark Holders Take Action?



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any lawyers' fees incurred by the drafting of the complaint. The refunding of costs by the opposing party is only rarely legally possible and practically almost never enforceable.

For further information, see:

newgtlds.icann.org



www.trademark-clearinghouse.com



Conclusion: Companies can only be encouraged to secure their rights proactively and to protect their trademarks under the new top-level domains.

Headnote of the Newsletter editorial office: In principle, no higher requirements are to be imposed for copyright protection for works of applied art than for works of pure art.

Note: Up to now, case law made a differentiation between the requirements that had to be met by a work of pure art and a work of applied art in order to be protected by copyright. The requirements for the level of creativity for pure art to be protected by copyright have always been relatively low (protection for minimal creativity, so-called “Kleine Münze” – literally: “Small Change”). For works of applied art, on the other hand (which play by far the greater role in economic life), up to now, German case law has only granted copyright protection on condition that the work “significantly exceeds the average level of creativity”. The significant grounds given for this were that otherwise there would be contradictions with the law on registered designs.

In its recent decision of November 13, 2013, the Federal Court of Justice expressly gives up this precedent. The previous comparison with the law on registered designs could not be maintained after legislators created an independent intellectual property right by means of the reform of the law on registered designs in 2004, which dissolved most of the previous close references to copyright law. This means that there are no longer grounds for differentiating between applied art and pure art. The underlying legal dispute in the case at issue related to additional compensation claimed by a designer from a product manufacturer after the product that she designed (a toy) turned out to be a major economic success for the manufacturer. Unlike the lower court, the Federal Court of Justice did not set aside these claims as a result of a lack of a copyright-protected work.

The change in the legal precedent will have consequences for many different economic sectors. Applied art can be found in the product design of most material economic goods, whether toys (as in the case decided by the Federal Court of Justice), electronic goods, other everyday objects, furniture, decorative or fashion items.

The entire area of graphic design, including web design, mostly falls under the category of applied art; even packaging design for

Protection for Minimal Creativity now also Applies to Works of Applied Art

Federal Court of Justice, Judgment of November 13, 2013 (Case I ZR 143/12 - Birthday train)



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Consequences

consumer goods is included. In the future, copyright protection will be considered for all of these forms of design, which was not previously the case. This is particularly controversial because copyright is created without there being any necessity or possibility to enter it in a register. Even if the designer has failed to register a design before the launch of a new product, in the future the designer will often be able to rely on copyright as a basis for a claim to prevent product imitations instead of relying on the unregistered community design, which has strict time limits, or on the regulations for complementary protection against imitation under competition law. Conversely, it will happen more frequently than previously that companies have to pay their own employees or external agencies additional compensation for the use of their designer services.

It should also be taken into account that the prerequisites for copyright protection in accordance with the new legal precedent may be lower than they previously were, but they have not been entirely removed. A personal expression of creativity remains necessary. Creations based purely on craft without the minimum level of creativity will still not be covered by copyright law in the future.

Conclusion: On the one hand, the change in legal precedent opens up additional opportunities to attack product imitations and look-alikes, on the other hand, however, it also creates an opportunity for designers to argue in favor of a claim to additional compensation for design services that are economically successful. The new legal precedent is also expected to have consequences on functional works in other creative areas, e.g., functional texts such as usage instructions, advertising material, etc. In the future, copyright issues will more frequently be the subject of legal disputes in these areas than it was previously the case. This will mean that in the medium term the development of concrete criteria for the assessment of the ability of “simple” functional works (i.e. not those that are “significantly exceeding the average level of creativity” in the previous sense) to be protected is to be expected. In the short term, however, this will initially result in increased legal uncertainty. It is a matter of opinion whether the change in this legal precedent is to be welcomed and different companies will assess the matter differently depending on the sectors they are active in. In any case, the new legal precedent of the German Federal Court of Justice is in line with the opinion of the European Court of Justice expressed back in 2009 in the Infopaq decision. This opinion stated that a high standard of protection must apply also to functional works and therefore, for example, even relatively short individual sentences or even parts of a sentence within a text can be protected by copyright law.

Headnote: In determining likelihood of confusion, the governing factor is the opinion of the averagely informed, suitably attentive, and reasonably prudent consumer of the goods or services in question. The presumption of a divided public opinion is therefore not compatible with the term “likelihood of confusion” as a legal concept. A different assessment is only justified as an exception if the opposing marks address different groups of the public, which can be objectively differentiated, for example, the general public and specialized markets or different language groups. In such cases, it is sufficient for the affirmation of an infringement if there is likelihood of confusion in one of the groups of public addressed.

Note: According to the conventional opinion, likelihood of confusion in trademark law is a normative concept. In principle, therefore, the question is not whether actual confusion occurs within the relevant group. This can be seen for example in the fact that likelihood of confusion is presumed to be all the more likely if the older mark is well-known, although in fact it is significantly less probable that a particularly well-known trademark will be confused with a similar third-party mark than that this will occur with regard to a less well-known mark. Nevertheless, a well-known mark – from a normative point of view – earns greater protection against similar third-party marks than a less well-known mark. This is taken into account in the case law at the level of likelihood of confusion.

The principle described above, however, does not apply without restrictions. Rather, jurisdiction keeps sometimes arguing with individual circumstances that relate to an actual likelihood of confusion. According to the case law of the German Federal Court of Justice, for example, the possibility of likelihood of confusion under trademark law is excluded if one of the conflicting signs has a concrete textual meaning that is known to the public and that the other sign does not also have.

The “neutralization theory” of the European Court of First Instance also finally relies on the actual point of view of the group of the public being addressed, when it rejects likelihood of confusion in cases in which, for example, the visual similarities that exist

No “Divided Public Opinion” with Regard to Likelihood of Confusion in Trademark Law

Federal Court of Justice, Judgment of March 27, 2013 (Case I ZR 100/11 AMARULA/Marulablu)



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Normative vs. actual likelihood of confusion

Previous opinion: in case of a divided public opinion it is sufficient for an infringement if there is a likelihood of confusion only among a part of the relevant public

Realignment of the legal precedent of the German Federal Court of Justice

are offset by sufficient acoustic differences between the signs. On the other hand, this will not apply if the goods in question are predominantly purchased on the basis of their appearance – another aspect based on actual rather than normative likelihood of confusion.

Accordingly, in the case of a divided public opinion, it was considered sufficient for the breach of trademark for a considerable portion of the group of the public in question to be exposed to likelihood of confusion (see, for example, Federal Court of Justice GRUR 2005, 264, 266 – Das Telefon-Sparbuch, or Federal Court of Justice GRUR 1992, 110, 111 et seq. - dipa/dib).

The Federal Court of Justice is deviating from this previous approach – without drawing sufficient attention to the fact – in its new decision AMARULA/Marulablu and is now of the opinion that the deciding factor is not how a significant portion of the group of the public been addressed assesses the conflicting marks, but rather the point of view of the (normative) average consumer (Federal Court of Justice, WRP 2013, 778, 784 [paragraphs 64 et seq.] - AMARULA/Marulablu). In concrete terms, the decision relates directly to the evaluation of the distinctive nature of the older mark only, but nothing else can apply to the other elements of likelihood of confusion (especially to the assessment of the similarity of the colliding marks). Exceptions from the new rule will apply only if individual groups can be differentiated within the relevant group of the public (e.g., consumers and specialists, residents and foreigners, etc.). In that case, an average level of understanding can then be defined within each group formed in this way and it is sufficient for there to be likelihood of confusion within one of the groups for trademark infringement to be present. Differentiation criteria that are purely subjective such as the presence or lack of certain prior knowledge among consumers are not sufficient for the formation of such groups though.

Consequences

Although the Federal Court of Justice refers, in its new line of argument, to the consumer model developed by the European Court of Justice, it should not be overlooked that there is a certain tension between its strictly normative reliance on the average consumer and the fact that otherwise purely factual circumstances are taken into account – including in European Court of First Instance case law – in the assessment of likelihood of confusion.

In addition, the Federal Court of Justice's new point of view makes it more difficult to act against certain ways of using a mark that are characterized by the intentional creation of an (actual) likelihood of confusion with an older third-party trademark by exploiting a specific existing expectation of a group of consumers that is formed based on a certain prior knowledge. For example: A certain product that only some of the consumers are aware of has initially been sold for a long time under a trademark that is similar to an older mark in such a way that there is likelihood of confusion. The manufacturer of the infringing product then changes its mark in response to a warning such that his previous customers still recognize the old infringing mark as a result of their knowledge of the previous mark and product design, while other outside consumers perceive the new mark differently (e.g., they read the word element of the mark in a different order). As a result, the new overall sign is no longer similar in such a way as to cause confusion with the older mark from the point of view of this outside "average consumer". In this example, according to the new case law of the Federal Supreme Court, a claim for trademark infringement would probably be rejected, although the mark infringer is actually continuing his previous trademark infringement, at least with respect to the previous purchasers of his product.

Conclusion: As long as the Federal Court of Justice sticks to its new case law, in the future it will have to be expected that the evaluation of likelihood of confusion between two marks will generally be based on the normative point of view of the average consumer. Any actual likelihood of confusion occurring only within certain groups of consumers will be considered irrelevant even if these groups make up a not entirely insignificant portion of the consumers overall. In certain situations this will lead to unsatisfactory results.

From our Practice

IP, Media & Technology

News

Practice Group advises Eutelsat on the Unity-media/Kabel Baden-Württemberg proceedings

In August 2013, Düsseldorf Higher Regional Court lifted the decision by the German Federal Cartel Office giving approval for the planned takeover of Kabel Baden-Württemberg (Kabel BW) by Unitymedia, which is part of the Liberty Global Group owned by U.S. entrepreneur John Malone. This would have meant that the previous oligopoly of the three largest regional cable companies (the third is Kabel Deutschland) had become a duopoly. **Michael Schmittmann** and **Dr. Philip Kempermann, LL.M.** from our Düsseldorf office advised Eutelsat visAvision GmbH both in the proceedings with the Federal Cartel Office and in the proceedings with the Higher Regional Court against the merger.

Practice Group successfully obtains judgment establishing a principle for Kunsthaus Lempertz on the return of cultural assets

Heuking Kühn Lüer Wojtek with **Prof. Dr. Rainer Jacobs** (Düsseldorf) has obtained a landmark ruling by Münster Higher Administrative Court (5 A 1370/12) on behalf of Kunsthaus Lempertz on the requirements of the German Act on the Return of Cultural Objects. According to this law, any cultural asset that was brought illegally from the sovereign territory of a contracting Member State into German federal territory after April 26, 2007 is to be returned under certain circumstances. It was in dispute whether for the requirement for return, cultural objects must have been exported only after April 26, 2007 from the Contracting State that requires the return or whether the date refers solely to the import into the federal territory. Münster Higher Administrative Court made clear in its ruling that there is a claim for return only if both the export from the country of origin and the import into German federal territory occurred after April 26, 2007.

Publications and Presentations

Publications

The 5th edition of the form book "Forms for Lawyers in the Field of Intellectual Property Law" authored by **Dr. Verena Hoene, LL.M.** and **Kai Runkel** (both Cologne) has been published by C.F. Müller. The book is primarily aimed at attorneys-at-law and in-house counsels, and provides them not only with theory about competition, trademark, copyright, internet, and press law, but also with practical tools in the form of example letters, sample procedural documents and model contracts.

The Handbook "Press Law" (publisher: Dr. Otto Schmidt) by Dr. Jörg Soehring, LL.M. and now **Dr. Verena Hoene, LL.M.** (Cologne) has also been published in its 5th edition. The Soehring/Hoene book comprehensively deals with research, presentation, and liability in the laws relating to the press, broadcasting, and new media and is an absolute standard work on press law.

Dr. Verena Hoene, LL.M. (Cologne) drafted the annual case law overview "Current Developments in Work Title Law" for the trade magazine Kommunikation & Recht (K&R 2013, 692-695). In addition, she published an article entitled "'GOOD NEWS' really? Freedom of the Press vs. Competition" in the trade magazine Der IP-Rechts-Berater (IPRB 2013, 107-109).

Since the 05/2013 issue, **Dominik Eickemeier** (Cologne) has taken over the column "A View to Brussels" in the trade magazine Archiv für Presserecht (AfP) that had been drafted by **Michael Schmittmann** (Düsseldorf) for more than 19 years. The column reports on current draft laws, commission decisions and opinions from the area of European media law. It appears in every issue and will therefore remain a fixed component of the AfP six times per year.

Dr. Ruben Hofmann (Cologne) published an article in the trade magazine MultiMedia & Recht (MMR) entitled “Legal Protection Against Preying on EAN Numbers on Amazon – an Inventory of Current Case Law” (MMR 2013, 415-418).

Entitled “OTT-TV and Cable Retransmission”, **Dr. Philip Kempermann, LL.M.** (Düsseldorf) published an article in the trade magazine Computer und Recht (CR) that had jointly been drafted with Jan-Hendrik Pieper, LL.M. (CR 2013, 661-666).

The topic of “Introduction of a Discovery Procedure on German Data Protection Law” is the subject of an article published in Zeitschrift für Datenschutz, which **Dr. Philip Kempermann, LL.M.** (Düsseldorf) and **Gerhard Deiters** (Cologne) drafted jointly with Robert U. Fischer (ZD 2013, 313-318).

A new book by Schmittmann et al.: “Gambling Law as a Reflection of European Legal Development” (publisher Medien und Recht Vienna – Munich) has been issued as Volume 4 in the “Series on European Gambling Law” published by **Michael Schmittmann** (Düsseldorf). The volume includes the speeches from “Second Düsseldorf Symposium on Gambling Law”, which took place on March 2, 2012 in the Düsseldorf office of our firm, as well as current texts such as the opinions of the EU Commission on the new State Treaty on Gambling. Moreover, an updated 2nd edition of Dirk Uwer: “Gambling Law – Text Collection” and the new volume Herrmann/Hufen/Kauder/Koch/Schneider/Uwer: “Reorganization of the Gambling and Lottery Market in Germany” are new additions to the series.

The family of the popular patent law Case Books has been joined by another volume. There are now 17 volumes and a special volume, the textbook on the “EU patent”. The Case Books contain judgments that have emerged as particularly relevant in our practice. An evaluation of the judgments in table form is placed in the front of each case. The Case Books may be ordered at www.heuking.de/patent or by email (patent@heuking.de).

In March 2013, **Dr. Søren Pietzcker** (Hamburg) hosted the event “Address collection, data protection and advertising” as part of the ANA Advertising Law and Public Policy Conference in Washington D.C., USA.

Presentations

On May 14, 2013, **Florian Geyer, LL.M.** (Frankfurt) gave a presentation at DDV Information Day entitled “Take a seat to have a dialog” on the topic of “Customer data protection – obtaining customer data legally and using it for marketing purposes”.

The “Workshops at Schloss Mickeln” are a Düsseldorf institution. They are organized by the University of Düsseldorf, Center for Intellectual Property, and in each case relate to a topic from the area of Intellectual Property. On June 12, 2013, **Dr. Anton Horn** (Düsseldorf) gave a presentation on “The enforcement of patents outside of the mainstream – public procurement law, criminal and other procedures”.

With regard to legal questions relating to data protection in digital media, **Dr. Søren Pietzcker** (Hamburg) held a lecture in Dublin, Ireland, as part of the seminar “Digital and social media advertising: a legal perspective” on the topic of “Data protection and advertising in digital media” in September 2013.

On September 20, 2013, **Dominik Eickemeier** (Cologne) held a lecture during a meeting of the DACH European Bar Association in Basle on the topic of “Copyrights and software – new technologies and developments”.

On May 21, 2014, **Michael Schmittmann** will discuss current questions of licensing of new, interactive media offerings together with other experts at a panel with the working title “Copyright for Network PVR, Catch-Up & OTT” at ANGA COM – specialist trade show and conference for broadband, cable and satellite in Cologne.

Dr. Søren Pietzcker (Hamburg) illustrated questions and problems of international trademark law (“Building an international trademark protection program for brands in a global digital environment”) during a lecture at the INTA Branding and Social Media Conference in October 2013 in Chicago, USA.

In November 2013, **Dr. Søren Pietzcker** (Hamburg) gave a presentation at the Promotion and Marketing Law Conference entitled “Globalizing your marketing strategies” in Chicago, USA.

On November 26, 2013, **Dominik Eickemeier** (Cologne) delivered a presentation on the topic of “Civil law principles based on the example of Federal Court of Justice and European Court of Justice decisions in the Donner case” during an event held by the Cologne Bar Association on interfaces between civil and criminal copyright law.

For further information, see:

[www.heuking.de/en/
european-unitary-patent.html](http://www.heuking.de/en/european-unitary-patent.html)



The decisions of December 2012 on the planned “EU Patent” were the topic of many events. Back in January 2013, **Dr. Anton Horn** (Düsseldorf) provided information via several telephone conferences, some of which were held in German and some in English. Approximately 150 specialists from around the world took part. On April 18, 2013, he held a speech at the seminar on “Global patent updates” in Düsseldorf about “The effects of the EU Patent package on conventional EP Patents”. A textbook entitled “EU Patent” was also published on this topic in German and English. In October 2013, a website specifically dedicated to the EU patent went online. Details on this can be found in the article “The EU Patent – A Dream or A Nightmare?” in this Newsletter and at www.heuking.de/en/european-unitary-patent.

Events

On April 19, 2013, at the occasion of ART COLOGNE held in Cologne, the Art Law Group invited to a get-together in the home of our Partner **Prof. Dr. Rainer Jacobs** (Düsseldorf). Heuking Kühn Lüer Wojtek's Art Law Group covers the entire range of legal questions in connection with art – starting with copyright protection of artworks, its scope and duration, to purchase and lease agreements, transport, losses and damages, claims in case of counterfeits, questions of provenance research, cases of restitution, the establishing of foundations and succession arrangements, the organization of collections, through to national and international protection of cultural assets.

In March 2013, in Düsseldorf and Cologne, the annual client seminar on data protection entitled "Current news on data protection" was held by the IP, Media & Technology Practice Group. **Gerhard Deiters** (Cologne), **Dr. Philip Kempermann, LL.M.** (Düsseldorf) and **Astrid Luedtke** (Düsseldorf), jointly with an external guest speaker, reported on the use of IT infrastructure by employees, notifications and exchange of information, data security, and current legal developments in the area of data protection.

In July 2013, in Cologne and Düsseldorf, a client seminar was held by the IP, Media & Technology Practice Group on the topic of "Current information on e-commerce & social media". **Dominik Eickemeier** (Cologne) reported on pitfalls on the Internet. Presentations were also given by **Dr. Ruben A. Hofmann** (Cologne) and **Dr. Georg Jacobs, LL.M.** (Düsseldorf).

Reception of the Art Law Group

Seminars across several offices

On September 12, 2013 and September 19, 2013, the IP, Media & Technology Practice Group held a seminar for the Association of Corporate Lawyers (BUJ) on the topic of "Social media and your company". Presentation topics covered opportunities and risks of social media, advertising in social networks, coping with "shitstorms", questions of data protection law, and employment law aspects. Presenters were **Gerhard Deiters** (Cologne), **Florian Geyer, LL.M.**, (Frankfurt), **Dr. Ruben A. Hofmann** (Cologne), **Astrid Luedtke** (Düsseldorf) and **Dr. Andreas Walle** (Hamburg). Heuking Kühn Lüer Wojtek is a strategic partner of BUJ.

Patent Law Workshop

Heuking Kühn Lüer Wojtek's patent law team held the international **2nd WSG Patent Law Workshop** in Düsseldorf on April 18 and 19, 2013. 42 lawyers specializing in patent law, including from Switzerland, Hungary, Russia, the U.S., Hong Kong, Brazil, and Venezuela took part. They exchanged detailed information, for example, on "Pharmaceutical patent litigation" and the "EU unitary patent". The law firms in question are members of the World Services Group (WSG), the world's largest association of lawyers. The association consists of leading law firms from the member countries. Heuking Kühn Lüer Wojtek has been the German member of the association for many years. In patent law and many other areas, different international teams have been formed, which often work together across borders. In October 2014, the 3rd WSG Patent Law Workshop will be held in Cleveland (USA).

Michael Schmittmann, Head of the IP, Media & Technology Practice Group was identified as one of the world's 35 best media lawyers by the "Experts Guide", published by Legal Media Group of Euromoney Ltd. in London.

Since April 2013 **Birthe Struck, LL.M.** has strengthened our Practice Group at the Düsseldorf office and thus contributes to the patent law team's continuing expansion. During her studies Birthe Struck focused on information law, telecommunications law and media law. After the second state examination she obtained the title LL.M. in the area of intellectual property rights at Heinrich Heine University in Düsseldorf and gathered practical experience as a research assistant in a renowned patent law firm. Birthe Struck supports Dr. Anton Horn, Melanie Künzel, LL.M., Dr. Sabine Dethof, and Sönke Popp in the fields of Intellectual Property and Patent Law.

Awards

Best of the Best

Team

Addition in Düsseldorf



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This Newsletter does not constitute legal advice. While the information contained in this Newsletter has been carefully researched, it only offers a partial reflection of the law and its developments. It can be no substitute for individual advice appropriate to the facts of an individual case.

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