Editorial

Living with uncertainty

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Some years ago, commenting on the state of reform of European trade mark law, Sir Robin Jacob observed that, while there was now the appearance of a substantial revision and clarification of the law, the truth of the matter was that all the biggest and most basic issues remained unresolved: questions like “what can you actually register as a trade mark?” Although the best part of two decades have passed since Sir Robin made this point, a host of cases referred to the Court of Justice of the European Union and a further bout of European trade mark reform do not appear to have lessened the truth of his words. While this editorial is being written, lawyers are still arguing over how to register colours, shapes, three-dimensional objects and even words as trade marks, while debate continues over whether the registration of a mark for goods described by their Nice Class headings retroactively gifts the applicant all the goods in that Class or not. The extent, if any, to which trade mark coexistence agreements bind their parties or are accepted by the courts remains uncertain, with wide variations between countries whose businesses trade extensively with one another. And as for jurisdiction where brand-bearing websites are pointed to, or accessible from, other countries, the permutation of possibilities remains complex.

But trade marks are not the only area of intellectual property in which uncertainty is king. Who would be so wise as to predict the latest nuances of patentability and patent-eligibility in the United States, where the toss of a coin has been replaced by an appeal to the Supreme Court as the closest thing to a random call, and this in a field of law in which the availability and validity of patents underpins billions of dollars invested in ICT software, business methods and genetics, to name but three disciplines. At present, the situation in Europe is more stable, since there is no random appeal court of equivalent influence, but in consequence of the adoption of a new unified court system the European Union will have created its own patents appeal court: it is hoped that the constraints of the old continent’s new patent system will leave that new appeal court less free than its transatlantic cousins to exercise the sort of judicial creativity that law students love and businesses dread.

It need hardly be added that the law of copyright remains in flux as the constant flow of new information storing and transmitting technologies continues to produce fresh factual situations that legislators cannot have foreseen or which, if they had foreseen them, they would not have known how best to rule for them. Even apart from that, the ever-changing battle-lines in the war between freedom of expression, protection of property, respect for privacy and transformative use make it difficult to give firm advice in all but the most clear-cut situations.

But uncertainty is not necessarily a bad thing. Where an intellectual property right may or may not exist, or equally where it exists but may or may not be enforced with the desired effect, both the IP owner and his commercial adversaries must make some big, risk-driven calculations. One need hardly be an expert in such situations to know that, on a simple application of game theory, where the likelihood of success is far from guaranteed and the cost of failure is greater than can be borne, cooperation brings its own reward. Such cooperation is part of the fabric of IP today in many sectors in which the principles underpinning fair, reasonable and non-discriminatory (FRAND) licence pools are reflection of fear, rational anxiety and the conscious desire to replace risk with something more reliably bankable.

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