

MARQUES and **OHIM** co-operate to explain and promote new Registered Community Design

The Office for the Harmonisation of the Internal Market (OHIM/OAMI) and **MARQUES** are to organise a series of one-day seminars for all intellectual property, design, marketing and advertising professionals. "Understanding the Community Design Law" will present a unique opportunity to gain an understanding of the new Community Design Law and its implications for the design and IP communities.

Vice-Chairman (Programming) of **MARQUES** Council, **Ingrid de Groot** (Perfetti van Melle Corporate Centre, The Netherlands), says:

"The Registered Community Design gives the proprietor of any design a uniform right applicable in all Member States of the European Union on the strength of a single procedure which simplifies design policies at European level.

*On each occasion, this special joint programme will examine and explain the new law and associated **OHIM/OAMI** procedures for registration, examination, representation, security etc. Alternative IP strategies for the protection of designs will also be evaluated.*

*The principal focus of the programme will **NOT** be the legal implications of the new system, but rather the practical opportunities it offers to companies and their designers, marketers and advertising agencies to exploit and protect their IP rights.*

The new – and long-awaited – Registered Community Design will enter into force on 1 April 2003.

The protection which a unified and harmonised system of design registration offers is to be warmly welcomed by many sectors of industry – especially by motor vehicle, furniture and furnishing, jewellery, tableware, textiles and toys – where industrial designs have become increasingly important.

We strongly urge those industries in particular to ensure that they are represented at this event"

The series will be jointly launched by **OHIM/MARQUES** – in advance of the official implementation of the new system on 1st April, 2003 – on **Wednesday 26th March, 2003** at the Scandic Hotel, Antwerp, Belgium and will be repeated on **Friday 28th March, 2003** at the Park Plaza Hotel, Utrecht, Holland where the programme will be delivered largely in Dutch. Thereafter **MARQUES** and **OHIM** plan to repeat the event in **France** (Paris, Lille and Lyon are under

consideration) and other venues yet to be determined in **Switzerland, Austria** and **Italy**.

Full details of the programme can be found on both the **OHIM** (www.oami.eu.int) and **MARQUES** (www.marques.org) web sites. Registration forms can be obtained from the **MARQUES** Conference Office (email: info@marques.org) from where the programme will be managed and administered.

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Shape mark dispute heads for ECJ

Europe's highest Court is set to rule on a landmark case that could establish the boundaries for the trade mark registration of shapes.

Citing "uncertain matters of law" a UK judge referred a dispute over the registration of the shape of Viennetta ice cream to the European Court of Justice for further clarification.

Claiming he was inclined to refuse trade mark registration, Justice Jacob decided to seek guidance from the EU's top judicial body on points that were "not wholly clear" before making a final judgment that will lay down the rules for shape mark registration in the EU.

"I do not think it has been proved that the public use the shape as a badge of origin," Jacob wrote in his December 18 judgment in the case of Société de Produits Nestlé v Unilever.

Added Jacob: "Yes, a substantial proportion recognise the product as Viennetta, a Wall's product. But no, it is not shown they regard the shape alone as a trade mark."

Following the results of a Unilever survey which showed 15% of the respondents confused other ice-cream products with Viennetta, Jacob concluded that Viennetta's shape was not sufficiently distinctive.

"The shape in any event has not acquired a distinctive character because a minor but nonetheless significant proportion of the public would take other shapes in use by other traders as the shape mark applied for," wrote Jacob.

Quotable Quotes:

This quote is from Evershed J.

"It is necessary... that I should, first, say something of the word which has been the subject-matter of the argument.

*It is "oomphies". In speaking of it as a word, as one must, one is, I think paying it a compliment, because it barely deserves an appellation which makes it part of articulate speech, which is said by some to be the only distinguishing feature between the human race and brute beasts."*¹

1 Re LA MARQUISE FOOTWEAR'S APPLICATION, Chancery Division [1946] 2 All ER 497

Call for Articles

The **MARQUES** Newsletter is an ideal vehicle for communicating your ideas, your opinions or your vision of where trade mark law is or should be heading. It will be seen and read by in-house counsel, trade mark practitioners, IP lawyers, academics, government officials and other NGOs.

Please send any contribution to robin_tyler@bat.com or:

The Editor,

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United Kingdom.

U.S. High Court Rejects Trademark Fight Over Barbie Doll

Toymaker Mattel has lost a U.S. Supreme Court appeal over a mocking pop song that called the iconic Barbie doll a "blonde bimbo." The high court did not comment in turning down Mattel's request to reopen a trademark fight over the 1997 dance hit "Barbie Girl" by Danish group Aqua. Mattel claims the pre-teen girls who buy Barbie dolls were duped into thinking the song was an ad for the doll.

Mattel Inc. v. MCA Records Inc. (27 January 2003)

End of national searches for Community trade mark

National searches for Community trade mark applications are to be abolished, under proposals published by the European Commission.

The recommendations are made in a proposal for a Council Regulation to amend the Community Trade Mark Regulation of December 1994. Article 39(7) of that Regulation envisaged that certain aspects of the functioning of the Community trade mark system would be reviewed five years after the office opened in April 1996.

Under existing rules, the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) makes a search in every participating member state whenever a Community trade mark application is made. The searching is time-consuming and expensive, and the results are rarely relied upon by applicants.

The Commission said that this system has led to many problems, which will be exacerbated when 10 new member states join in 2004. It said that experience of national searches "has made it clear that

the system is extremely expensive for the Office, that users, in particular, are not impressed by it, and that it slows down the Community registration procedure".

The Commission also proposes measures to improve the efficiency of the Boards of Appeal. In particular, it allows for the creation of an enlarged Board of Appeal, to deal with controversial cases and leads to greater consistency.

To make the Boards more efficient, the Commission recommends that decisions on appointments will be made by OHIM's Administrative Board rather than by the Council of Ministers. This will lead to greater flexibility, while retaining the principle that member states are responsible for the decision.

Source:
Proposal for a Council Regulation amending Regulation (EC) No 40/94 on the Community trade mark COM(2002) 767 Brussels

Lego wins landmark copyright case in China

Stephanie Bodoni – 26 January 2003

Foreign companies stand to benefit from a court decision that could pave the way for better intellectual property rights protection in China.

In a landmark decision issued on January 20, China's court of appeal ruled in favour of Danish toy manufacturer Lego in a legal dispute that began in 1999 after Lego discovered fake Chinese copies of its famous building-brick toys.

The Beijing High People's Court last week ruled against Chinese toy company Coko Toy, based in the northern city of Tianjin, for having infringed 33 of Lego's 53 copyright-protected items.

In a statement, Lego said it was the first time "the Chinese legal system has delivered a judgement that confirms copyright protection of industrial design/applied art".

Lego added that the court's decision showed it was possible for a company to gain "double protection" for its products, consisting of designs and copyright protection, under Chinese intellectual property law.

Source:
Stephanie Bodoni – Legal Management Group, 26 January 2003

Odorous Onus

The ECJ has held¹ that non-visual trade marks *can* be registered *provided* they are capable of being represented graphically "particularly by means of images, lines or characters" and provided that the representation is "clear, precise, self-contained, easily accessible, intelligible, durable and objective". However they found that these requirements were not satisfied by a chemical formula, description in words, deposit of an odour sample or by any combination of these elements.

The judgement agreed with submissions by the UK Government that the chemical formula did not represent the odour of the chemical itself – "Upon reading the chemical formula, few people will understand what product it represents and, even if they do, they may well not understand what the product smells like. Furthermore identifying the nature of the mark from a number of chemical formulae would cast an undue burden on those consulting the register"

This seems to place an almost insurmountable obstacle to olfactory marks. Whilst the registrability of sound marks has yet to be decided, the fact that more people can read music than chemical formulae may save many of those represented in standard musical notation.

¹ Sieckmann v Deutsches Patent-und Markenamt (Case C-273/00); European Court of Justice. 12 December 2002

ECJ extends protection for well-known trade marks

by Kay Uwe Jonas¹

On 9 January 2003, the ECJ handed down a judgement concerning the scope of protection for well-known trade marks under Articles 5(2) and 4(4)(a) of First Council Directive 89/104/EEC (“the Directive”), extending the protection granted under these provisions and thereby resolving the controversy about its interpretation.

The issue brought before the ECJ by the German Federal Supreme Court (Bundesgerichtshof - BGH) was whether Articles 5(2) and 4(4)(a) of the Directive are to be interpreted – contrary to their wording – as also entitling the Member States of the European Union to provide more extensive protection for well-known marks in cases where the later mark is used or to be used for goods or services identical with or similar to those in respect of which the earlier mark is registered.

In the particular case, the BGH had to decide whether the registration and use of the trade mark “DURFEE” and device constituted an infringement of the senior, well-known trade mark “DAVIDOFF” and device. The owners of the mark “DAVIDOFF” had sued the owner of the mark “DURFEE”, arguing that the font used for the respective marks was identical and the goods and services offered thereunder were at least partially identical. Davidoff’s action was dismissed both by the first instance court and on appeal on the ground that there was no likelihood of confusion.

The BGH agreed with the Court of Appeal insofar as the marks in fact did not sound similar. However, the BGH disagreed insofar as it found that the font used by plaintiff Davidoff was somewhat original and the font used by defendant was almost identical. In line with this reasoning, the BGH stated that the younger mark was an approximation to the plaintiff’s mark.

Nevertheless, the BGH found that further findings of fact were required before it was possible to determine whether there was a likelihood of confusion according to Section 14(2) No.2 German Trademark Act or not.

In light of these findings, the BGH considered the interpretation of Articles 4(4)(a) and 5(2) of the Directive, which were literally incorporated into German Trademark Act into Sections 9(1) No.3 and 14(2) No.3, vital to determining whether an infringement had occurred. These Articles provide for an extended scope of protection of well-known trademarks in cases where the conflicting goods and services are not similar in kind.

Article 4(4) of the Directive provides:

4. Any Member State may furthermore provide that a trade mark shall not be registered or, if registered, shall be liable to be declared invalid where, and to the extent that:
 - (a) the trade mark is identical with, or similar to, an earlier national trade mark... and is to be, or has been, registered for goods or services which are not similar to those for which the earlier trade mark is registered, where the earlier trade mark has a reputation in the Member State concerned and where the use of the later trade mark without due cause would take unfair advantage of, or be detrimental to, the distinctive

character or the repute of the earlier trade mark;

Article 5(2) of the Directive provides:

2. Any Member State may also provide that the proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade any sign which is identical with, or similar to, the trade mark in relation to goods or services which are not similar to those for which the trade mark is registered, where the latter has a reputation in the Member State and where the use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark.

Before the ECJ’s judgement of 9 January 2003, this issue was unresolved and debated widely in Germany regarding Sections 9(1) No.3 and 14(2) No.3 German Trademark Act. While proponents of a wide interpretation of the provision’s language argued that the need for protection of a well-known mark is even more important where the goods and services are identical, their opponents pointed to the provisions’ explicit language, which seemed to preclude this understanding.

The ECJ found that a sole focus on the provisions’ language is insufficient and that the interpretation of Article 5(2) of the Directive must consider the “overall scheme and objectives of the system of which it is part”. In applying this finding, the Court reasoned that the provision cannot be

ECJ takes on Wrigley trade mark dispute

understood in a manner which would give “well-known marks less protection where a sign is used for similar or identical goods or services”. The Court further concluded that Article 5(1)(b) of the Directive (which was incorporated into Section 14(2) No.2 German Trademark Act) does not provide for equivalent protection, since it requires evidence of confusion. Since it considered its interpretation of Article 5(2) applicable to Article 4(4)(a), the Court did not specifically address the latter.

With this judgement, the ECJ clarifies not only that Articles 5(2) and 4(4)(a) of the Directive are applicable where the goods and services offered under a mark or sign are identical or similar, it also states that it falls within the Member States’ discretion to provide for such protection. Since Germany has done so by incorporating Articles 4(4) and 5(2) of the Directive in Sections 9(1) No.3 and 14(2) No.3 of its Trademark Act, the ECJ’s interpretation of articles 5(2) and 4(4)(a) is equally applicable to these provisions. Therefore, it is to be expected that the ECJ’s interpretation resolving this controversy will be adhered to by the German courts and should result in analogous application of Sections 9(1) No.3 and 14(2) No.3 of the German Trademark Act in cases where the goods or services offered under a mark or sign identical with or similar to a well-known trademark, are identical or similar – in spite of the provisions’ language.

Well-known trademarks are therefore now clearly protected against use of identical or similar signs in the course of trade also in cases where the goods or services offered under the respective marks are identical or similar and where there is no likelihood of confusion.

1 Linklaters Oppenheim & Rädler, Cologne, a member firm of Linklaters & Alliance

A trade mark dispute that could reinforce the legal status of descriptive word marks has made its way to the European Court of Justice (ECJ).

The trade mark and designs office of the European Union last week took an international chewing gum manufacturer’s application for a community trade mark to the ECJ, where it received a first hearing on January 21.

The aim of the Office for Harmonisation in the Internal Market (OHIM) is to reverse a decision taken by the European Court of First Instance in 2001 to grant chewing gum company Wrigley a community trade mark on the name Doublemint.

In last week’s hearing, OHIM argued that the Court of First Instance was wrong to base its final decision on the fact that the combined words in Doublemint had several meanings and could therefore not be exclusively descriptive. A word would in such a case still be descriptive even if it was not exclusively descriptive anymore, it said.

Source: Stephanie Bodoni – Legal Management Group, 26 January 2003

“A sign will be descriptive for the purposes of article 7(1)(c) of Regulation No 40/94 not only where it is factually descriptive of certain characteristics of the goods in question, but also where it is potentially descriptive, in the mind of the consumer, of those characteristics,” OHIM said.

The ECJ’s final decision is likely to reinforce its earlier word mark decisions, such as in the Pampers Baby-Dry case, according to Abida Chaudri, a trade mark specialist at Bristows.

Chaudri was confident that the ECJ would rule as it did in the Baby-Dry case, meaning that its final decision would be in Wrigley’s favour.

“Doublemint has an ambiguous meaning. You wouldn’t go around saying Doublemint as well as you wouldn’t go around saying Baby-Dry,” she said.

India: Tea Board plans Darjeeling protection

The Tea Board of India has applied in various jurisdictions to register (i) the word ‘Darjeeling’ as a certification trademark, and (ii) a logo comprising the word ‘Darjeeling’ and the representation of an Indian woman holding tea leaves. This constitutes the first step towards developing a system to protect the tea-growing region in West Bengal.

The registered trademark and logo will guarantee the origin, quality, composition and mode of manufacture of the region’s tea and allow the board to pursue trademark infringement proceedings if either is used unlawfully.

The board’s trademark/logo licensing scheme will function as follows:

- The board will certify (ie, by way of a licence) only those who produce tea on authorised estates in West Bengal.
- The licensees will have to satisfy the board that their tea meets the board’s high standards. This may involve factory inspections and sample testing in accordance with the Tea Act 1953.
- The manner of commercial use of the trademark and logo will be determined by the board.
- Each licensee will have to display a licence number on all packaged items.

Ms V Neeraja, Anand & Anand, New Delhi

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China's New Trade Mark Laws

by Lindsay Esler and Annie Tsoi*¹

It is easy to forget that China's trade mark laws have developed very recently. It was not until the late 1970s' that China began to introduce and enforce specific intellectual property laws. The current Trade Mark Law traces its roots back to the early 1980's.

The National People's Congress introduced sweeping changes to China's Trade Mark Law which came into force on 1 December 2001. Although the previous law was less than 20 years old and had been kept broadly up-to-date with international developments by amendments (such as those allowing for the registration of trade marks covering services), the law had to be updated for several reasons. The first and most pressing reason was that China's imminent entry to the World Trade Organisation meant that the Trade Mark Laws had to be up-dated so as to comply with international standards fixed under the Trade Related Aspects of Intellectual Property Rights (TRIPs) agreement. The second reason was that the rapid economic change in China required the development of a more sophisticated and streamlined system for registering and enforcing trade marks. In recent months, trade marks are being registered in China at a rate of approximately 5000 per week, so it was clear that any legal obstacles to efficient administration would have to be removed.

Although the new Trade Marks Law came into force on 1 December 2001, the regulations which set out the detailed procedural reforms did not come into force until 15 September 2002. During the 9 months between the introduction of the new Trade Mark Law and the introduction of the new regulations, there had been considerable uncertainty regarding the scope and the practical application of the provisions of the new law. Certain procedures of the Chinese Trademarks Office and the Trademark Review and Adjudication Board (which decides cases taken on appeal from decisions of the Trade Marks Office) had effectively been suspended.

Broadly, the new law brings China up-to-date with the latest international developments in the trade mark field and in conjunction with the recent amendments to the Patent and Copyright Laws it will establish a sound and transparent legal structure which will assist China's economic development by encouraging investment by foreign

companies. Coupled with recent improvements to China's administrative trade mark enforcement procedures and amendments to the rules of evidence, the new Chinese Trade Marks Law should provide investors with a greater sense of security that their intellectual property rights can be adequately enforced both through existing administrative means and through the courts.

One of the changes which will be most welcome to foreign trade mark owners is the provision of clear and specific procedures which will provide additional protection to owners of trade marks which have attained well-known status. Helpfully, a list of principles to be taken into account when determining whether or not a trade mark is well-known has been incorporated into the law for the first time. Although China has officially been accepting formal applications for recognition of trade marks as well-known since 1990, no foreign trade marks have as yet been officially recognised as well-known. The incorporation of specific provisions concerning well-known trade marks is likely to provide weight to the arguments of foreign proprietors seeking protection of their trade marks in China.

Under the old law, protection was only given to registered trade marks (although certain protection for unregistered marks could be obtained by taking action under the Anti-Unfair Competition Law). Under the new law, protection is given for trade marks which are the subject of a pending trade mark application and which are already in use in China. In addition, evidence of prior use of trade marks in China will formally be taken into account for the first time when determining whether or not a particular mark can be registered in China.

Under the new law, decisions of the Trade Mark Review and Adjudication Board may be appealed to the courts. China is beginning to develop a network of specialist intellectual property courts and although this is not clear from the legislation, it seems likely that

responsibility for deciding such reviews will be the responsibility of these specialist courts. The introduction of judicial review is a very welcome move which will increase transparency. Procedures have also been introduced to ensure that both parties in a trade mark dispute will be given the opportunity to view the evidence which is filed by the other side.

Under the new law, it will become possible to apply for an interim injunction, as well as an order for preservation of evidence. As has already occurred following an introduction of such remedies in patent matters, it can be expected that foreign companies will be quick to pick up the opportunity to obtain prompt redress through the courts as an alternative to relying upon administrative enforcement of their trade marks through the local offices of the Administration for Industry and Commerce.

The maximum penalty for trade mark infringement has been increased to 300% of the infringer's illegal turnover. In cases where the turnover is not ascertainable, fines of up to RMB100, 000 may be imposed.

Foreign trade mark owners with active licensing programmes will be comforted to know that while it is still mandatory to record trade mark licences with the Chinese Trademarks Office, the specific penalties for failure to record licence agreements have now been eliminated.

Minor changes to the definition of "use" of a trade mark have been introduced. These changes suggested that the Chinese Trademarks Office will no longer accept non-commercial advertising of trade marks as valid evidence of use to enable non-use cancellation actions to be defended.

The amendments embodied in the new law and regulations are generally extremely positive and they will over the course of time provide a significant boost to foreign investor confidence in China.

¹ Partners, Deacons Intellectual Property Department

Community Trademarks in the enlarged European Union

The enlargement of the European Union will lead to important changes in the protection of intellectual property rights in the E.U. Ten new states are due to join during the first half of 2004: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic and Slovenia. Negotiations are continuing with Bulgaria and Romania.

Enlargement raises a number of legal and administrative questions for the existing Community trademark (CTM) system. At the expected time of the accessions, there will be an estimated 100,000 CTMs in existence.

The Community Trade Mark Regulation (CTMR) does not contain specific provisions for enlargement. The framework conditions for the adoption of Community trademark law are a matter for negotiation between the E.U. and acceding countries.

Two basic principles of the CTM system are preserved. The first is the unitary character of a CTM – it can be acquired in a single procedure, enjoy uniform protection, and be valid throughout the E.U. The second is that it exists alongside Member States' national trademark laws with equal status, so intellectual property rights already existing in the acceding countries will not expire as a result of enlargement.

For further information readers are recommended to see the full article "Community Trademarks in the Enlarged European Union" By Kay-Uwe Jonas and Joanna Gray¹ in the January 2003 edition of World Intellectual Property Report published by BNA International Inc. e-mail: marketing@bnai.com

¹ Linklaters, London and Alicante; e-mail: kay-uwe.jonas@linklaters.com and joanna.gray@linklaters.com

Arsenal v Reed: Did the ECJ overstep its jurisdiction?

by Robin Tyler

It seems we will have to wait for a further appeal to find out.

It seems worthwhile repeating extracts from the final paragraphs of Mr Justice Laddie's judgement in this case.

The ECJ ruled: *"Once it has been found that, in the present case, the use of the sign in question by the third party is liable to affect the guarantee of origin of the goods and that the trade mark proprietor must be able to prevent this, it is immaterial that in the context of that use the sign is perceived as a badge of support for or loyalty or affiliation to the proprietor of the mark."*

Laddie J however found that the finding "in the present case" referred to in the first line of that paragraph is one of fact. The nature of the finding is that set out in the first two lines, namely that use of the sign in question is liable to affect the guarantee of origin of the goods. If one inquires in relation to the words "once it has been found", who has made that finding, the answer is the ECJ. That finding is at odds with the finding in the High Court...

The ECJ has disagreed with the conclusions of fact reached at the trial and indicated that the claimant should win because Mr Reed's use was such as would be perceived by some customers or users as a designation of origin. If this is so, the ECJ has exceeded its jurisdiction and I am not bound by its final conclusion. I must apply its guidance on the law to the facts as found at the trial.

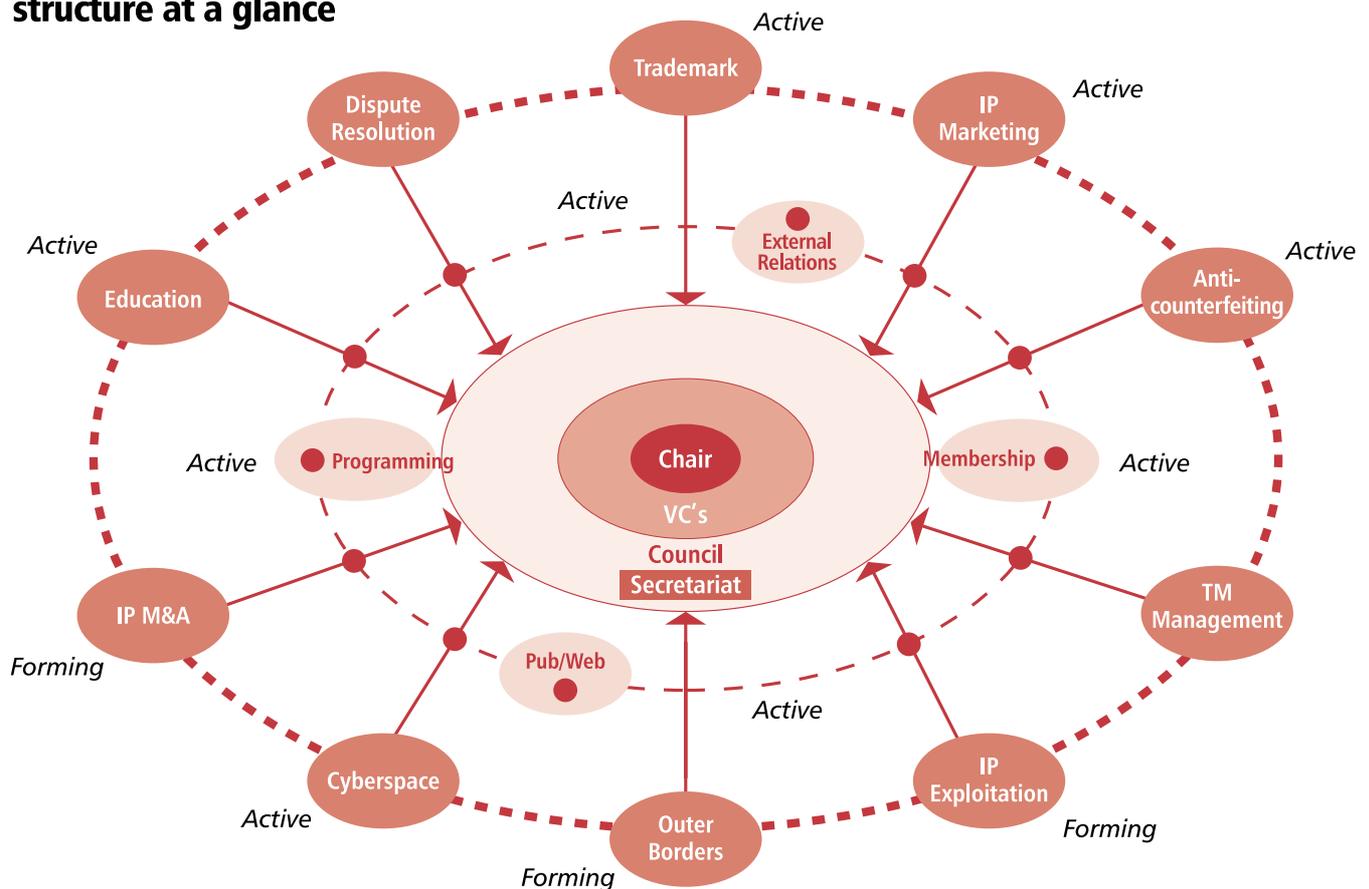
This is a most unattractive outcome.

It is in no one's interest, even Mr Reed's, for there to be such a difference between the views expressed by the High Court and the ECJ. The courts of this country cannot challenge rulings of the ECJ within its areas of competence. There is no advantage to be gained by appearing to do so. Furthermore, national courts do not make references to the ECJ with the intention of ignoring the result. On the other hand, no matter how tempting it may be to find an easy way out, the High Court has no power to cede to the ECJ a jurisdiction it does not have.

In these circumstances there are few options open to me... In my view, the only course is for me to apply the ECJ's guidance on the law to the current findings of fact made in the High Court. This means that the defendant wins on the issue of trade mark infringement. The correct route of appeal is to the Court of Appeal. Unlike the ECJ, it will have all the evidence before it and will give the parties the opportunity to argue what the proper findings of fact should be. It might come to the conclusion that the findings in last year's judgment are incorrect in whole or in part and that Mr Reed's use of the AFC signs, or the use of some of them – for example the logos, would be perceived as indicating trade origin to those who may buy or use his products. If so, the appearance of inconsistency between the English courts and the ECJ will disappear.

MARQUES Governance

Management and Project Team structure at a glance



THE COUNCIL 2003

Full details of the Chairmen and members of each active and formative Team can be found at: <http://www.marques.org/teams>

Chairman: **Tove Graulund** (Denmark)

Vice-Chairman (Programming):
Ingrid de Groot (Netherlands)

Vice-Chairman (External Relations):
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Paul Steinhauser (Netherlands)
Massimo Sterpi (Italy)
Eva Szigeti (Hungary)
Nunzia Varricchio (Belgium)

Secretary General: **Colin Grimes** (UK)

NOTE: Council is composed of up to 40 members with not more than six from any individual country; not more than six drawn from countries outside of Europe and not more than 14 Special Members.

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