In Schütz (UK) Limited v Werit (UK) Limited [2013] UKSC 16 the UK Supreme Court has provided guidance on the meaning of “making” a product, as opposed to repairing a product, in the context of patent infringement disputes.

BACKGROUND

Schütz (UK) Limited is the exclusive licensee of a patent relating to intermediate bulk containers (IBCs), which are used to transport a wide range of liquids. IBCs consist of a cage into which a large bottle is fitted that holds the liquid. Typically, the cage will last five to six times longer than the bottle, as often the bottle will become damaged or cannot be reused, owing to the liquid that was stored in it. The patent protects the IBC as a whole, but it is agreed that the inventive concept of the patent relates to the flexible welds on the cage that improve the durability of the IBC.

Werit UK Limited manufacturers IBC bottles. These are sold to an IBC reconditioner that replaces the no longer usable Schütz bottle with a Werit one and offers the reconditioned IBC on the market. Schütz brought patent infringement proceedings against Werit, alleging that the replacement of the bottle in its IBCs constituted “making” the product for the purposes of Section 60(1)(a) of the Patents Act 1977. The High Court of England and Wales found in favour of Werit. It considered that the correct approach to determine whether or not Werit’s actions constituted making the product was to ask whether or not, when the part was removed, what was left embodied the whole of the inventive concept of the claim. The Court of Appeal disagreed with the High Court’s approach, and found in favour of Schütz on the basis that the product covered by the claim of the patent (the IBC) ceased to exist when the bottle was removed. Werit appealed to the Supreme Court.

DECISION

The Supreme Court, in a judgment given by Lord Neuberger, began by considering the meaning of the word “makes”. Lord Neuberger set out a number of considerations, including that it should be given an ordinary meaning and not treated as a term of art, and that it will often be a question of fact and degree as to its meaning, amongst other policy considerations. Against this background, he undertook a review of the leading English case on the subject, United Wire Ltd v Screen Repair Services (Scotland) Ltd [2000] 4 All ER 353 (a House of Lords decision that he noted should not be departed from unless there was a very good reason to do so) and a number of German decisions on the equivalent German patent.

The Supreme Court considered that both lower courts had not approached the central issue in this case in the correct manner. It decided the High Court had oversimplified the issue, whilst the Court of Appeal relied overly on United Wire and did not appreciate that making is a matter of fact and degree. It thus fell to the Supreme Court to decide the correct approach to the question of when a product is “made” in the context of repairing.

Lord Neuberger considered it helpful to ask whether or not the bottle was “such a subsidiary part” of the product protected by the patent that replacing it would not invoke making a new product. This is a question of degree. The bottle was a substantial part of the IBC, but it was noted that its life expectancy was five to six times less than that of the cage and was easily replaceable. Further, it did not include any aspect of the inventive concept of the patent, which related to the welds on the cage. On this analysis, the Supreme Court sided with the High Court in finding that replacing the bottle did not constitute “making” a new IBC.

COMMENT

Ultimately, the Supreme Court agreed with the High Court but for, in Lord Neuberger’s words, “more nuanced reasons”. Making is a question of degree and in finding in favour of Werit, Lord Neuberger considered his approach to be compatible with United Wire.

Of interest is the Supreme Court’s willingness to review the German decisions on the German equivalent patent. Lord Neuberger noted that, whilst the Supreme Court was not bound to follow the German courts, it was “sensible for national courts at least to learn from each other”.

ISSUE 99, MARCH 2013
CIVIL LITIGATION
The Jackson Reforms Come Into Effect

The Jackson reforms, the result of a one-year review of costs in civil litigation by Lord Justice Jackson, were largely implemented on 1 April 2013. The reforms present the most radical changes to the civil litigation system since the introduction of the Civil Procedure Rules in 1999 and are aimed broadly at controlling the costs of civil litigation.

BACKGROUND
In his final report, Review of Civil Litigation Costs, published in January 2010, Jackson LJ noted that the costs of civil litigation were too high and criticised the current model of conditional fee arrangements (CFAs). He noted that there was no incentive for claimants to keep costs down where a CFA was on a “no win no fee basis”, with the financial risk falling squarely onto the claimant’s lawyer and the defendant.

Jackson LJ recommended a complete revision of the current system, putting forward damages-based or contingency fee agreements as alternative methods of funding. He also made a series of other recommendations aimed at cutting the costs of civil litigation such as more robust case management procedures, cost budgeting and more streamlined procedures pertaining to disclosure and expert evidence.

DISCUSSION
Previously, a losing defendant was responsible for the claimant’s legal costs, after the event (ATE) insurance premiums and CFA success fees. Success fees are no longer recoverable from a losing party under any CFA entered into from 1 April 2013, although implementation has been delayed for insolvency, publication and privacy proceedings. Parties to litigation may still enter into CFAs with their representatives. Clients will, however, be responsible for the payment of any success fee. ATE insurance premiums taken out after 1 April 2013 will not be recoverable from a losing party.

COSTS BUDGETING
Another key change is an emphasis on cost budgeting. Generally, the budget must be for the entire action and cover each stage of the proceedings. Any time incurred by solicitors and barristers, plus their expenses, must be categorised and allocated to the appropriate stage of proceedings.

The court may at any time make a “costs management order”, recording the extent to which budgets are agreed between the parties. Any revisions to the budget must be agreed or approved. Where a case management order is made, the court will not depart from the budget unless it is satisfied that there is a good reason to do so. Where no case management order is made, any variations of 20 per cent of the cost budget must be justified and the court will assess whether departure from the cost budget is appropriate.

The court cannot approve costs incurred before the date of the budget. It can, however, record its comments on those costs and take them into account when considering the reasonableness and proportionality of all subsequent costs.

COMMENT
It was intended initially that costs budgeting would apply to all cases, other than those in the Commercial Court and Admiralty Court, which would have posed a significant burden on legal representatives in terms of preparing cost estimates and tightly controlling costs. The exemption for cases where the sums in dispute exceed £2 million suggests that the new provisions may have less bite than originally envisioned, with many intellectual property cases likely to be exempt.

COPYRIGHT
CJEU Ruling Confirms Live Internet Streaming of TV Broadcasts Infringes Copyright

On 7 March 2013, the Court of Justice of the European Union (CJEU) ruled in ITV Broadcasting Ltd and others v TV Catchup Ltd [2013] C-607/11 EUECJ that live internet streaming of terrestrial TV broadcasts constitutes a “communication to the public” within the meaning of Article 3(1) of the Copyright Directive. Without broadcaster permission, such retransmission may infringe broadcast copyright.

BACKGROUND
On 17 November, the High Court of England and Wales in ITV Broadcasting Ltd and others v TV Catchup Ltd [2011] EWHC 1874 (Pat) requested a preliminary ruling from the CJEU concerning the interpretation of Article 3(1) of the Copyright Directive (the Directive).
TVCatchup Ltd (TVC) operates the website www.tvcatchup.com, which offers a free subscription service, enabling its subscribers to view live internet streams of free-to-air UK terrestrial TV channels. The Claimants, a number of broadcasters that own copyright in their broadcasts, including ITV, Channel 4 and Channel 5, brought proceedings against TVC for copyright infringement. The Claimants alleged, inter alia, that TVC’s service constituted a “communication to the public” of their works and therefore required their consent.

Article 3(1) of the Directive (implemented into UK law by the Copyright and Related Rights Regulations 2003) confers on rights holders “the exclusive right to authorise or prohibit any communication to the public of their works by wire or wireless means […]”

The High Court requested the preliminary ruling in order to determine, inter alia:

1. Whether or not the right conferred by Article 3(1) extends to third party organisations providing such services as TVC does, even where the subscribers can lawfully receive such broadcasts through television receivers; and

2. Whether or not it makes a difference to question 1 if the third party is profit-making or is in direct competition with the relevant broadcaster.

DECISION

In response to question 1, the CJEU ruled that the principal objective of the Directive is to establish a high level of protection for authors and, accordingly, “communication to the public” should be interpreted broadly. In particular, it held that Article 3(1) covers a retransmission of the works included in a terrestrial television broadcast by a third party, by means of an internet stream made available to subscribers, even though those subscribers may lawfully receive the broadcast on a television receiver.

In relation to question 2, the CJEU ruled that its interpretation of Article 3(1) was influenced neither by whether or not the third party, such as TVC, is profit-making, nor whether or not it was in direct competition with the broadcaster.

COMMENT

The CJEU’s ruling, which is consistent in conclusion with the High Court’s view, now means that live streaming services will require the consent of the relevant broadcasters. Whilst the High Court expressed the view that it considered whether or not the streaming service’s activities were “for profit” to be a determining factor, the CJEU has clarified that this is not the case.

This ruling is clearly very favourable to broadcasters and rights holders, many of which have disputed third party streaming services in recent years. It is unclear whether or not the numerous websites offering services similar to TVC’s will risk copyright infringement or seek to enter into content distribution agreements with broadcasters, which may result in a significant cost to the current business model. TVC, for its part, has indicated that it will dispute the CJEU’s view in the High Court.

Osteoporosis Patents Found Invalid

Two osteoporosis treatment patents have been found to be invalid following the ruling by the High Court of England and Wales in Hospira UK Ltd & Anor v Novartis AG [2013] EWHC 516 (Pat). The Court found that none of the claims were entitled to the claimed priority and were invalid on the ground of insufficiency owing to the open-ended construction of certain claims specifying dosage and administration intervals.

BACKGROUND

Novartis was the proprietor of European Patents 1296689 and 1591122 (the second is a divisional of the first patent). The patents, protecting inventions used to treat osteoporosis, related to the administration of zoledronic acid or zoledronate (a salt of the acid) intravenously at intervals of at least six months. The patents claimed priority from two priority documents filed on 20 June 2000 and 9 February 2001. The Claimants sought revocation of the patents for invalidity on the basis that the claims were not entitled to priority and the patents were invalidated by an intervening publication made by Novartis, the claimed inventions were obvious and some of the claims were invalid for insufficiency.

DECISION

Arnold J held that the patents were invalid on the basis that none of the claims were entitled to the priority asserted. Had they been entitled to the claimed priority, none of the claims would have been obvious over the cited prior art, but several claims would also have been invalid for insufficiency.

One of the principal issues of priority revolved around the fact that Novartis relied on one of its own previous patent application abstracts—part of a piece of prior art referred to throughout the judgment as PD2—for the purposes of priority. The Claimants submitted that the abstract could not be relied on for that purpose, citing Abbott Laboratories v Medinol [2010] EWHC 2865, where it was held, by reference to the European Patent Convention, that an abstract in a European patent application did not form part of that application in relation to an added matter issue. The Court held that the same reasoning should not be applied in this case, because PD2 was a United States patent application. Despite this, it found that
PD2 does not disclose that intravenous zoledronate at intervals of at least six months is effective to treat osteoporosis because, although the information contained in the abstract links zoledronate, osteoporosis and six monthly administration, it does not mention intravenous administration.

The Claimants pointed out that some of the claims of the patents were open-ended in that they either had no upper limit to the period between administrations, or they had no upper or lower limit to the doses, or both. Relying on the test quoted in Novartis AG v Johnson & Johnson Medical Ltd [2010] EWCA Civ 1039, [2011] ECC 10, the Claimants argued that these claims were invalid for insufficiency because the skilled person could not readily perform the invention over the whole area claimed without undue burden and without needing inventive skill.

The Court determined that the open-ended claims should only be interpreted as extending to any dose or dosage interval that was effective in practice. Even so, in this case, the Court found that the potential scope of the open-ended claims was wide, requiring the skilled person to undertake a comprehensive series of clinical tests to find out what doses and dosage intervals were efficacious. It followed that the claims were not enabled across their breadth and therefore these claims were invalid for insufficiency.

**COMMENT**

Although it was held that the abstract of a US patent application could be relied on in establishing priority, it is perhaps not surprising that the abstract did not overcome the invalidity arguments, as an abstract does not usually contain information that is not already in the body of the main text.

**TRADE MARK**

**EU General Court Upholds Partially Successful Opposition to CAFFE KIMBO**

In *Bimbo, SA v OHIM* [2013] T-277/12, the EUGC has upheld a decision of the Board of Appeal of the Office for the Harmonization of the Internal Market (OHIM), allowing a Community trade mark (CTM) application for the figurative mark CAFFE KIMBO to proceed to registration in relation to a limited scope of goods. The General Court confirmed that while the signs at issue were similar, the opposition could only succeed in relation to those goods for which the prior mark BIMBO was well known.

**BACKGROUND**

*Café do Brasil SpA* filed a CTM application for the figurative mark CAFFE KIMBO covering, amongst other goods, “coffee, tea, cocoa, sugar, rice, tapioca, sago coffee substitutes; flour and preparations made from cereals, bread, pastry and confectionery, ices; honey, treacle; yeast baking-powder; salt, mustard; vinegar sauces (condiments); relish; ice” in Class 30. Bimbo brought an opposition under Article 8(1)(a) and (b) of the CTM Regulation 207/2009/EC on the basis of its prior Spanish word mark for BIMBO covering “cereals, milling industry, baking, pastry and starch” in Class 30. Bimbo also claimed a reputation in respect of these goods, arguing that BIMBO was well-known in Spain in respect of those goods within the meaning of Article 8(5).

The opposition based on the earlier Spanish trade mark was rejected because Bimbo had not provided proof of its renewal within the time limit set by OHIM. The assessment therefore had to be carried out on the basis of the earlier, unregistered right for BIMBO, which Bimbo claimed was well known in Spain.

The opposition division upheld the opposition in respect of parts of the goods at issue, namely, in relation to “flour and preparations made from cereals, bread, pastry and confectionary, ices; yeast, baking-powder”. On appeal by Café do Brasil, the OHIM Board of Appeal annulled part of the decision. Bimbo’s evidence showed that the BIMBO mark was only well known in Spain for packaged sliced bread. Accordingly, the OHIM Board of Appeal rejected the application in relation to “preparations made from cereals, bread and pastry” only. Bimbo appealed to the General Court, arguing that there had been various procedural errors and that the assessment of a likelihood of confusion should have been carried out against goods other than only packaged sliced bread.

**DECISION**

The General Court rejected the various procedural grounds raised and went on to uphold the OHIM Board of Appeal decision. The General Court confirmed that the signs at issue were similar overall, so the Board of Appeal had therefore been correct to find a likelihood of confusion in respect of the goods covered by the application. These were found to be similar to goods for which the well-known character of the earlier mark was established. The well-known character of the mark had been established only in respect of goods related to “packaged sliced bread”. Consequently, the opposition had to be upheld in relation to “preparations made from cereals, bread and pastry”.

With respect to “flour, confectionary, ices, yeast and baking-powder”, the General Court found that the Board of Appeal had been correct to conclude that these goods were dissimilar to “packaged sliced bread” covered by the earlier mark because they had a different nature, purpose and method of use. There was accordingly no likelihood of confusion in respect of those goods.

**COMMENT**

The decision serves as a reminder of the importance of ensuring that all evidence pertaining to an opponent’s case, including the
subsistence of earlier rights, is put forward in a timely manner. Although Bimbo was partially successful in its opposition proceedings, the evidence submitted could only demonstrate that its mark was well known in relation to a very limited number of goods. If Bimbo had submitted evidence that its Spanish registration was still valid and subsisting, it would have been able to rely on a broader range of earlier goods and may have accordingly been able to successfully remove further goods from the specification of the opposed mark.

DISCUSSION
The key recommendations from the ICO guidance include the following:

- Employers should carry out detailed assessments of the types of data being processed and the nature and risks involved with the different personal devices used by its employees.
- Employers should implement a clear BYOD policy which will necessarily be unique to each employer and should be monitored for compliance regularly.
- Employers should be clear as to what types of personal information may be processed on personal devices.
- Personal devices should be password-protected. Strong passwords should be used and controls put in place for the automatic deletion of all data if an incorrect password is detected several times consecutively. Employees should be clear as to which information will be deleted.
- Encryption should be used to store data on the device securely.
- Employers should exercise extreme caution in any use of public cloud-based sharing or back-up services.
- Devices should have remote locate and wipe services in case of loss or theft.
- Monitoring technology should remain proportionate and not excessive, in particular during personal use.

COMMENT
Whilst many employers have experienced the increased efficiency and other benefits that modern personal devices can bring to their workforce, their potential for data protection breaches must not be ignored, in particular when devices are owned by the employees themselves. Employees’ personal devices are, by their nature, outside the control of employers. This is a particularly dangerous situation when they are also used to process personal information that is under the control of the employer.

The guidance should be welcomed by employers, as it offers clear insight into good practice when developing policies and implementing controls to keep personal information secure.

DATA PROTECTION
New “Bring Your Own Device” Guidance Published by Information Commissioner’s Office

On 7 March 2013, the Information Commissioner’s Office (ICO) published new guidance on “bring your own device” (BYOD), which explains the risks organisations must consider when allowing personal devices such as smart phones, laptops and tablets to be used to process work-related personal information.

BACKGROUND
The Data Protection Act 1998 (the Act) places obligations on organisations responsible for processing personal information. In particular, Principle 7 requires appropriate technical and organisational measures to be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.

Data protection risks occur when there are a large number of devices used to process personal information outside the employer’s direct control.

According to a recent survey commissioned by the ICO and carried out by YouGov, many employers are at risk of failing to comply with the Act. In particular, it was identified that many employers’ approach to popular personal devices such as laptops, tablets and smart phones put personal information at risk.

This is increasingly relevant, as the survey indicates that nearly 50 per cent of all UK adults use personal devices for work-related purposes, but only 30 per cent of those who do so have been provided with guidance from their employers on data protection policies. The ICO guidance explains how allowing employees to bring their own devices can be done safely, permitting the employing company to retain control of the personal information for which it is responsible, and ensuring compliance with the Act.
Angiogenesis Patent Found to be Valid by the Court of Appeal of England and Wales

In *Regeneron Pharmaceuticals Inc. and Bayer Pharma AG v Genentech Inc* [2013] EWCA Civ 93 the Court of Appeal of England and Wales found that a patent for therapeutic agents for the treatment of non-cancerous diseases associated with blood vessel growth was valid and infringed.

**BACKGROUND**

In March 2012, a first instance trial was held to determine the validity and infringement of European Patent (UK) 1,238,986 (the patent), owned by Genentech Inc (Genentech). The patent concerns therapeutic agents, called VEGF antagonists, for the treatment of non-neoplastic diseases characterised by neovascularisation or angiogenesis. The Claimants alleged that the patent was invalid on the basis of lack of novelty, obviousness and insufficiency.

The Claimants also sought a declaration of non-infringement of the patent in relation to a product they were planning to market called VEGF Trap Eye (VTE) for the treatment of age-related macular degeneration. Genentech counterclaimed, asserting that the patent was infringed by VTE. Floyd J rejected all the validity attacks and held that VTE was infringing at first instance. The Claimants appealed this decision.

**DECISION**

The Court of Appeal, with the lead judgment given by Kitchin LJ, upheld the entirety of Floyd J’s decision.

The Claimants maintained that Floyd J had misconstrued the claims of the patent as not requiring any therapeutic effect on the condition in question, and was inconsistent in applying his construction when considering validity. They also argued that he had wrongly held that the claims encompassed any variant of a natural receptor that retained the ability to bind VEGF and inhibit its activity.

The novelty attack was based on a Genentech article authored by the named inventors of the patent which, the Claimants asserted, disclosed VEGF antagonists in the form of antibodies and their use for treating relevant conditions. The Claimants also argued that Floyd J had applied the wrong test in assessing whether the invention was obvious in relation to the prior art and that it was not plausible that all VEGF antagonists would be useful in the treatment of non-neoplastic diseases. The Court of Appeal rejected all these criticisms of Floyd J’s approach and held that he had applied the correct tests and conclusions when making his assessment.

Some of the most interesting commentary pertained to the consideration of the insufficiency arguments put forward. The Claimants argued that Floyd J should have found the patent to be insufficient because the protection claimed was far too wide. It included large numbers of antagonists in the treatment of an extensive range of conditions which, they claimed, it could not deliver in relation to certain specific diseases and it would require undue effort to determine which antagonists were therapeutically effective against any particular neovascular disease. The Court of Appeal rejected all the insufficiency attacks offered, determining that it was credible that VEGF antagonism could be used to treat any non-neoplastic neovascular condition, and that it was not necessary to evidence this through clinical trials.

The Court of Appeal clearly stated that a claim for an invention of broad application may validly cover products identified at a future date, provided such embodiments exemplify the principles and technical contribution made by the invention.

**COMMENT**

Insufficiency issues are a concern when drafting a patent application for therapeutic treatments, owing to the fact that the basic patents usually have to be applied for long before the clinical testing is completed and marketing authorisation is achieved. As such, patent drafters cannot predict which of the array of disorders the claimed invention may treat will be the ones in relation to which a product will be brought to market. In this case, because the claimed invention disclosed a principle of general application, focussing on a mechanism for treating one physical aspect of an overall condition (angiogenesis), it was able to prevail over insufficiency challenges.

Survey Evidence Admitted in Trade Mark Dispute

*Interflora Inc and another v Marks and Spencer plc and another* [2013] EWHC 273 (Ch), 21 February 2013 is another example of the application of the Court of Appeal of England and Wales’ two step test to assess whether survey evidence should be permitted in trade mark infringement proceedings. The test requires the party seeking to rely on the evidence to show that it i) will likely be of value at trial and ii) the costs involved are justifiable.

**BACKGROUND**

This judgment in the ongoing dispute between the parties over the use of keywords concerned the Claimants’ application for permission to rely on 13 witness statements at trial. It followed another application in the same dispute to rely on witnesses.
identified by way of surveys, which was recently determined by the Court of Appeal.

In the main action, the Claimants allege that Marks and Spencer infringed UK and Community trade marks through the purchase of keywords that generated advertisements that did not enable (or only with difficulty) reasonably well-informed and reasonably observant internet users to ascertain whether the goods advertised were from Marks and Spencer or the Claimants. The Claimants decided to look for evidence of the goods advertised were from Marks and Spencer and reasonably observant internet users to ascertain whether the goods advertised were from Marks and Spencer through the purchase of keywords that generated advertisements that did not enable (or only with difficulty) reasonably well-informed and reasonably observant internet users to ascertain whether the goods advertised were from Marks and Spencer or the Claimants. The Claimants sought to rely on 13 witness statements at trial.

This communication may be considered attorney advertising. Prior results do not guarantee a similar outcome.

Mr. Justice Arnold was tasked with applying to the present application the Court of Appeal’s guidance on when survey evidence was permissible. He began by considering the nature of the exercise undertaken by the Claimants, concluding that, whether or not it was a survey, the Court of Appeal’s approach should be applied. The two step test required Arnold J. to decide i) whether or not the evidence would be of value, and ii) whether or not the value of the evidence would justify the costs involved.

On the first limb of the test, Marks and Spencer argued that the evidence was not representative of the legal construct of the “average consumer” and that it had necessarily been distorted by the way in which it had been gathered by the Claimants. Both these arguments were rejected. In doing so, Arnold J quoted Lewison LJ in the Court of Appeal that there could be no objection to producing evidence of actual confusion. The judge noted that this method of gathering the evidence of confused consumers, rather than subjecting samples of the population to an artificial questionnaire, did not have to be based on a statistically reliable sample (unlike survey evidence generally). The consumers were asked about something they had experienced, rather than “an experiment which they had participated in”. Arnold J considered that the evidence was likely to be of some value in assisting the court at trial.

On the question of whether or not the likely value of the evidence justified its cost, Arnold J. noted that much of the work done by Marks and Spencer in preparing for this application would have been work that it would have undertaken in any event for trial. This exercise would now not need to be repeated. The exercise constituted approximately 5 per cent of the total cost estimate for the Claimants. Arnold J. also noted that there were large sums at stake for both sides in the dispute, and accordingly found that the costs were justifiable. Permission was therefore granted to rely on the witness statements at trial.

**DECISION**

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**COMMENT**

The Court of Appeal’s approach to survey evidence in *Interflora* has already been applied in a number of cases. Requiring the applicant to show the evidence will likely be of assistance to the court and, moreover, is justifiable in terms of cost, is likely to result in many more challenges to the use of such evidence by the other party to the dispute. It will also lead to, and already has in a number of cases, increased scrutiny of the way in which the evidence is gathered. It is notable that the Claimants in this application waived privilege over the entire exercise and that their solicitors gave a number of witness statements as to how the evidence was gathered. Parties seeking to rely on survey evidence should be aware that this is a trend that can be expected to continue.
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