

FINAL TRANSCRIPT

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****ACC - New Product Launches in Europe - IP Protection and Pitfalls**

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PRESENTATION

Michelle Foster - *Symbian Software Limited - General Counsel*

Welcome everyone. My name is Michelle Foster and I am the general counsel of Symbian Software Limited.

Symbian is a technology company based in London, England with subsidiaries globally which develops and supplies the advanced open standard operating system, Symbian OS for data enable mobile telephones.

Symbian's mission is to establish Symbian OS as world standard for mobile digital data systems primarily for use in cellular telecoms.

You are joining an audio webcast presented by the Association of Corporate Counsel International Legal Affairs Committee and Eversheds.

The topic of today's live webcast is "New Product Launches in Europe IP Protection and Pitfalls."

This webcast will last about an hour and if you have any questions throughout the presentation I would encourage you to send an email to myself at michelle.foster@symbian.com.

We will try to take time at the end of the presentation - at the end of the session to answer any queries that we have received.

I would now like to take a moment to introduce our panel of speakers who work for the law firm Eversheds. Eversheds is one of the world's largest law firms with over 2,000 legal advisers based across the globe from internationally renowned specialists to beating (ph) regional teams they provide a complete legal service to many of the biggest names in business and act for over 75 of the Fortune 500.

Clients in the U.S. include Cisco, Dupont, General Electric and IBM. With an approach that emphasizes innovation, accountability and total client service they are regularly recognized as one of the most forward thinking firms in the legal industry.

We are lucky to have two individuals joining us from Eversheds today. Sally Shorthose and Vicky Salmon.

Sally is a partner in the intellectual property bio-sciences group and heads, and head of non-contentious intellectual property. Sally spent 11 years working in-house, firstly as senior legal advisor at ICI/Zeneca and latterly as Legal Director of Novartis UK, where she was responsible for all legal matters for the Novartis Group within the UK, with particular responsibility for intellectual property protection and competition law compliance.

As a member of the biosciences group Sally is able to provide a full range of sector-focused commercial advice, including co-promotion and co-marketing agreements for the sale and development of pharmaceutical products, research, development and marketing joint ventures and regulatory advice to bio-pharma companies.

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Vicki Salmon. Vicki is a UK and European patent attorney, as well as being a qualified solicitor. She has a degree in natural sciences biochemistry from Cambridge University. She gained experience of preparing and prosecuting patent, trademark and design applications around the world before qualifying as a solicitor. Her current practice includes both contentious and non-contentious IP work. She conducts patent litigation for clients, as well as advising on patent portfolio and patent clearance strategies. She also acts in relation to trademark infringement and passing off, as well as in relation to design, copyright and confidential information. Her non-contentious work includes assisting with corporate deals, carrying out due diligence exercises and negotiating IP clauses and agreements. She also assists clients to license and transfer IP rights.

Vicki is a fellow of the Chartered Institute of Patent Agents where she is a member of the Council, the chair of the Litigation Committee and the Social and Programme Committee and a member of the Patents Committee and the Biotech Committee. She is chair of the CIPA Congress Steering Committee and has organized the annual conference since 2002.

So with that I would say that we are going to be in very, very good hands today with our discussion and once again I encourage you to look at the website. If you have any questions send them to myself and the bios are also on the website.

With that, I will turn over the beginning of the conversation to Sally to commence with the program.

Sally Shorthose - *Eversheds - Partner, Head of Non-Contentious IP*

Many thanks Michelle and good afternoon. My first slide you may have to move to it. It's called, "IP Protection and Pitfalls."

I'm sure that there are many things that you consider when your business is launching new products in Europe. Each product is unique and will need to be considered on its merits.

So today, we've chosen three aspects of IP to discuss wherever the differences between the ways that these IP's might work in Europe from the way that they work in the U.S. We've chosen branding, design rights and patents.

Please turn to the next slide. In my experience choosing a trademark or service mark for the European market can involve considering other factors than when choosing ones for the U.S. market. Although Europe aspires to be one market in some respects there are still 25 separate markets. One in each member state.

Although the laws across Europe are being harmonized there's still differences and so advice may need to be sought in more than one country. Europe has multiple languages and even where one tongue is spoken in another country there can be differences of pronunciations or variations in meanings. It can be important to ensure that your businesses choice of trademark will work across Europe.

For example, when Vauxhall chose Nova for the name of one of their cars they were probably thinking about stars. However, sales in Spain were not good as their Nova meant "doesn't work." I'm sure that if the business gives you enough time before product launch you regularly check that the chosen trademark is free to use.

In Europe this could mean searching both at the community level and also at the national level in each of the European countries where the products are to be launched. Common law searches may also be a good idea in the UK and Ireland but not really necessary in most of the civil law countries.

Due to time differences language use may make it more time to complete in Europe than it would do in New York. I'm sure that you all know that registration of the trademark can happen at the national level or at the community level. Also, protection can be sought using the Madrid protocol. Ten years protection in Europe will cost around 3,000 pounds, approximately \$4,500 to obtain. However, if an interested third party launches an opposition or the community trademark office known as OHIM objects to the mark then costs will rise.

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I will now discuss some of the European case law on what marks can be registered. I will then hand over to Vicki to discuss the census infringement action and parallel imports. Before I go on to these cases I would just like to talk about the judicial structure in Europe for trademarks.

If a trademark application is refused by OHIM then an appeal lies to the Court of First Instance in Salzburg. Decisions of the CFI can then be appealed to the European Court of Justice. We get two opinions from this court. The first is by the Advocate General and then we get the decision of the ECJ itself. In most cases the ECJ will follow the advice of the Advocate General but this does not always happen.

If a trademark application is refused by a national trademark registry then the appeal usually lies in the court of that country.

However, trademark law across Europe has been harmonized so that where a court has a question about how the law should be interpreted it can refer that question to the ECJ. Again, you can get an opinion from the advocate general and then the decision of the court but the ECJ does not decide the case.

Instead, it answers the legal questions which the national courts have posed and sends those answers back to a national court. The national court to apply for the facts of its own case.

Please turn to the next slide. Generally speaking, it is harder to register descriptive trademarks in Europe than it is in the U.S. and I'd like to look at three of these cases.

'Baby-Dry', 'Doublemint' and 'Popstkantor'.

The famous 'Baby-Dry' decision in 2001 had seem to mark a watershed shed in registrability. In that case registration was sought for the word 'Baby-Dry' in relation to nappies. The ECJ held that although the mark was made up of two words descriptive of nappies, the words were arranged in an syntactically unusual juxtaposition which did not constitute a familiar expression.

On this basis the combination of the words in this way bestowed on the phrase a distinctive power and the registration went ahead. The test said the court was whether the word combination was the normal way of referring to the goods or services or of representing their essential characteristics.

It seemed that this decision meant that in order not to be registrable the mark or sign must be exclusively descriptive. So if a mark which might be descriptive was capable of having other possible meanings which were not descriptive it would be registrable. Since then however, the ECJ seems to have taken a step back from this more liberal approach.

Please turn to the next slide dealing with the 'Doublemint' case. In 2003 we had the 'Doublemint' decision. Here an application was made to register Doublemint for chewing gum. The application was refused by OHIM on the basis the combination of these two ordinary English words was descriptive, i.e., the combination of the words did not have anything imaginative to the sign.

An appeal was made to the CFI, the Court of First Instance which overturned OHIMs decision. The CFI held that the mark 'Doublemint' was ambiguous and suggestive and so was not exclusive descriptive. For an English speaker the mark could have more than one meaning. Double strength mint or two kinds of mint and these meanings were immediately apparent. But for a non-English speaker the mark was not clear and so the average consumer would not immediately identify the mark or the description of the goods.

OHIM appealed the decision. The Advocate General set out some tests as a precursor to the final ECJ decision. One important element of this was the following question. How immediately is the message conveyed? If the mark quickly conveys the characteristics of the goods and services then it will not be registrable.

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Contrary to 'Baby-Dry', the ECJ held that if one of its possible meanings of a sign is capable of designating a characteristic of the goods or services then registration must be refused. In this case the reference to mint in this mark indicated that flavor is a prominent feature of that product and as such the mark was not registrable.

Referring to 'Baby-Dry' it was held that 'Doublemint' was less unusual than 'Baby-Dry'. The only amendment to the common phrase being the removal of the space between the words.

Please turn to the next slide. Then in February 2004 came the decision in relation to the application by the Dutch Post Office to register 'Popst Kantor' which means 'post office' for 'paper, advertising, stamps, telecoms and education'. The Benelux Trade Mark Office refused the registration on the basis that the mark was exclusively descriptive of goods and services in relation to a post office.

On referral to the ECJ, the ECJ did follow the 'Baby-Dry' test but seemed to take a more stringent approach. The ECJ's rulings seemed to suggest that the Dutch Court should refuse the application.

It would seem that the test is now whether one meaning the mark applied for can be said to be descriptive. In this case the ECJ held that if the overall impression created by the mark is sufficiently removed from its descriptive elements or if the new word has acquired its own meaning, the mark will not be refused registration on the basis that it is descriptive.

Taking a broader view it would seem that the 'Baby-Dry' decision has not brought in a sea change in the way in which the applications are considered for their descriptiveness. The old tests still apply and principally if the mark devoids (ph) distinctive character (audio disturbance) and or if its a sign to designate the kind, quality or other characteristics of the goods or services.

Now I would like to turn to some of the more unconventional trademarks so please turn to the next slide.

Sound marks. In November 2003, the ECJ ruled that sound marks are capable of registration as trademarks provided the sound can be represented in a way which is clear, precise, self-contained, easy accessible, intelligible, durable and objective.

Please turn to the next slide. In the case of 'Shield Mark BV against Joost Kist' trading as MEMEX in 2003 different ways of representing a sound mark were considered.

The first was the first nine notes of Beethoven's "Für Elise". Representations were - 1) The first nine notes of "Für Elise" on a musical stave; 2) The words "the first nine notes of Für Elise", and; 3) The sequence of musical notes "E, D#, E, D#, E, B, D, C, A".

I could sing that for you which is dah, dah, dah, dah, dah, dah, dah, dah, dum.

The other was Wood Cockcrow. The representations were - 1) The word "Kukelekuuuuu" which is spelt K-U-K-E-L-E-K-U-U-U-U-U. This is an onomatopoeia imitating a cockcrow; and 2) A cockcrow.

The ECJ held that in order for the representation to be clear, precise, self-contained, easy accessible, intelligible, durable and objective a written description of the sound would not do. This would lack the clarity required for a third party to be able to determine the scope of the registration.

Also, the use of onomatopoeia was rejected on the basis it would be pronounced differently as it is in different member states. The simple sequence of notes was also rejected as the third party would not be able to ascertain pitch or the intervals between notes. However, the court considered that musical notes on a stave would be acceptable.

Please turn to the next slide. I'm now going to deal with color marks. There have been two fairly recent ECJ decisions relating to registrability of colors.

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This is the registration of the color itself as a corporate color rather than a colored logo or label. The first concerning a single color and the second color combination.

In 1996 Libertel a Dutch mobile telephone operator now part of Vodafone applied to register a particular shade of orange in respect to telecommunications equipment and services at the Benelux Trade Marks Office. The case was rejected. On appeal, rulings were sought from the ECJ.

In May 2003, the court ruled. a color per se is capable of distinguishing goods and services of one business from those of other businesses. In order to be acceptable the graphic representation of the sign must be clear, precise, self-contained, easily accessible, intelligible, durable and objective.

You may note that those are the same tests as the sound marks.

A sample of color is not on its own acceptable as it may deteriorate. A verbal description might suffice particularly if I referenced it internationally recognized codes such as hunting numbers. The authorities must consider whether the color as a matter of public interest should remain available to all.

An example might be the use of green in connection with environmentally friendly products or services. Normally a color mark will not be capable of distinguishing the goods or services of one business. Distinctiveness acquired through use will, therefore, usually be a prerequisite for registration. The applicant will usually have to provide evidence that other traders do not use the color applied for.

Please turn to the next slide still dealing with color marks.

In 1995, Heidelberg Bauchemie GmbH applied to the German Patent Office to register a trademark in respects to various products they use in the building industry. The mark was a combination of the colors blue and yellow and the application was in the form of a piece of paper. The upper half blue and the lower half yellow. The description stated that the colors in every conceivable form in particular on packaging and labels.

The application was rejected on the basis the mark was not capable of being represented graphically and that it was devoid of any distinctive character. A referral was made to the ECJ. The question was whether colors or combinations of colors framed in the abstract and with contours could be registered as a trademark.

Please turn to the next slide. Continuing with color marks. The ECJ stated that where an application consisted of combinations of colors three conditions must be met. Firstly, the combination of colors must be assigned. In 'Libertel' it was held color is capable of being assigned. Secondly, it must capable of being represented graphically; and thirdly, the sign must be capable of distinguishing goods and services of one business from those of other businesses.

Of course all the usual criteria will apply as well. On the one hand you might suppose that a corporate livery consisting of two colors would be more recognizable as a trademark than a corporate livery of one color.

However, I think that where there are two colors there needs to be more information about how the two colors are used, e.g., where the one is dominant and the other is for emphasis. So it is easier to register a single color than a combination.

In Heidelberg, the ECJ ruled that for combinations of colors the combination must be represented in a systematic way. This might mean the application to register the colors alone will not do. The representation must be made to the way they will be applied i.e., the form in which they will be used.

Again as with the single color it will usually be necessary to show the distinctiveness has been acquired for use. The threshold of the registration of color marks is, therefore, high.

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Please turn to the next slide. And I will now hand over to Vicki.

Vicki Salmon - *Eversheds - Associate, UK and European Patent Attorney*

Hello and thank you Sally. I'm going to start with a case between the English football or as you would say soccer team also and a street trader selling Arsenal merchandise outside the grounds but just before going into that I'd like to mention the earlier British case of British Sugar and Robertson where the judge held that any use of a registered trademark in business without permission could amount to trademark infringement.

This case is much criticized and the debate has suggested that the tests should relate to whether the use complained of is used in a trademark sense rather than used in any other sense. So lets go back to Arsenal and Mr. Reed. Mr. Reed had been selling merchandise for many years but did not claim that this was genuine club merchandise. On the base of it though after obtaining trademark registrations and Mr. Reed was using a mark identical to the arsenal registered trademark on goods which were identical to those for which the mark was registered.

However, the judge felt that the mark was not being used in a trademark sense but rather as a badge of allegiance or loyalty and so he thought that there was no infringement but was persuaded to refer questions to the ECJ.

When the ECJ produced the answers to the questions they came back to the English Court to be applied and the judge felt that the ECJ had upheld his interpretation of the law and that would that the exercise of the exclusive right conferred on trademark proprietors had to be reserved to cases in which a third party uses the sign affected or was liable to affect the functions of the trademark.

In particular, its central functions of guaranteeing the consumers the origin of the goods. But the ECJ had also made a finding for Arsenal. The judge disagreed with this and he said the ECJ in these sort of referral cases had no business of finding on fact rather than answering the questions of law. But in the end he was overturned on this point. Arsenal won and Mr. Reed lost.

However following on from British Sugar there is a potential new defense here. The trademark owner must first show that the mark is being used in trademark sense. In particular, this is important to some cases although in practice may not apply to all.

I thought of some cases where it might apply and that might be particularly so for a band such as Cold Play. If you put Cold Play's name on a tee-shirt or a calendar then one could argue that this was demonstration of loyalty to the musical band rather than the use of the mark in a commercial sense.

Please turn to the next slide where we come on to the defense of using one's own name. This is recently being considered in cases because it's not an infringement for a person to use his own name or address. That wouldn't infringe someone else's registered trademarks and the English Courts have traditionally applied this defense to companies as well as to individuals.

However, the wording in the act is that you can use your own name provided that the use is in accordance with honest practices in industrial commercial matters. Although it is not always easy to discern whether a practice is honest in the case of Reed and business information the Court of Appeal in England held that this proviso would not help someone who would dishonestly selected a name for his company in order to take advantage of the defense and, therefore, might end up misleading the public.

But the court also took the approach that an honest defendant might choose his own name and cause significant deception then the defense wouldn't succeed either and this was regardless of whether the defendant knew about the confusion or about the risk of confusion occurring.

Please would you turn to the next slide. Because in the spring of 2004 we have some guidelines from the ECJ as to what they consider to be honest practices and this is the case of Golschteiner (ph) of Brunei and Butch (ph).

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The ECJ held that the defendants duty was to act fairly in relation to the legitimate interest of the trademark owner and not to give the impression that it was unfairly competing. However, the defense they thought might be available even where there was some confusion. So I think there are two points to consider with the own named defense. The first is whether the defendant has commenced use of the mark honestly, i.e., without the intention of causing confusion but one then has to go on and consider whether as a matter of fact what the affect of that use is, if it causes significant deception then the defendant will not benefit from this defense.

There is two further cases on this slide which relate to the ownership of an individuals name as a trademark for a business.

Mr. Richard Ablim (ph) was a funeral director and he sold his business to a purchaser who then sold it onto Newman. Mr. Ablim works for the purchaser but eventually tried to set up a new business for himself as a funeral director and he used his own name. He tried to disclaim any connection between his new business and the previous business but the court found he couldn't do that. He sold his name and that was his problem. He needed a new name for the new business.

The second case relates to Elizabeth Emmanuel and you may remember that she designed the wedding dress of the Princess of Wales. She had a business which included registered trademarks and that had been sold and the trademark registrations were now owned by Continental Shelf who were also trying to obtain a new trademark registration and she tried to cancel their existing registration and oppose the new application.

Her argument was that she was a well known designer and it would be confusing if she had nothing to do with the business which made use of her name. She didn't do very well in the UK but questions have been referred to the ECJ and I think that - I hope that she's going to lose as otherwise this will cause real difficulty in the corporate world. We could end up with a law where the rich and famous get to sell their businesses with their valuable names as trademarks and then come back and reclaim the trademark with a completely rule applying to those who are unknown.

Please turn to the next slide. Another important issue in Europe is the concept of parallel imports. The idea of the European community is that once we put goods on the market anywhere within the EU they should be free to circulate around. Parallel importers are entitled to buy products in a low priced country and arbitrage them into a country where the price is higher and IT rights such as trademarks cannot be used to prevent this from happening.

Once a product has been put on the market by the trademark owner or with his consent then the rights of the trademark are exhausted. So products sold cheaply in Poland can be brought into the UK and the premiums which the trademark owner was obtaining in the UK can end up being eroded.

We've had many cases on the topic but the most recent of these is Peak Holdings. The interesting issue here was that although the products have been put in a shop they've then been taken off the shelves again without being sold and the question that was put to the ECJ was whether these goods had been put onto the market. ECJ held that this had not because they haven't been sold and, therefore, the rights in those goods couldn't be exhausted which must be good news for trademark owners.

But in some cases of parallel trading the arbitrage has to re-label or re-package the goods in order to sell them in another EU member state. Again we've had many cases on the extent to which these goods can be re-labeled or re-packaged by the parallel importer and many of these cases relate to the pharmaceutical industry.

The ECJ has laid down a number of tests which can be applied and in the recent case of Boringer Swingwood (ph) they looked at when you could restrict a parallel importer so that they could only re-label a product as opposed to applying completely fresh re-packaging which could include the trademark owners own trademark.

The ECJ said that it would need to be objectively necessary for parallel importers to repackage trademark products and the necessity related to whether the re-packaging would make effective access to the market where without it there would be hindrance due to strong resistance from a significant proportion of consumers who wouldn't take re-labeled products.

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The English Court of Appeals is not completely happy with the response from the ECJ and this has been sent back for further questions so if this is of interest to you, you need to watch this space.

So to recap we've looked at some of the factors to consider when choosing trademarks and service marks in Europe. Some of the factors that will affect registration and how these trademarks can be enforced.

And now I'd like to move on to design rights in Europe so please could you turn to the next slide.

Design protection in Europe looks different to that in the U.S., even if the outcome of the registered rights may be similar. We had new design rights introduced across Europe in 2001 and those are an unregistered community design right or UCR and a registered community design right which I've referred to as the RCD.

At the same time member states were required to get their own design law into line with the community ones and there are also a national unregistered design exists in the UK. Although I'm telling you about it I'm not going to talk about it today because its grounds for getting into slightly different and it isn't automatically granted to American companies.

So I'm now going to look at some of the colonization issues in a bit more detail. The new rights themselves and then move on to some practical pointers.

Please could you turn to the next slide. The registered designs director the number of which is on your slide was aimed to harmonize all national design laws to the same core standards. This means that when the community design rights were introduced as well the courts would apply the same law to that and to the national law and the changes in the UK took place at the end of 2001.

We now have a new definition for design. Previously you tended to protect a product to which a design was applied but now the design is defined as the appearance of the whole or a part of the product and it can result from steaches (ph) of lines, contours, ornamentation, colors, shape, texture and even from the materials of the product itself.

The product now covers both industrial and handicraft items. Computer programs are excluded from design protection but design protection will extend to packaging and get up and even to graphic symbols and typographic typefaces even though those can be within a new computer program.

You can also seek design protection for the components which are intended to be assembled into a larger product. However, design right applies only to the features which are on view when the product is in normal use so that might frequently exclude clever interfaces which would be hidden once the product had been assembled.

Please would you turn to the next slide. To obtain a design it must be new and have individual character. Infringement where you don't have an exact copy is judged by the affect of the overall impression on the informed user. I don't think we really know what all these phrases mean yet and we'll have to wait for the court to tell us.

The RTD is obtained by making an application to OHIM who also administers the community trademark and the unregistered design right comes about automatically on making the design available for the public.

However, to show infringement of the UCD you have to show that there's been copying where you don't have that where you have infringement of an RCD. So in some respects the RCD is more effective.

Please turn to the next slide. I only want to pickup a couple of points from this slide. Obtaining registered design protection in Europe is now pretty cheap and straightforward. The UK designs registry has seen a real pull off in its business would be the new ability to obtain single protection across Europe.

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One of the new features when compared to the previous UK position is you can put several linked designs into the single application. Before if you had a dinner service you would have to file a separate application for each cup and plate et cetera but now they can go in one application.

Another advantage is that you can seek design protection ahead of a product launch and then apply for deferred publication so that until you're ready to launch the design won't actually be published.

Please move to the next slide. There are a couple of disadvantages for the European wide right. Firstly your eggs all in one basket. So if someone successfully applies to revoke your company's design right then it will be revoked across the whole of Europe and not simply for one or two countries. The design rights are easy to obtain but then not fully examined for novelty or individual character and this means that there may be many registrations which are completely invalid.

This can create a significant cost for competitors to see a registered design right and decide to avoid it even though they may feel this is well known or lacks any originality.

I think I have a typo on the final line and it should read: "lose right to apply 12 months after release to the public and not 2 months."

Unregistered design rights comes into being immediately upon publication and lasts for 3 years but the registered right will last for up to 25 years but the application has to be made within a one year grace period following publication and both rights can subsist side-by-side.

Please could you turn to the next slide on designs and practicality. One of the practical issues that we're seeing at the moment are the dangers of copying items in Europe even though these items have no patent protection. I have recently been assisting a UK client where his US boss looked at the design proposal from a supplier to some packaging and thought that the business could make it itself more cheaply in one of their Far East factories but the results was quite embarrassing.

The supplier has complained both to my client and to its customer about the new design being copied and it may well have rights that are being infringed but its not necessarily worth all the investigation.

If your business has designs in Europe which you might wish to enforce even though you're not intending to obtain design registration then our advice is make sure that you keep appropriate records. That way, if you need to take urgent action in Europe you will have all the information at hand. Your records should set out who created the design and how it is that your business is the owner.

For example, whether it was created by an employee or a if it has been assigned by external consultants. The records should also indicate when the design was created and when it was put on the market.

We're currently doing a lot of work for high street fashion outlet. We're using the European unregistered design right to stop its competitors from copying garments. If we can show that our client's product was put on the market before the third party said he made its own creation then there is a strong inference that copying has occurred and that certainly helps us to make our case.

So to recap. The popularity of designs to protect product appearance and packaging is on the increase in Europe. Obtaining this protection and avoiding copying of competitors products is also becoming increasingly important and I'd now like to turn to our final topic of patents.

I'm sure that many of you will be aware of the patent system in Europe but I thought I'd just recap briefly. We lack a community wide patent. There have been several attempts to obtain one but they keep floundering on language issues and on the splitting of seeds between the nationalists countries. So instead we have national patents. These can either be obtained directly by

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applying to the relevant National Patent Office or from many European countries by applying to the European Patent Office. The EPO grants a bundle of national patents but the problem is that these then need to be enforced on a country by country basis.

Some European countries particularly the Netherlands and Germany, the courts have been readily granting injunctions covering other European states in relation to patents or the same bundle of patents granted by the European Patent Office but other countries like England, the courts have been reluctant to do this.

So if it comes to trying to sue or deciding where to launch it may be important to look at how the patent regime will affect that product. You can carry out clearance searches in Europe but we don't have the complex and willful infringement and triple advantages so if clearance searches are not carried out then you don't have the same level of risk.

And now I'd like you to turn to the next slide. In contrast to your patent law we have lists of types of inventions which even if they're new and inventive, nonetheless cannot be patented. These include inventions which are aimed at computer programs or schemes, rules or methods for performing mental acts or for doing business.

The wording is method for doing business as such or computer programs as such and the as such words are quite important because it means if you have an invention which is implemented by a computer program rather than being a computer program it may still be possible to patent it. The patent office has to look for a technical effect. This helps to distinguish the invention for a computerized filtering system which can produce a proper technical effect on the product.

From a computerized system for EG or queuing system or a method of standing in line. On the latter system we'd probably be rejected as a business method and lacking technical effect.

The European Commission was worried that there were differences across Europe as to how software was being patented and put forward the directive to harmonize the position but this caused a huge storm amongst an anti-patent lobby who felt that software should be freely available and the software directive has now been abandoned.

I think that in practice this will have very little effect and software will continue to be patented where there is a technical effect. This has been happening across Europe and particularly from the EPO for sometime. The UK Patent Office has just announced that it's going to follow the EPO practice much more closely because there were a few differences although the UK Patent Office is pretending that they weren't. But I think the attitudes of the EPO like the U.S. PTO are hardening in your ability to get patents for some of these inventions.

If patent protection is important for software products in Europe then I would very much recommend that local advice is taken as to how the patent application should be drafted. The requirements of the EPO and the U.S. PTO as to what needs to be drawn out from the invention are quite different and if the right information is not emphasized then the EPO can end up refusing to grant a patent when it's too late to re-draft it even though it had been written as the EPO requires it then the invention would have led to a granted patent.

So we've looked at some of the differences between the U.S. and Europe in terms of protection for your company's new products and the launch and what third party rights you need to avoid.

And now I'd like to thank you for listening to us and to hand back to Michelle.

Michelle Foster - *Symbian Software Limited - General Counsel*

Thank you, Vicki. Thank you very much for those excellent presentations on these various aspects of trademark design and copyright patent protection in Europe.

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We have received several questions which I would like to pose to yourself. We have a few minutes before the end of the hour and the first of those questions is, 'can one do clearance searching on designs?

When responding could you please tell whether its yourself, Vicki or Sally who will respond to the question?

Vicki Salmon - *Eversheds - Associate, UK and European Patent Attorney*

Hi, it's Vicki. You can do some clearance searching for designs because you have to look through the pictures. They can take quite a long time. The UK and the OHIM registries have been quite slow to produce good searching databases but you can search on names and you can also search under the Locarno Convention but there's quite a big pile to look through.

Unregistered design searching is very difficult and is not something that I would recommend as something which would be cost effective.

Michelle Foster - *Symbian Software Limited - General Counsel*

Thank you. Thank you for that. We have a second question as well. Could you briefly address whether shapes can be registered?

Sally Shorthose - *Eversheds - Partner, Head of Non-Contentious IP*

Hello, it's Sally here. Yes, there have been successful cases where shapes has been registered as trademarks. There are in addition to the usual rules there are three further restrictions on the registrability of shapes. They're set out in Article 3.1 of the Rosen Directive.

So they say a sign can't be registered as a trademark if it claims this exclusively all in restricting a) the shape which results from the nature of the goods themselves. So an example here if you think of the JIF Lemon case which was won successfully by JIF so the goods to lemon juice does the shape of the plastic lemons result from the nature of the goods. And the answer is no. Lemon juice can be and is sold in ordinary bottles.

And there is another case Philips where it's held that the mark which was that they're trying to register the head of the razor was not excluded because electric razors could be and were made into several shapes.

The second exclusion is the shape of goods which is necessary to obtain a technical result. So lets think about telephones. Now there's certain minimum requirements for telephones. You practically need an earpiece of various size, a mouth piece and an aiming the dialing but we didn't after all an infinite range of possibilities, some of which can be quite distinctive. And when considering these the authorities often try to prevent protection by trademarks of features pictured more properly protected by patents or design rights.

The third exception is the shape gives substantial value to the goods. This could be quite problematical so lets go back to JIF again. Lemon juice sold inside of plastic lemons we'll presumably command a higher price than lemon juice sold in an ordinary bottle or actually in a real lemon.

Does the packaging, therefore, add substantial value? Actually I think the answer to that question you probably know there but again in the Phillips case he said that this exclusion mustn't be taken too literally. He said that the exclusion referred to shapes which exclusively adds some sort of value so design or functions or appearance or perhaps something else to the goods disregarding any value attributable to a trademark for identification function.

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So the shape it had was excluded under this section as well and in Veneto which was about ice cream they're trying to register the way the ice cream is Veneto. The judge there noted that those grounds should have not been pleaded that it was clearly arguable - probably strongly arguable that the appearance adds value to the product and may serve only that purpose being essentially a basic creation.

There have also been cases involving chocolates where a shape mark has been refused on the grounds of lack of distinctive character or descriptiveness. Other exclusions are public policy or deception or (inaudible) numbers are restricted. In short the answer is yes you can register a trademark for shape but there are quite few hurdles to overcome on the way.

Michelle Foster - *Symbian Software Limited - General Counsel*

Thank you that was very, very helpful.

I would say that we are coming to the end of the session now so I would like to thank our presenters for those excellent summaries and discussions that we've been having this afternoon and I would say that if anyone has any further questions please refer those questions to either Sally or Vicki. I believe you have their details either on the website or you can find them as well on the slides which you have had before

And with that we would like to close these presentations and say thank you very much to the audience for participating and sending their queries in and thank you very much.

Vicki Salmon - *Eversheds - Associate, UK and European Patent Attorney*

Thank you Michelle very much too. Good bye.

Michelle Foster - *Symbian Software Limited - General Counsel*

Good bye.

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