



DOING BUSINESS IN EUROPE

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Europe-A Fortress or a Monastery

Over the past few years, the US has tended to see the EU as "fortress Europe." I think an architectural metaphor would be more useful. The outsider wishing to do business in Europe faces three legal structures. First are the 15 national legal systems. Secondly, there is the expanding courtyard of common regulation at the EU level. The third is a web of what are essentially international agreements which, though reliant on the sovereign nature of their EU member state signatories, is premised on the economic integration provided by the EU structure. While the latter is important, for example, in providing a basis for enforcement of judgments, cross-border IP injunctions, and other important legal effects and structures, the technical nature of these agreements places it beyond the scope of this discussion.

Until recently, EU law had only to contend with its own goals of creating a single market and building international competitiveness. With the rise of e-commerce, however, this situation is further complicated. Over the past few years, the EU has drafted considerable legislation dealing with varying aspects of e-commerce, none of which has yet been formally enacted. The operation of e-commerce has already had considerable effect on the workings of existent legal structures in European countries. Among the effects has been the rendering ineffectual of certain national laws which the member states had never intended to sacrifice on the altar of European harmonization. What I would like to try to do is to untangle these three legal strands to try to make the whole comprehensible to the American company wishing to do business in Europe, and to give you a few ideas about where problematic areas are located and what is on the horizon.

It is almost impossible to say which of these—the individual national systems or the EU system—is foremost. The safest thing to say is what lawyers often say to everything— "It depends." Much of the EU legislation affecting any given sector is incorporated into national law through Directives—a sort of command from Brussels to the member states requiring them to achieve a certain legislative goal by a certain date in a manner appropriate to each state's legal system. The Design Directive is a good example of this. Other Directives of importance to American textile and clothing exporters include the Trademark Directive, which harmonizes certain aspects of trademark law, various copyright Directives which harmonize protection of computer programs, length of protection, and the 1997 Directive on Comparative Advertising. Most of the legislation dealing with the internet will be in the form of such directives.

Some EU legislation on the other hand becomes a part of the law of each member state upon publication in the EU Official Journal— these are Regulations. The Regulation creating a European design right is an example of this. Similarly an EU-wide Regulation exists through



which Trademark registrants may treat the EU as a single territory. A 1994 Regulation provides measures to prohibit release for free circulation into the EU of counterfeit goods.

While much legislation relies on incorporation into national law, overriding concepts of EU law are often only operational, and sometimes only visible, when one steps back and looks at the EU as an entity. Article 10 of the EC Treaty provides, for example, that "products coming from a third country shall be considered to be in free circulation in a Member State if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that Member State." This is similar to what imports to the US face and nothing is particularly foreign about that. What regulations and possibly barriers those products will encounter after entry, however, are not always clear. Some things depend on the legislation in operation where the sales are made. Other legal rights (e.g., the ability to protect a trademark or patent) can be handled at the EU level, at the national level, or even at the international level, depending on the seller's objectives.

Although much national law has been harmonized, or brought into compliance with a common scheme set out at the EU level, much national law has not been harmonized and probably never will be. And as if the complexities involved in creating and using a workable package of 15 legal systems are not enough, there is of course the added confusion created by the internet, e-commerce in particular. E-commerce has had the effect not only of instigating a whole raft of new EU legislation designed to create a level field where European companies and consumers can operate safely and effectively but also of rendering ineffectual many national laws which were never intended to be modified by membership in the European Union. Because the EU legislation slated to be enacted in the near future may not be in its final form, I will not address the technicalities of this body of law but will only mention some areas in which e-commerce has already affected the workings of national law.

Lands End Meets Europe

To make all this into something more concrete, I am going to expand upon a real situation that has been in the news to explain how European Union and national law may affect a product imported into the EU. My example involves Land's End, which began to export backpacks, among other things, to Germany through catalog sales in 1996. Products contained in the Lands End's catalog come with a standard lifetime guarantee-this is the way Lands End does business worldwide. While Lands End encountered no difficulty with its guarantee in other European countries, shortly after it commenced its German operations, it was sued by the German agency that monitors advertising for violation of national unfair competition law.

Unfair Competition-A Relic Lives On

This "unfair competition law" is not the law of cartels and abuse of dominant position, or anti-trust law. It is rather a body of law in each individual country which sets out the ethics of its own



marketplace-what lengths a seller can or cannot go to sell his product. Usually developed through case law, the concept of unfair competition constitutes a strong element in all European systems and it is said to be the area of law which differs the most from one European country to the next. It has been the source of many disputes over obstacles to free movement of goods within the EU itself. It is widely acknowledged that no harmonization of this field will take place (though the World Intellectual Property Organization is attempting to draft harmonizing legislation on a worldwide basis), given the strong roots which the laws have in the local cultures of the Member States. In other words, these laws, as varied as they are, will remain applicable to all commerce within the various member states.

The problem with the lifetime guarantee on the Lands End backpacks was that in October 1998 the German Court of Appeals held such statements to be "economically unfeasible," therefore prohibited. This finding was based partly on the fact that the German Statute of Limitations (period within which a party can sue for relief) is 30 years. A lifetime guarantee therefore violates Germany's Unfair Competition law in that Lands End is promising something that the consumer cannot rely on as enforceable under German law. It was also found to be in violation of the German Act on Premiums (i.e., an unpermissible addition to the goods). Lands End was required to remove the guarantee in its German catalog even though it had encountered no such obstacle in any other European country.

Enter E-Commerce

E-commerce diminishes the significance of this because German consumers need only log on to the Lands End US website to become aware of the guarantee. It must be noted that Lands End is appealing this case and, given the German court's tendency to be able to see the way the wind is blowing, this might be overturned by the Supreme Court.

Under EU law, once a product like the backpack in question legally enters any country in the 15-member EU, it is considered to be in free circulation for customs purposes in all 15. This does not mean it will not be subject to separate laws of the individual member states, some of which may be circumvented by the conditions of e-commerce. Many German consumers have gotten around local laws (e.g., those prohibiting discounts or sales prices except for two two-week periods per year) by shopping on line. Many have avoided customs and value-added taxes by buying from private dealers through e-bay. Though Germany's laws prohibiting auction sale of goods not physically displayed sometimes been avoided by on-line shopping, one German auction site selling clothing was sued by an association of traditional auctioneers based on a 100-year-old law that requires auctioneers to obtain a permit for each auction and make a public exhibition of goods. (The Court, apparently recognizing the perils this presented for the expansion of e-commerce, held that on-line auctions were not really auctions but sales to the highest bidder and therefore not subject to the laws.) Germany's law that sellers may not sell their goods at different prices to different buyers has prevented the practice of reverse auctioning common on the internet whereby the buyer offers a price and it is left to the seller to accept it.



Advertising is also regulated at the EU level, the most recent legislation being a 1997 Directive on Comparative Advertising. While this new Directive has yet to be implemented in all member states, German courts have already shown their willingness to apply its provisions. In addition, they appear to be taking a looser view of discounts and premiums, in keeping with emerging standards and conditions of competition. Potential obstacles and modes of circumvention exist in all EU member states. Germany is a particularly good example because its laws are often the model for EU laws and because Germany's commercial law is particularly well developed. However, activities unregulated by EU legislation are merging in various member states. One example is the prohibition on "cold calling."

However flexible a member state's courts might be, it must be remembered that it is only natural for European companies and other groups to use the law, whether national or EU, to limit outside competition. For this reason, it is important that American companies follow these developments closely. This is particularly crucial since part of the new regime under consideration by the EU would allow consumers to sue on-line sellers under their own laws regardless of whether the site targeted the country in question. Thus 15 different sets of consumer laws could be used against a single on-line merchant.

Other Aspects of EU Law

From the point of view of intellectual property, a company like Lands End would want to protect its trademark. EU trademark law is based on registration rather than use, whether at the member state level, the EU level, or through international provisions such as the Madrid Protocol to which the EU and all member states are signatories. When Lands End becomes aware that counterfeit goods are entering the EU, they may use the above mentioned EU Regulation to stop entry of the goods at any EU external border. Internal copyright protection of, for example, fabric design, is governed for the most part by national law, and member states' laws in this area vary considerably. Many states have overlapping protection for design and copyright. England provides that industrial goods such as machine-made fabric, though otherwise subject to 70-year protection under copyright, may be limited in its protection to the 25-year design period. France has particularly strong laws to facilitate the protection of textile designs and allows overlapping copyright and design protection. The benefit of choosing one over the other is something the rightsholder will want to explore if rights are being infringed.

Although much of the appeal of American clothing is contained in its classic styles and reputation for durability and performance, many items will nevertheless benefit from design, or even patent, protection. Even though a design may not be protectable in the US, it may well be protectable in Europe. Novel backpacks have been subject to design and patent protection in the various member states. Patents may be sought at the national level or through the European Patent Office, which, though not an EU institution, may grant a package of national patents for any or all member states. EPA has 19 members and offers centralized registration and validity provisions. Many EU member states also have utility model or petty patent laws under which



small inventions may be protected with less red tape than required to obtain a full patent.

Harmonizing legislation is in the works for this form of IP at the EU level.

Fiber names and fiber content constitute another area subject to EU-wide legislation. Artificial fiber names may be protected by trademark. In addition, EU regulations set out the fabric content requirements that must be met for various natural and artificial fibers for a seller to describe a product in terms of fiber content. If a company wished to describe a particular product as made of polyamide or lyocell, the requirements of these Regulations would have to be complied with.

Parallel Imports-A Big Issue

Two other areas of intellectual property (IP) law need to be mentioned. The first involves an issue which is complex but crucial to understand if one wishes to make the most of one's intellectual property in Europe and avoid unnecessary legal trouble-parallel imports. The grey market goods issue originated in the EU and has always posed a particular problem to the concept of free movement of goods. The issue is basically whether the holder of a trademark or a licensee can rely on that license to prevent the entry of legal, but unlicensed, goods into a national territory. Traditional IP law, organized on a territorial (single nation) basis provided for such exclusivity. Under the principle of free movement of goods in the EU, this becomes problematic. The EU has developed case law so that once a product is put in the market anywhere in the EU, its circulation cannot be prevented based on IP law. A license in one country gives the holder the right to export to the others.

For American IP rightsholders, this means effectively that, while you can license the right to use your trademark to different parties in different countries, you cannot use those licenses to divide the EU market by country once your goods are on the market in EU territory. You can charge different prices, but you cannot keep legally produced goods from other EU member states to maintain your price differentiation. This has been an issue before European courts for 30 years and is still highly contentious. Part of the 1989 Directive harmonizing trademark law was addressed to this question. The most recent developments in this area are still controversial-Italian Courts have allowed Calvin Klein and Eastpak to keep down-market goods destined for the non-European market out of Italy, where the companies wish to maintain high-end reputations. In England strong pressure from consumer groups has led Parliament to espouse the view that excluding parallel imports of legitimately produced goods from outside the EU constitutes price-fixing. In their recommendations that WTO take a harder line, practices of Calvin Klein and Levi Strauss in pricing their Euro-pean goods well above their American counter-parts have received specific mention. The bottom line is that price differentials among member states cannot be maintained by excluding goods from individual European countries using IP law.

Alternate Technologies May Also Infringe

The second is best illustrated by an injunction issued by a French court in a trade-mark infringement case involving unauthorised internet transmission of copyrighted material on fashion designs and from fashion shows. The suit was filed by Christian Dior against producers



and service providers of a commercial web site for reproducing and electronically disseminating fashion designs and photos of collections and marketing of counterfeit video clips from Dior fashion shows. The point here is that trademark infringement actions can arise not only from selling counterfeit goods, or even parallel imports, but may be based on the mere act of unauthorized internet transmission. Although there is considerable harmonization and operating at the EU level, the character and content of national legislation is still ignored at one's peril.

Protecting Genetically Modified Fabrics

Protecting fabrics containing patented genetically modified fibers is another area to watch in Europe. While the Biotech Directive was finally enacted in 1998 after years of dispute among states and NGOs, the Netherlands is seeking to set this directive aside. Much of the work in this area has been with cotton fibers, whether designed to produce cotton fabric which requires no ironing, is blue, or is softened by rabbit genes. Other fibers, such as green silk from worms containing plant genes, have also benefited from biotechnological advances and are subject to patent protection.

The European Textiles Market

This new Europe is today the largest importer of textiles in the world (the US is the second largest), and therefore an extremely important market for US textile and clothing companies. It is also a major exporter of textiles-Germany is the largest exporter of textiles in the world-and is still characterized by a protectionist bent in spite of the effects of the 1995 World Trade Agreements provisions on textiles and clothing which will open up all markets by 2002. This primordial urge for national protection, common to all countries, combined with a law-savvy sector in an increasingly legalistic world which is ready and willing to use the law to limit the power of, if not exclude, competitors, makes it mandatory that US exporters at least go in with their eyes open with regard to legal provisions which may be used against them.

Europe as a Legal Entity

The European Union is a legal entity; it lacks the characteristics of exclusive sovereignty over its territory and population. It exists only in law as the structure set out in its constitution or what is since May 1, 1999 known as the Treaty of Amsterdam. The EU has sought through secondary legislation (Directives and Regulations) and amendments to its constitution to replace national laws, which may obstruct free movement of goods and services or limit the EU's competitiveness in the international market, with common legal structures. The EU is basically a customs union which has expanded its domain into all aspects of life.