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# European IP and Regulatory Issues

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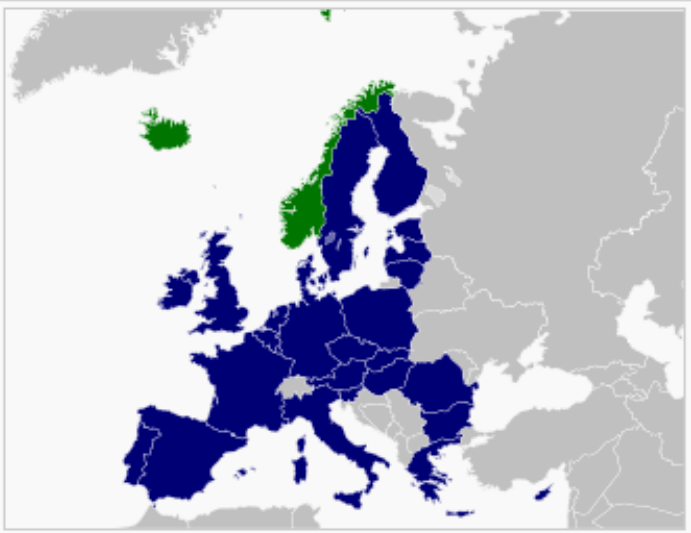
# European Union



The EEA is composed of the;

EFTA member countries (except Switzerland)

European Union member-states

| | | |
|---|---|---|
| Austria | Greece | Netherlands |
| Belgium | Hungary | Norway |
| Bulgaria | Iceland | Poland |
| Cyprus | Ireland | Portugal |
| Czech Republic | Italy | Romania |
| Denmark | Liechtenstein | Slovakia |
| Estonia | Latvia | Slovenia |
| Finland | Lithuania | Spain |
| France | Luxembourg | Sweden |
| Germany | Malta | United Kingdom |

# Current state of rules relating to jurisdiction

**The new IP trends are**:

1. Fortress Europe (local not international exhaustion)
2. Wider assumption of jurisdiction where not constrained by statute

**Current state of rules**

- Registered rights: constrained by EU Regulation 1215/2012 (ex 44/2001 Article 24)
  - Exclusive jurisdiction of the courts where register is located
- Constrained by statute:
  - Rule is that jurisdiction pan-EU based on site of defendant's domicile
  - Anywhere else is just local jurisdiction (EU Community trade mark Regulation 207/2009 and EU Designs Regulation 6/2002)
- Based on general EU Regulation principles (*Lucasfilm v Ainsworth [2011] UK SC 39*)
  - Copyright, breach of confidence, common law torts like passing off (double actionability has gone)

# What does a pharma company need to succeed in Europe?

## Patents

- Its own patents or the ability to attack third party patents for generics
  - First mover advantage
- What is the effect of the Community Patent?
- To bundle or unbundle?
- Sue for invalidity in the Unified Patents Court or use local courts
  - Choices to be made:
    - ✓ Now
    - ✓ When the court opens
- Buying off the opposition (reverse premiums)
  - Under severe scrutiny (EC Commission sector investigation - Les Laboratoires Servier)
- Patent strategies to prolong patent life
  - *Arrow v Merck [2007] EWHC 1900 (Pat)* – use of divisionals and withdrawal of GB patent in favour of EP application

# What does a pharma company need to succeed in Europe? (2)

## Trademarks

- Local exhaustion of rights
  - Importation and infringement
    - *Zino Davidoff v A&G Imports and Levi Strauss v Tesco Stores ECJ joined cases C-414/99, C-415/99 and 416/99 (20 November 2001)*
    - *Silhouette v Hartlauer ECJ Case C-355/96 (16 July 1999)*
- Passing off and unfair competition
  - *Inter Lotto v Camelot [2003] EWCA Civ 1132*
  - Civil law systems
- Channels of importation
  - Through an EU port of entry
    - Seizure rules - EU Regulation 1383/2003
      - ✓ Mainly trademarks and copyrights - but also patents
      - ✓ Pre-notification to customs
      - ✓ Ten days after seizure to sue or release
    - Complaints made by Indian pharma companies resolved through negotiations after WTO complaint

# Trademarks: free movement rules

## Applies also to patents

- Arbitrage between EU member states especially in pharma (e.g. *Bristol-Myers Squibb v Paranova ECJ Case C427/93 (11 July 1996)*)
  - Provided status of goods inside the package is intact, can repack and apply original mark
  - Can translate the instructions (obliged to do so)
  - Still need to conform to regulatory approval but fast-tracked
  - Doctrines of (i) necessity and (ii) no serious damage to the trademark
- But there are some grounds for dividing the market:
  - Splitting of trademarks
    - *IHT v Ideal-Standard ECJ Case C-9/93 (22 June 1994)*

# Latest position: pharmaceuticals

- The basic framework is encapsulated in the EU Medicines Directive 2001/83/EC
  - Now bolstered by the EU Falsified Medicines Directive 2011/62/EU
    - ✓ Now need a licence to wholesale medicines for export
- Medical devices are dealt with under a separate regime using CE marking – EU Directive 93/42/EC
- The big question of the moment is the extent to which pharmaceutical companies must disclose secret data during trials
- *AbbVie v EMA General Court Case T-44/13 (25 April 2013)*
  - Appeal case in progress before the ECJ Case C-389/13
- *InterMune v EMA General Court Case T-73/13 (25 April 2013)*
  - Interim Injunction Awarded against EMA
  - Appeal case in progress before the ECJ C-390/13

# The Framework of the Medicines Directive

- For new medicines a dossier relating to safety and efficacy is required
  - The contents of the dossier is the result of toxicology, phase 1, phase 2 and phase 3 trials - these are clinical trials on healthy individuals (~10) for establishing efficacy and safe limits (~150), and long term safety and efficacy (~1000)
  - Also there are requirements for labelling, packaging and good pharmaceutical manufacturing practice (quality of plant, impurity profile etc)
- On product launch you get ten years protection against read across of the data by generics
- Local approvals being phased out gradually in favour of EMA
  - Generics approved locally and use the decentralised process
  - Biologics and complex molecules use the centralised EMA process
    - ✓ Biologic Generics likely to have to use EMA process

# Orphan Drugs

- An **orphan drug** is a pharmaceutical agent that has been developed specifically to treat a rare medical condition, the condition itself being referred to as an orphan disease
  - Not more than five sufferers per 10,000 population or uncatered for seriously debilitating or chronic disease.
- In the EU it is easier to gain marketing approval for an orphan drug, and there may be other financial incentives, such as extended exclusivity periods, all intended to encourage the development of drugs which might otherwise lack a sufficient profit motive (EU Regulation 141/2000)
- The assignment of orphan status to a disease and to any drugs developed to treat it is a matter of public policy in many countries, and has resulted in medical breakthroughs that may not have otherwise been achieved due to the economics of drug research and development
- You get ten years' exclusivity - may be reduced to six years if the drug is very profitable by Year 5
- Patent infringement rules apply, so mainly look at old substances which are off-patent
- May be a way of getting early approval and experience with a drug which has wider applicability, and levering off the orphan drug experience

# Getting added protection

- **Patent policy**
  - SPCs for the active ingredient for up to five years (EU Regulation 469/2009 Article 13)
  - Further two years available for paediatric applications (Articles 7 and 8)
  - Change of dosage regime (patentable)
  - Change of physical form (patentable)
  - Different composition of matter (formulation) (patentable)
  - Not a patent extension but based on the protection conferred by basic patent
- Up to five years added protection if regulatory process takes more than 15 years
- **Regulatory policy**
  - Withdrawal of old product licence for the new licence
    - ✓ Probably anti-competitive if to remove regulatory rights to defect generics
  - Claims of six year added data exclusivity period
    - ✓ But if taken too far, may run into competition issues
    - ✓ *AstraZeneca v Commission ECJ Case C-457/10 (6 December 2012)* - ECJ fined €52.5m for preventing the marketing of generic Losec

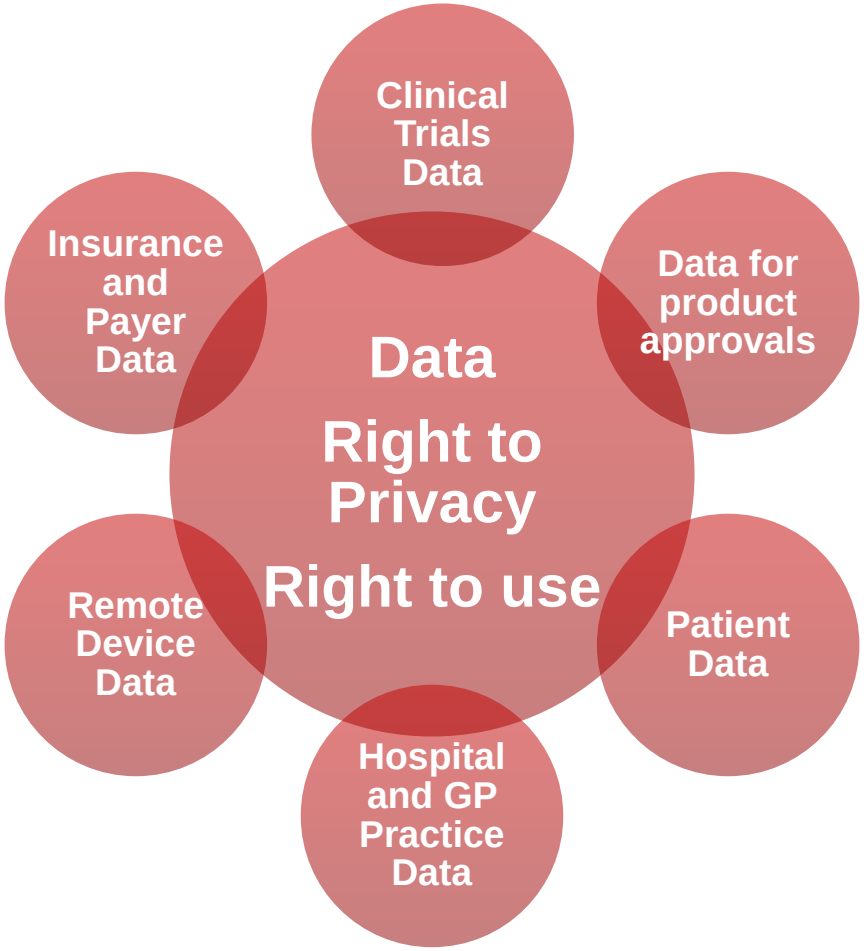
# Second medical use patents

- Enables patent protection for a new use of an existing active ingredient (Mobil's patent) (European Patent Convention Articles 54(4) and (5))
  - Not limited to pharma
  - Cannot claim active ingredient - but only active in second use (which must be novel and have an inventive step)
  - Usual to claim as a pharmaceutical composition
  - If master patent is still current you will need a licence under it
  - The use of substance X for treating disease Y is now patentable (G2/08 Kos (19 February 2010) in the EPO and UK Patents Act 1977 Section 4A (added by amendment))
- The commercial danger is generic substitution
  - By doctors or pharmacy if first use product has same composition
  - Even if off label (may be reimbursement issues)
  - Hence need for a unique formulation
- Regulatory approval should be easier as tox profile and safety package of the active ingredient is already established
- Mixtures means the need to produce a new tox package
  - Case Law in UK
    - ✓ *Actavis v Merck [2008] EWCA Civ 444*
    - ✓ *Novartis v Hospira [2013] EWCA Civ 583*

# Conducting clinical trials

- Data protection issues
  - Use outside agency
  - But do your own independent analysis of the results before release of results
  - You need informed consent from the patient
  - The patient must not be identifiable from the data
    - A postcode may be sufficient for a rare disease
  - Need to depersonalize the data
  - If informed consent is not possible the Ethics Committee will need to justify selection of candidates
  - Testing against placebo may be unethical and/or may give a wrong end point
- The choice of end point is the most critical issue
  - It can turn a successful trial into an unsuccessful trial
  - The FDA and EMA will not easily allow you to re-analyse a trial to turn failure or neutrality into success
  - The (costly) solution is another trial with a different end point
- Transparency issues
  - Use of outside agency avoids conflicts of interest and allegations of collusion
  - Avoid taking a commercial interest in the product of the trials you are conducting
- Ethnicity issues
  - Different diseases affect different ethnic groups differently - so phase 3 testing may need to cut across different regions

# Sources of data



# Specific data regulation - European rules

## Processing of Sensitive Data

- Explicit consent
- Protect vital interests
- Strictly for medical diagnosis and treatment (if health professional)

## Export Restrictions

- Adequate country or “Safe Harbor”
- Model clauses
- Binding corporate rules
- Unambiguous consent
- Protect vital interests

New rules on the horizon – specific scope for variations nationally in healthcare

# Explicit consents for data dissemination

| Patient | Collector | Aggregator |
| --- | --- | --- |
| • Explicit consent<br>• Informed<br>• Freely given<br>• Positive opt in<br>• Withdrawal | • Controller<br>• Need to obtain consents<br>• Recordable format | • Anonymisation<br>• Controller<br>• Need to keep track of consents<br>• Monitor withdrawal and data retention |

# Anonymisation of data

## Anonymisation

- Encryption
- Can de-encrypt
- Encrypted data is private data which is difficult to access
- It is more or less secure
- There may still be liability for breach
- Anonymized data is aggregated data where the individual subject cannot be identified

## Identification

- Zip Code +
- Age +
- Sex
- Can identify any individual

# Setting up distribution

- There are strict rules on distributing pharmaceutical products
  - Based on national requirements
  - EU Directives 2001/83/EC and 2011/62/EU
  - EU Guidelines on Good Distribution Practice of Medicinal Products for Human Use (2013/C 68/01)
- Need to have licensed premises
- Need to have a local address in EU
- Need to have a responsible person on-site when product is distributed
  - Regulation 45 Human Medicines Regulations 2012 (UK)
  - Ensure provisions of the licence are observed
  - Keep adequate records
  - Ability to deal with product recall
- Licence now required even for export
- Need to have reporting structure for pharmacovigilance

# Advertising pharmaceutical products

- Strict rules about advertising pharmaceutical products
  - Primary legislation
    - EU Medicines Directive 2001/83/EC
    - EU Misleading Advertising Directive 84/450/EC
  - Interpreted at local level
    - Part 14 Human Medicines Regulations 2012 (UK)
  - No entertainment or significant gifts to doctors
  - Bribery legislation is a real issue
- Statutory code requires
  - Follow the rules
  - Set out in “The Blue Guide” (MHRA)
    - 112 pages long
    - Must be followed or liable to administrative action
  - Criminal prosecution is reserved for serious cases
  - Subject to special rules in the UK e.g. the Advertising Standards Authority
    - Claims must be rigorously justifiable
    - Limited advertising possible to key stakeholders depending if OTC, or prescription only
- May be dealt with by administrative action

# Comparative Advertising

- Sits on top of trademark law - EU Directive 2006/114/EC
- Prohibits misleading and unfair comparative advertising
  - Claims must be fair and justified
  - The claims must be objectively relevant taking the products as whole
    - But do not require exact comparisons
  - They must not discredit or denigrate a third party trademark or sign
  - Must not create confusion amongst traders or customers.
    - *Lidl v Vierzon ECJ Case C-159/09 (18 November 2010)*
    - *O2 v Hutchinson ECJ Case C-533/06 (12 June 2008)*

# Analogous products - cosmetics

- Is the product a medicine or does it come within a different regulated regime?
  - EU Cosmetics Regulation 1223/2009
- **Cosmetic products** are substances or mixtures of substances intended to be placed in contact with the external parts of the human body (epidermis, hair system, nails, etc) or with the teeth and the mucous membranes of the oral cavity with a view exclusively or mainly to cleaning them, perfuming them, changing their appearance, protecting them, keeping them in good condition, or correcting body odours
- **Free movement of** these products in the internal market is permitted if they comply with this Regulation
- **Market surveillance**
  - A **responsible person** established in the Community shall be designated for each product placed on the market. This person shall ensure compliance of the products with the rules set out in the Regulation. In particular, they shall ensure compliance with requirements relating to human health, safety and consumer information. They shall maintain a product information file accessible to the public authorities
  - In order to ensure product traceability, responsible persons shall identify the distributors to whom they supply the cosmetic product: for a period of three years following the date on which the batch of the cosmetic product was made available to the distributor. The same applies to all other persons involved in the supply chain

# Summary of foods & cosmetics

- Novel Foods (EU Regulation 258/97)
  - Applies to foods and food ingredients in the following categories:
    - Foods and food ingredients which present a new or modified primary molecular structure;
    - Foods and food ingredients which consist of micro-organisms, fungi or algae;
    - Foods and food ingredients which consist of or are isolated from plants and ingredients isolated from animals; and
    - Foods and food ingredients whose nutritional value, metabolism or level of undesirable substances has been significantly changed by the production process.
    - Food regulation does not cover GMOs.
- For both cosmetics and foods there is overlap. In patent a pharmaceutical product may require a prescription, whilst a food or cosmetic product does not. This has a significant effect on the strike price

# Reimbursement

- Matter for national governments
  - Most EU countries have centralized buying e.g. in the UK - the NICE and NHS Pharmaceutical Price Regulation Scheme
  - There are 3 issues: approval, efficacy and price
  - They are interlinked:
    - Look at number of people who will benefit, the cost and the expected outcome
      - ✓ An expensive cure is ok, but just prolonging life by a short time may not be sufficient
      - ✓ One new strategy is a change of product licence holder on patent expiry
        - ❖ Leads to big price rises when a new PL company hikes the price and there is no other generic substitution- Exparatin led to price rise from £0.57 per 50mg to £16 per 50mg when Pfzier Ltd sold to Flynn Pharma
  - Can average cost - can charge more for some drugs and less for others if average price is in the correct range
    - Need to avoid fraud

# Adwords and liability

- The question is the extent to which the Adword is adopted (an adword is the listing of your own trademark in response to a third party trademark)
  - *Google France v Louis Vuitton ECJ Case C-236/08* and *Google France v Viaticum ECJ Case C-237/08 (both 23 March 2010)*
  - *Interflora v Marks and Spencer [2013] EWHC 1484* and *ECJ Case C-323/09 (22 September 2011)*
    - The basic rule is that adwords are permitted provided the consumer is not misled into thinking that there is an association or economic link with the other brand or you are free-riding on the other brand's reputation
    - The link was shown in the Marks and Spencer case when the public thought that Marks and Spencer was part of the Interflora Network

# Liability and internet trading

- Is the website aimed at a particular country?
  - Mere accessibility does not confer access
  - *Euromarket Designs v Peters [2000] EWHC 453*
  - *Sony v Pacific Game Technology [2006] EWHC 2509*
- ISPs are generally free of liability if they act as a mere conduit and do not interfere with the goods
  - Articles 12-15 EU Directive on E-Commerce 2000/31/EC
    - If caching, hosting or mere conduit then there is no obligation to monitor
    - But can be ordered to take down - Copyright, Designs and Patents Act 1988 Section 97A (UK) and *Twentieth Century Fox v British Telecommunications [2011] EWHC 1981*
- Auction and other internet sites are more vulnerable depending on the degree of involvement in goods which are counterfeit or non-permitted parallel imports
- *L'Oréal v Bellure ECJ Case C-487/07 (18 June 2009)* and *[2010] EWCA Civ 535*
- *L'Oréal v eBay ECJ Case C-324/09 (12 July 2011)*

# General data protection

- New tightened rules
  - Europe is the tightest area in the world
  - Need a data controller to monitor data
    - Each member state has an information commissioner
  - The basic rule is that personal data needs to remain in Europe
    - Safe harbor provisions under 2007 EU/US Agreement - if the data is protected
    - No 8 principles
    - No safe harbour agreement with other non-EU countries
    - Safe harbour provisions are no longer in force
    - If data is to be exported outside the EU it must no longer be capable of identifying the individual
    - The EU Commission has approved model clause protection laws
      - ✓ Depends on data of country of export
      - ✓ Of particular importance to clinical trials and other pharma work
      - ✓ May affect call centres
      - ✓ *Twentieth Century Fox v British Telecommunications [2011] EWHC 1981* (Newzbin 1 and 2) - originator involved international piracy streaming from the Maldives and a stop order was granted as there was no other way to enforce