

# IP IN EUROPE

A Greek drama in many, many  
episodes



***BRUSSELS***

***Mannekin Pis***

***I.P. in Europe ?***

**Filip De Corte**

*Chief IP counsel Europe CARGILL, Mechelen Belgium*

# A Greek drama

- ▣ Hellas - Europe
- ▣ Recent financial problems

EUROPE is  
**NOT**  
a country



# The fundamental problem



**“TRULY” FEDERAL  
COMMISSION  
PARLIAMENT**

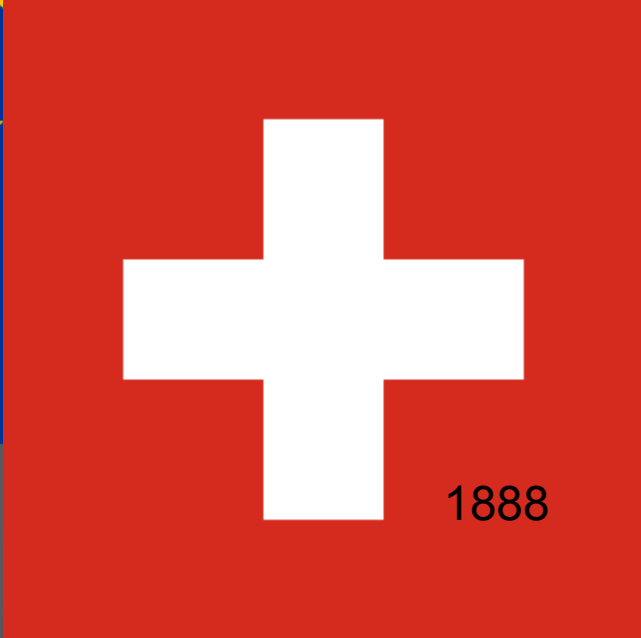
**COUNCIL  
PRESIDENT  
Mr. EUROPE**



No product claims in Spain, Portugal and Greece until 1992 !



1910



1888



1011001111000010010010000101  
1111001000101111110010100010  
100100011001000110010001001  
0000111111100101011001001100  
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**COPYRIGHT**

## BUSINESS IDEA

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usedSoft trades with second-hand software licences, which have been resold at least once by developers or dealers directly to users. Those licenses handle non-material copyrights for software. Used software is traded basically for two reasons: First, applications may run out of use, e.g. after mergers and insolvencies. Second, software licences are purchased, but do not get to be used. For instance, the market research company Gartner estimates that 42 percent of the CRM software licences are unused. According to Meta Group, 15 percent of the sold business intelligence tools have never been used at all. Thus, the purchase of second-hand licences offers the user companies significant saving perspectives compared to the initial software acquisition – without having to cope with any disadvantages in exchange, since

- software cannot wear out.
- usedSoft guarantees and notarises the legal security of an acquisition by purchase and sales invoices, respectively licence certificates.
- the after-sales services of the developers (maintenance, support) for all software licences sold by usedSoft are available to the user without any restrictions.

Yet, not only the purchasers of used licences benefit from this concept: The second-hand market also offers overlicensed enterprises the chance to sell licences which are no more needed. Thus, part of the formerly invested assets can be repatriated to the company.

### The Business Concept

**Purchase:** Due to excellent connections to users on an international level as well as to liquidators, usedSoft has a wide portfolio of inexpensive software licences for all application areas. **You wish to sell licences?** usedSoft buys in software licences rendered useless from enterprises and other institutions. This may be due to system changes, staff reductions, cuts in business segments, respectively insolvencies etc. Moreover, when selling software, usedSoft accepts other used licences as payment. On demand, usedSoft can also update purchased licences of older software versions.

**Sale:** Generally, usedSoft has software licenses of the prevalent standard products in stock; special requirements can be provided quick and easily over the existing supply network. If needed, just add a short message to your **Licence Request**. One of the usedSoft sales agents will immediately contact you and submit a tailor-made offer covering your specific demands. With each sold licence, usedSoft provides you with a notarised confirmation documenting the legitimacy of the purchase.

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"Nothing is stronger than an idea  
whose time has come."  
Victor Hugo

Do you have unused  
software licences?

See [You wish to  
sell licences](#)

Do you want to purchase  
licences at a good price?

See [You wish to purchase  
licences](#)

# Oracle Int. Corp. v UsedSoft GmbH

Case is pending as C 128/11 referred to by Bundesgerichtshof

Can usedSoft benefit of Art 4(2) of the Computer Program Directive ?

*The first sale in the Community of a copy of a program by the rightholder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof.*

## BUSINESS IDEA

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“NOTHING IS STRONGER THAN AN IDEA  
WHOSE TIME HAS COME”  
*Victor Hugo*

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[TOP](#)

software licences:

See [You wish to sell licences](#)

Do you want to purchase licences at a good price?

See [You wish to purchase licences](#)

TRADEMARKS

# DHL Express *versus* Chronopost

- ▣ The facts  
WEBSHIPPING™ *versus*  
WEB SHIPPING
- ▣ French court of appeal ad  
instance Community trademark

Can a national court give an extra-territorial  
injunction ?

EUROPE is  
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# DHL Express *versus* Chronopost



EUROPE is  
~~NOT~~  
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# ONEL *versus* OMEL

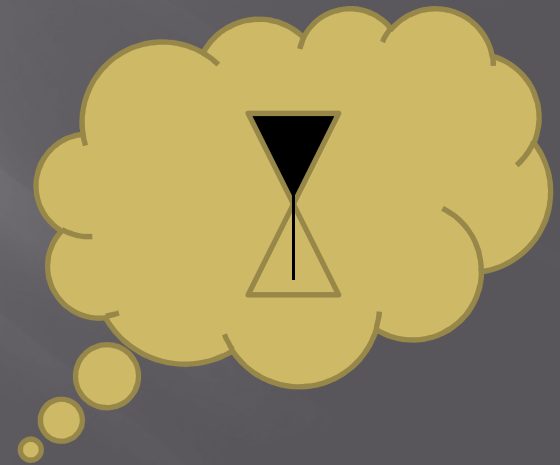
- ▣ The facts
- ▣ ...genuine use in the Community
- ▣ National versus Federal
- ▣ The first decision of the Board

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# ONEL *versus* OMEL

Appeal to the Court of The Hague



Patents and neighboring fields

# Supplementary Protection Certificate

- ▣ Sort of patent term extension but actually not
- ▣ EU Regulation 489/2009
- ▣ “the product is protected by a basic patent in force”

# Supplementary Protection Certificate

Fundamental question :

*What is the proper test for determining whether an approved medicine is, for the purposes of SPC law, a product protected by a basic patent in force?*

# Supplementary Protection Certificate

Two competing approaches

## *The disclosure approach*

consider whether the medicine's active ingredient is both disclosed and claimed in the basic patent.

## *The infringement approach*

assess whether the product which is the subject of the SPC application would infringe the basic patent

# Some SPC questions

- ▣ Multi-disease vaccines
- ▣ MEDEVA Basic patent claimed a method for preparing two antigens for use in vaccines
- ▣ 5 vaccines containing the 2 antigens AND other actives
- ▣ Under the disclosure approach : NO SPC  
...other actives are not disclosed

# Some SPC questions

- ▣ Combination in space or time ?
- ▣ YEDA files an SPC application for cetuximab
  - ... use in combination with irinotecan
- ▣ YEDA patent claimed a combination of a monoclonal antibody and an antineoplastic agent.....cetuximab alone was **not** claimed
- ▣ Claim towards a combined use ... by means of separate administration

# Article 112a

## EPC 2000 novelty

# Art 112a EPC

- ▣ The fundamental injustice
- ▣ The rules of “due process” require that one gets two instances of (independent) judicial review.
- ▣ Opposition division is NOT judicial nor independent (1 member (the active one) = primary examiner)
- ▣ Board of Appeal can be considered judicial and independent

# EPC 112a

- ▣ Enlarged Board of Appeal never was a second instance
- ▣ EPC 2000 : Enlarged Board of Appeal becomes a very limited second instance
- ▣ Only two “useful” grounds
  - A fundamental violation of Article 113 occurred
  - Any other fundamental procedural defect ...occurred during the appeal proceedings
- ▣ Record until recently all but one “clearly inadmissible” or “withdrawn”

# EU ? patent

- ▣ March 14, 2011  
EU Competitiveness Council authorized  
“enhanced cooperation” (coalition of the  
willing)
- ▣ Against Spain and Italy
- ▣ June 27, 2011  
two draft Regulations :
  - “European Patent with Unitary Effect “
  - Language arrangements EPO regime

# Italy files a court case

Italy's appeal against the European patent  
Rome 31 May 2011

....

Italy's aim in submitting the appeal is to challenge the European Union against the attempt to define a hierarchy of languages as a violation of the principles of equal dignity and respect for linguistic and cultural diversity.

Italy also opposes the creation of a negative precedent for the integration process. Enhanced cooperation was not conceived as a divisive instrument, essentially used to nullify the provisions of Treaties requiring unanimity. Rather, it was conceived to enable groups of states to initiate developments in the European integration process in which other states are not involved.

Lastly, enhanced cooperation on the issue of language is counter to the spirit of the single market, because it is liable to create distortions and distortions within this market, to the detriment of our entire continent.

EUROPE  
will NEVER  
be a  
country?



# EU litigation

DRAFT  
AGREEMENT  
EUROPEAN AND  
EUROPEAN  
UNION  
PATENT COURT

**Not  
Approved**



# Chicken and egg

European Patent with  
**Unitary** Effect



**Unitary**  
Patent Court

# The grapevine

Diplomatic  
Conference early  
next year

Still a lot of  
deficiencies

# CONCLUSION

# EUROPE = POINTILLISME



Georges-Pierre Seurat (1859 -1891 )

Detail of the painting “La parade de cirque” (1887 – 1888)

Metropolitan Museum of Fine Arts in New York

Will  
EUROPE  
**EVER** be a  
country?

