Breadcrumbs from Brussels and left-overs from Luxembourg. The diminishing role of the Member States' courts in IP cases

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Blissful ignorance

- *Lancome v. Kecofa* (Hoge Raad NL 2006): smell of a perfume is copyright subject matter
  - Harmonisation of copyright not even considered by Supreme Court or AG

Wishful Thinking
"Our law is 100% EU compliant"

- *Nova v Mazooma* [2007] EWCA Civ 219: the idea that there might be infringement by copying 'insubstantial' parts is "so absurd as to be assuredly wrong"(Jacob LJ)
  - But see Infopaq I (CJEU 2009)

Wishful thinking
"Our law is 100% EU compliant"

- *Tripp-Trapp* cases (Hoge Raad NL 2012): Dutch test of originality & personal stamp is identical to EU's 'the author's own intellectual creation', no PR
  - How can you be so sure?

Protest
"The ECJ was dead wrong"

- *l'Oréal v Bellure*, [2010] EWCA Civ 535: "My duty as a national judge is to follow EU law as interpreted by the ECJ. I think, with regret, that the answers we have received from the ECJ require us so to hold" (Jacob LJ)

Unconditional Surrender
"It's all harmonized!"

- 'Geburtstagzug', Bundesgerichtshof 2013: copyright protection of industrial design is surely harmonized under common EU standard of 'author's own intellectual creation', lowering of German standard, no PR
  - But what about art. 17 Design Directive?

COURT OF JUSTICE

Following the entry into force of the Treaty of Lisbon, this note replaces the information note published in OJ 2005 C 143, p. 1 and the supplement to that note published in OJ 2008 C 64.

INFORMATION NOTE

on references from national courts for a preliminary ruling

(2009/C 297/01)

I. General

1. The preliminary ruling system is a fundamental mechanism of European Union law aimed at enabling national courts to ensure uniform interpretation and application of that law in all the Member States.

2. The Court of Justice of the European Union has jurisdiction to give preliminary rulings on the interpretation of European Union law and on the validity of acts of the institutions, bodies, offices or agencies of the Union. That general jurisdiction is conferred on it by Article 19(3)(b) of the Treaty on European Union (OJEU 2008 C 115, p. 13) ('the TEU') and Article 267 of the Treaty on the Functioning of the European Union (OJEU 2008 C 115, p. 47) ('the TFEU').

3. Article 256(3) TFEU provides that the General Court is to have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 267, in specific areas laid down by the Statute. Since no provisions have been introduced into the Statute in that regard, the Court of Justice alone has jurisdiction to give preliminary rulings.

4. While Article 267 TFEU confers on the Court of Justice a general jurisdiction, a number of provisions

When to refer?
'Information note' CJEU (2009)

- Any court *may* and court of final instance *must* refer questions on interpretation of EU law to CJEU, unless case law is clear or answer is obvious
- "[a] reference for a preliminary ruling may prove particularly useful […] when there is a new question of interpretation of general interest for the uniform application of European Union law in all the Member States [...]"
- "Desirable" to have established all relevant facts and legal issues before making reference

Diminishing Role for National Courts as Interpreters (Creators) of IP Law, But …

- Facts remain important (as ever), and are not to be determined by the ECJ
  - See *Leidseplein Beheer* (Hoge Raad NL 2015): Court of Appeal may ignore ECJ's assessments of the facts
- Larger role for comparative law (other MS courts): we're all interpreting the same EU norms!

Role for National Courts

- Assume and accept that IP law in EU is largely harmonized, but not everything
- Lower courts may do PR's too
  - Accelerate court proceedings
- "Constructive unionism" is more productive than "splendid isolationism"