

one hand, *Junek* confirms that *Bristol-Myers Squibb* and *Boehringer Ingelheim* also apply to the parallel import of products other than drugs, in this case medical devices. On the other hand, and more importantly, *Junek* clarifies that any alteration made by importers that does not put at risk the origin function of the trade marks, does not constitute repackaging under EU law. The CJEU assessed whether JEV had altered the package of the Debrisoft products in accordance with the essential functions of trade marks, looking at the factual circumstances of the case. Size, positioning, content of the additional label and integrity of the original package were all the relevant factors considered by the CJEU.

In practice, what the CJEU did in *Junek* was to craft a safe harbour for parallel importers by setting the limits within which they can modify the packages of products without infringing the trade mark rights of manufacturers. Where parallel importers stay within these boundaries, they are outside the reach of *Bristol-Myers Squibb* and *Boehringer Ingelheim* and can successfully respond to infringement claims invoking the principle of exhaustion.

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Copyright

■ Get a licence or do not stream! Interlocutory judgment against Deezer in Hungary

Municipal Court of First Instance, 1.P.26.229/2013/54

Municipal Court of Appeals, 8.Pf.21.212/2017/6

The Municipal Court of Appeals has confirmed that the streaming of musical performances without the authorization of the competent collective management organization (CMO) of the musical performing artists runs against the Hungarian Copyright Act and the Act on Collective Rights Management.

Legal context

Making available to the public is an exclusive right of musical performers under HCA Article 73(1)(e), and such right can be exercised via CMOs under Article 74(2). Collective rights management has an extended nature in Hungary, which means that national and international rightholders are equally represented by the respective organizations with respect to uses in Hungary, unless they expressly opt-out from the regime in compliance with HCA Article 87(3)

and Article 18(1) of the newly enacted Act XCIII of 2016 on Collective Rights Management (CMO Act).

Facts

Deezer, one of the leading music streaming portals, launched its service in Hungary on 1 October 2012. Its free, premium and premium plus models were offered under the authorization of the composers' CMO, Artisjus and of the record labels. At the same time, Deezer made available to the public its repertoire—30 plus million unique songs in 2014 and 40 plus million currently—without the consent of the competent CMO representing musical performers, namely Előadóművészi Jogvédő Iroda (EJI, in English: Bureau for the Protection of Performers' Rights). EJI therefore sued Deezer seeking a judgment holding that the unauthorized streaming of fixed musical performances is unlawful under Act LXXVI of 1999 on the Hungarian Copyright Act. EJI also sought an order that would require Deezer to provide relevant data in order to calculate damages.

The claimant argued that nobody had opted-out of the system until 2016, when eight musical performers requested that they cease being represented by EJI. Consequently, the CMO argued that the provision of streaming services without the authorization of and payment to EJI was an infringement of the making available right of musical performers. EJI further contested that the payment of any royalties by Deezer directly to the producers of sound recordings under unique licensing agreements would exempt the streaming platform from the obligations (licensing and paying levies) to EJI. This is statutorily provided under HCA Article 86(2) and CMO Act Article 8.

Deezer did not deny that it did not seek permission from EJI, but it claimed that this would not be required because all performers had previously transferred their rights to the producers. Deezer further argued that the claimant's requests to provide data and also for remedies would go astray of the realities of streaming services. In other words, Deezer submitted that providing the names of performers and titles of performances streamed by Hungarian users during the relevant period of the claims would cause an undue burden. The defendant also claimed that EJI had acted wrongfully when it did not publish the list of all represented clients and the English translation of the relevant copyright provisions on its website.

Analysis

The Municipal Court of First Instance accepted all of the claimant's arguments in its interlocutory judgment (1.P.26.229/2013/54). It confirmed that the right of making available to the public is an exclusive right of musical performers that can be exercised via a representative CMO, unless a performer opts-out properly by complying with the rules of HCA and CMO Act. The court also confirmed

that a musical streaming service should be regarded as making available content, as end-users can select the time and place of accessing such content on an individual basis. The lack of publication of the names of musical performers represented by EJI is not a misuse of rights, as international performers are lawfully represented by EJI under the concept of extended collective rights management and EJI has published the list of performers who directly authorized EJI to represent them. Any submissions to the contrary must be evidenced by the defendant. Any payment to sound record labels cannot exempt a streaming platform from seeking a licence and paying the necessary fees to EJI. Payment to record labels alone might be relevant only if relevant performers opted-out of EJI's regime. Consequently, the Municipal Court of First Instance obliged the defendant to disclose the necessary data requested by EJI in 15 days. The relevant information includes: the number of subscribed users; the net income of Deezer each relevant month; the number of musical performances that were made available to the public by Deezer each month; and finally, the name of the main artist, the title, the record label and the year of release of each performance. The court also ordered the defendant to publish the decision at its own cost.

The Municipal Court of Appeals confirmed the above ruling almost in its entirety by its interlocutory judgment (8.Pf.21.212/2017/6). It only changed the trial court's ruling on the deadline of data disclosure to 45 days.

Practical significance

The Sixth Circuit in the USA argued in the famous *Bridgeport Music* case that bright line rules are needed with respect to musical sampling, and the panel concluded '[g]et a licence or do not sample' (*Bridgeport Music, Inc v Dimension Films*, 410 F 3d 792 (6th Cir 2005) 801). We might paraphrase this sentence on making available to the public of musical performances (as well as the underlying compositions) as 'get a licence or do not stream'. In fact, contrary to the controversial ruling in *Bridgeport Music*, the rules of the HCA and the CMO Act are totally bright. Streaming is subject to licensing, and the relevant making available to the public right can only be exercised for the benefit of performers by the relevant CMO. Further, no previous payment to record labels or any other entities exempts users from licensing the use and paying the necessary levies to the performers CMO.

The rulings also confirm that the extended nature of collective rights management is a proper and acceptable method of representing the interests of international performers in Hungary. The burden of proof to the contrary—especially regarding the withdrawal of any performers from the collective rights management service of EJI—lies with the person wishing to use the relevant performances.

It might be emphasized, however, that both interlocutory judgments discussed solely whether the defendant's activity resulted in an infringement, and decided on the objective remedies, especially on the provision of data to calculate damages. Consequently, the trial will continue on the first instance on the subjective remedies, especially the exact amount of damages to be awarded.

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Passing off

■ Israeli Supreme Court holds that overall appearance is the determining factor in passing off cases

Judgment of the Israeli Supreme Court in Request for Civil Appeal 1521/18 Chain of stores *Rami Levi Shivuk HaShikma 2006 Ltd et al. v Barilla G e R Fratelli*—SpA, 22 April 2018

In this case, the Israeli Supreme Court (ISC) ruled that, in analysing the likelihood of confusion in the context of passing off of retail products, the main criterion should be the overall look-and-feel of the products at stake, which is more important than a detailed and precise examination of the various visual components of each of the products.

Legal context

The case reached the Israeli Supreme Court (ISC) on a request to appeal by both parties of a temporary injunction ruling by the District Court. As detailed below, the District Court issued the injunction in respect of pasta packages but refused to grant it in respect of pasta jars of sauce. The ISC accepted Barilla's (plaintiff) appeal and dismissed Rami Levi's (defendant) appeal, extending the injunction to cover the jars of sauce as well.

It should be noted that since the appeals were classified as 'requests to appeal' (according to rules of procedure applying to interim injunctions) the ISC judgment was issued by a single-judge panel, and was based on the limited evidence presented in the interim proceedings before the District Court.

Facts

Barilla, one of the largest producers and manufacturers of pasta products worldwide, filed a lawsuit against one of the biggest retail chains in Israel, Rami Levi, requesting to enjoin it from marketing pasta and pasta sauces sold under