



European Intellectual Property Review

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Table of Contents

Opinions

COBUS JOOSTE

The Rooibos Rush 1

The wealth of natural and indigenous resources in South Africa presents a challenge to intellectual property law, particularly when trade mark protection for terms that denote the origin of uniquely South African goods is sought abroad. Recent developments in the use of the Merchandise Marks Act, as the basis for protection of ROOIBOS as a geographical indication in terms of the TRIPS Agreement, illustrate the difficulties faced by South African producers.

Articles

PROFESSOR WINFRIED TILMANN

Spain's Action against the EU Patent Package: Arguments and Counter-Arguments in Case C-146/13 4

Spain has raised two actions before the ECJ against the Council and the Parliament regarding the Unitary Patent Regulation and its accompanying Translation-Regulation, both of 2012. The article deals with the arguments put forward by Spain and comes to the result that the arguments are not well founded.

ELLEN FRANZISKA SCHULZE

Resale of Digital Content Such as Music, Films or eBooks under European Law 9

Can digital content such as music, films or ebooks be "resold" in a second-hand market? The CJEU allowed the resale of computer programs downloaded with a perpetual licence in *Usedsoft*. Capitol Records has recently won a (partial) summary judgment against *ReDigi* in the United States, and the Federation of German Consumer Organisations recently lost a first instance decision in the German district court of Bielefeld.

PING-HSUN CHEN

To Submit "Confidential" Prior Art Documents or Not, That is the Question: Conflicts of Interest in Representing Two Clients from Related Industries for Patent Prosecution 14

When simultaneously representing two clients in related industries, an attorney for patent prosecution may encounter conflicts of interest because the patent agency requires a duty to disclose prior art documents. This article discusses whether a patent attorney can disclose to the agency prior art documents learned from non-applicant clients. To reduce the risk of violating the ethical rules governing the attorney-client relationship and the duties to the patent agency, this article provides that an idea of implementing a technology-oriented system for collecting prior art documents learned from different clients is necessary.

GLEN GIBBONS

Trade Mark Remedies in the United Kingdom and Ireland: Recent Developments 22

This article addresses the impact of the IP Enforcement Directive on UK and Irish law. In particular, it analyses recent judgments that have assessed the compatibility of existing remedies with the requirements of the Directive and the ECHR/EU Charter. Furthermore, the article discusses IP remedies generally—for example, the use of general orders in granting final injunctive relief and the use of survey evidence.

PARAMJEET SINGH BERWAL

Articles 3 (a) and 3 (b) of the SPC Regulation: An Analysis 29

With the *Medeva* and *Georgetown* judgments rendered by the Court of Justice in response to the references for preliminary ruling concerning the interpretation of art.3 of Regulation 469/2009 concerning the supplementary protection certificate for medicinal products, it is crucial for the pharmaceutical industry to analyse this decision, which would affect investments in pharmaceutical research and development. The issue before the court pertained to the interpretation of arts 3(a) and 3(b) of the Supplementary Protection Certificate (SPC) Regulation. This article discusses the questions arising in relation to the interpretation of arts 3(a) and 3(b) in the light of the Regulation; the interpretation by the courts; general principles and statutory provisions of patent law; commercial aspects of the pharmaceutical industry; and other possible permutations and combinations that might serve the purpose behind the enactment of the said provisions.

Essential Medicines and the Complexity of Implementing Nationally Based Compulsory Licensing: On the Need for a Regional System of Compulsory Licensing in Sub-Saharan Africa 39

The global enforcement of pharmaceutical patents under the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement makes essential medicines very expensive for least developed countries (LDCs), limiting supply for the majority of patients in sub-Saharan Africa (SSA). Nevertheless, essential medicines are a component of the human right to health, according to art. 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The experience of developing countries outside SSA shows that the successful exploitation of the TRIPS flexibilities, in particular compulsory licensing, constitutes a potential means of obtaining affordable medicines. The aim of this article is to examine the feasibility of a regional system for compulsory licensing in order to manufacture and distribute essential medicines in SSA. The hypothesis of this article is that compulsory licensing by SSA countries will not provide a suitable means of procuring essential medicines in view of their individual economic and political constraints. This hypothesis is premised on the inability of LDCs in SSA to obtain compulsory licences for the procurement of affordable medicines and to distribute them according to need. While the article identifies legal, institutional and, particularly, political pressures as major obstacles to the implementation of the WTO Paragraph 6 Programme, it proposes a regional system for compulsory licensing that is arguably compliant with TRIPS, in order to overcome the complexity in compulsory licensing. Consistent with the hypothesis, the article recommends a regional arrangement for a pharmaceutical compounding programme as a pooled manufacturing scheme to distribute essential medicines within SSA.

Comments

JOHN HULL

How (Not To) Use Non-Disclosure Agreements: A Note on *Dorchester Project Management v BNP Paribas Real Estate Advisory and Property Management* 53

Non-disclosure agreements are some of the most commonly used of commercial documents. Their ubiquity may make parties to commercial transactions give inadequate thought to their significance in the transaction. The decision in *Dorchester Project Management v BNP Paribas Real Estate Advisory and Property Management* deals with the dangers of using these agreements without giving proper thought to their drafting and how appropriate they are to the aims of the transaction and the protection of confidentiality.

HUW BEVERLEY-SMITH AND LIDDY BARROW

Talk that Tort ... of Passing Off: Rihanna and the Scope of Actionable Misrepresentation: *Fenty v Arcadia Group Brands Ltd (t/a Topshop)* 57

In July 2013, Mr Justice Birss had before him a well-publicised spat over the unauthorised use of Rihanna's image on a T-shirt, and whether this amounted to passing off. This article considers the development of the law of passing off in relation to the protection of personality rights, the extent of protection afforded by the English courts, and the implications of Birss J.'s decision.

JANUSZ PIOTR KOLCZYŃSKI AND PRZEMYSŁAW DOMINIK ANTAS

Audiovisual Works are Integral Works as Broadcast or Rebroadcast as a Single Work and Not as a Set (Collection) of Various Component Works 61

In the judgment of the Polish Court of Appeal in Warsaw of May 22, 2013 (I ACa 1359/12) it was confirmed that the use of an audiovisual work is—by virtue of a legal presumption—subject to an exclusive right of the producer of such a work and, as long as that work is used as the whole, the broadcasters or rebroadcasters transmitting it do not require additional licences for its integral parts (for instance musical and worded-musical works with words) from the respective copyright collecting society representing those integral parts or pre-existing works. The court pointed out that until that assumption was disproven it is the producer and not the authors who holds the right to use the audiovisual work as a whole. The Appeal Court stressed also that an audiovisual work is not a set (collection) of various so-called component works: it is a single work.

HUBERTUS SCHACHT

Commencement or Completion: What Constitutes a “Human Embryo” within the meaning of the EU Biotechnology Directive? 66

After the Court of Justice of the European Union (CJEU) decided in 2011 on the definition of “human embryo” in its judgment C-34/10 *Oliver Brüstle v Greenpeace eV*, the legal framework for the patenting of inventions relating to human embryos seemed to be clarified. This assumption has been recently questioned by a reference for preliminary ruling of the British High Court seeking clarification as to whether parthenotes containing only pluripotent stem cells are included in the term of “human embryo”. It further draws attention to the latest judgment of the German Federal Court of Justice in the litigation between Dr Oliver Brüstle and Greenpeace. Although the German court emphasised that it made its decision in the light of the precedent CJEU ruling, it excluded pluripotent stem cells from the term of “human embryo”. This article aims to illustrate the difficulties arising from the definition of “human embryo” given by the CJEU and to provide arguments for a coherent interpretation of it.

Book Review

72