

# European Intellectual Property Review

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#### Principles for Intellectual Property Provisions in Bilateral and Regional Agreements 207

Building on years of research at the Max Planck Institute on Intellectual Property and Competition Law, a group of academics has drafted a set of *Principles for Intellectual Property Provisions in Bilateral and Regional Agreements*. The *Principles* address the core problems the drafters see when international IP rule-making occurs in a framework of non-transparent, export-industry driven trade negotiations which produce ever more complex and detailed IP rules that often are transplanted from the laws of the IP-demanding country with little flexibility for the domestic situation in the implementing country. In response, the *Principles* recommend ways to achieve a better, mutually advantageous and balanced regulation of international IP.

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In *Transocean Offshore Deepwater Drilling v Maersk Contractors USA*, the US Court of Appeals for the Federal Circuit expanded the scope of infringement for offering to sell an invention in two ways, first by expanding the extraterritorial reach of US patents and, second, by permitting infringement based on diagrams alone. The US Supreme Court has requested the views of the Solicitor General as to whether the court should review the decision, a strong indication of the court's interest in reviewing the case. This article examines these holdings.

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Who authors and who owns (the) dance? This article explores those questions within the context of two case studies: one a recasting of *Love Games*, and the other called *The Two Fridas*. Both feature the choreographer and dance artist Caroline Bowditch. In our contribution we seek not only to address the legal questions, but also to confront concerns around the legacy of the Unlimited Cultural Olympiad Programme, and to challenge the reader in relation to any prejudices that may exist in relation to this genre.

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The article provides an introduction to sculpture in art and focuses on sculpture in copyright law. It shows a divergence between art and law. It evaluates art and criticises fake art. It advocates that copyright law should take a firm stance in extending protection only to true art by giving sculpture its ordinary meaning. It takes issue with the Supreme Court in *Lucasfilm* and argues that the court got it wrong when it refused to recognise the *Star Wars* helmet as a sculpture. In further showing the erroneous finding of the court, it expands the horizon to a comparison with US law.

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Industrial design is a form of intellectual property. It is also a valuable asset for any organisation specifically when two products/articles have the same functionality; the industrial design gives a competitive edge to one product/article over the other. Industrial design is protected in India by the Industrial Design Act 2000. The present article makes an effort to analyse the industrial design law in India. It has been found that a few of the provision may need to be further discussed and debated.

## Comments

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In *Bowman v Monsanto*, the US Supreme Court held that it was patent infringement for a farmer to save patented seeds from one crop to plant and grow a subsequent crop—a practice in which farmers had engaged for thousands of years before the advent of patents on crops. The farmer sought to defend under the exhaustion doctrine, but the Court held that he was “making” a new patented article rather than merely using a purchased article on which the patent rights had become exhausted. The ruling was clearly based on the Court’s opinion that unless this practice were suppressed, agricultural companies would lose the incentive to engage in research and development of new plants, so that innovation would be stifled. The article criticises the legal reasoning by the Court and suggests, further, that it ignored countervailing policies and made unwarranted assumptions.

JOEL SMITH, RACHEL MONTAGNON  
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### **Concurrent Use of Retail Marks: A Not IDEAL Situation—*IPC Media Ltd v Media 10 Ltd* 261**

The Intellectual Property and Enterprise Court (formerly the Patents County Court) has held that IPC Media, publisher of *Ideal Home* magazine and owner of the trade mark IDEAL HOME (a retail mark for a wide range of home goods sold online, by phone or in-store) could not prevent the use of “Ideal Home Show Shop” by the owners of the Ideal Home Show in respect of its new online shop. The Ideal Home Show had used the name since 1908 and the court held that public were used to distinguishing between the two. Any low levels of confusion had been tolerated, and even encouraged, by both parties for a significant period.

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### **A Fight on the Tiles 262**

For 20 years, debate has raged about the registrability of exotic trade marks. Although the CJEU have handed down a number of judgments that relate to these issues, two recent Court of Appeal cases show that there remains some uncertainty about when a sign is registrable. The decision in *Nestlé v Cadbury* is particularly interesting, and the two leading judgments may be inconsistent.

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### ***HTC v Nokia: a brief comparison of UK and US exhaustion/first sale doctrines* 266**

This article looks at the recent patent infringement case involving the Finnish telecoms group Nokia and the rival Taiwan-based HTC Corporation. By virtue of an agreement between Nokia and Qualcomm, a company which supplied some of the chips in the alleged infringing HTC smartphones, HTC argued that Nokia could be deemed to have consented to the allegedly infringing acts, or else the sale exhausted Nokia’s patent rights. Mr Justice Arnold’s rejection of HTC’s defences raises once again whether the doctrine of international exhaustion of patent rights should be a shield or a sword.

JOEL SMITH AND LAURA DEACON

### **NOW: BSKyB wins in Court of Appeal Decision that Confirms that Hong Kong TV Company does not have Protectable Goodwill in the United Kingdom and that its Community Trade Mark for “Now” is Invalid—*Starbucks (HK) Ltd v British Sky Broadcasting Group Plc* 271**

On November 15, 2013, the Court of Appeal handed down its decision in *Starbucks v BSKyB* in which it upheld the High Court’s decision that, based on the evidence, the claimant did not have a valid Community trade mark or any goodwill in the United Kingdom that would give the claimant the right to prevent BSKyB from using the name “NOW TV” in relation to its internet protocol TV service. The appeal considered the requirement of distinctiveness for a Community trade mark to be valid and whether a reputation built up outside the United Kingdom could give rise to goodwill in the United Kingdom on which to base a claim for passing off.