

European Intellectual Property Review



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The European Commission's Public Consultation on the Review of EU Copyright Rules: A Response by the CREATE Centre 547

The European Commission consulted between December 5, 2013 and March 5, 2014 on a wide-ranging review of EU copyright rules. This response by the CREATE Centre attempts to make two contributions: (1) the process of policy formation matters for the evolution of the EU legal framework, and so we offer a short critique of the consultation format; (2) we summarise available evidence in seven thematic areas where CREATE has developed or is developing research (term of protection, libraries and archives, disabilities, text and data mining, user-generated content, fair remuneration for authors and performers, and respect for rights). CREATE understands evidence here as empirically grounded, but open to historical and comparative approaches.

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This article considers the law with regard to accessory liability for breach of confidence in the light of a recent decision of the Supreme Court. The Supreme Court held that an accessory to a breach of an equitable obligation of confidence can only be liable for participation in a common design where she knows that the act involves misuse of the claimant's confidential information and, apparently, is dishonest. It is suggested that a better test would be to ask whether a reasonable person in the position of the accessory would appreciate that the information was confidential to the claimant.

ALICE BLYTHE

Confusion Online: Does the Test for Trade Mark Confusion on the Internet Differ from that Applied to Infringement in Other Spheres? 563

Recently there has been debate as to whether the test for trade mark confusion is different online. *OCH-Ziff v OCH Capital* and *Interflora v Marks & Spencer Flowers Direct* reopened the debate as to the role of initial interest confusion and the likelihood of association in defining the boundaries of this provision.

NICHOLAS FOX AND WILLIAM CORBETT

UK and EPO Approaches to Excluded Subject-Matter and Inventive Step: Are *Aerotel* and *Pozzoli* Heading for the Rocks? 569

European patent law regarding patentable subject-matter is stated to be harmonised (precluding patent protection for a program for a computer as such). However, English courts apply a different test compared with the EPO, and practice also differs in countries such as Germany, France and the Netherlands. What might the future hold for UK/European patent law in this area?

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Enforcing Copyright Online: Internet Service Provider Obligations and the European Charter of Fundamental Rights 577

This article considers whether an internet service provider can rely on art. 16 of the European Charter of Fundamental Rights (Charter) in curbing its obligations under the European legal framework as to copyright enforcement. It will consider recent, contradictory case law from the Member States and argue that the Charter plays a limited role for ISPs in this context.

ROB AERTS

The Unitary Patent and the Biotechnology Directive: Is Uniform Protection of Biotechnological Inventions Ensured? 584

If, after grant of a European patent with unitary effect concerning a biotechnological invention, the validity of the patent is challenged, there is no possibility to refer a question on the interpretation of provisions of Directive 98/44 on the patenting of biotechnological inventions to the Court of Justice of the EU during an opposition procedure. In contrast, referral of such a question is possible or even compulsory during a procedure before the envisioned Unified Patent Court. This may result in different applications of patentability criteria to identical biotechnological inventions, and it may be questioned whether the European patent with unitary effect can ensure uniform protection as required by the EU Treaty provision on which its creation is based.

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Test of Infringement: What is it Now? 588

The traditional English test for infringement is now replaced by the European test. The article juxtaposes the two tests and probes into their conformity. It first evaluates the traditional English test for infringement; then goes on to examine the European test; further, it discusses the stance of the English courts toward the test and its practical and theoretical impact on the test of infringement in England.

Comments

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Control-Alter-Delete: The “Right to be Forgotten”—*Google Spain SL, Google Inc v Agencia Española de Protección de Datos* 595

The Court of Justice of the European Union has held that internet search engine operators, even if based outside the EU, may be responsible for the processing of personal data and must therefore be held to be data controllers within the meaning of Directive 95/46. The effect of so holding was that the internet search engine in question may be ordered to remove a link to a third-party web page from its list of results where that link contained personal data deemed to be “inadequate, irrelevant or no longer relevant”, thereby effecting the data subject’s “right to be forgotten”.

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Gucci Loses GG Trade Mark: An Important Lesson in Keeping Records and Evidence 601

In a decision of the UK Intellectual Property Office of November 5, 2013, Gucci’s trade mark for its interlocking GG logo (the GG logo) has been revoked in certain classes on the grounds of non-use. The case is an important reminder to brand owners of the importance of looking after their trade marks. It is often forgotten that once a UK or a Community trade mark is registered, the proprietor must make use of the mark in order to maintain that registration. Any continuous periods of non-use which span five years or more will leave the mark vulnerable to revocation. Even if a trade mark is being used, it is important to be able to demonstrate this should the need arise.

JOHN TESSENSOHN

Stella McCartney Succumbs in Japanese St Ella Trade Mark Invalidation 606

The Intellectual Property High Court of Japan (IPHCJ) has affirmed the decision of the Board of Appeals of the JPO that dismissed the invalidation appeal filed by Stella McCartney’s fashion company on the ground that the Malaysian-owned ST ELLA (stylised script) junior mark was not similar to the senior STELLA-related trade mark registrations owned by the ex-Beatle’s daughter.

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