

European Intellectual Property Review

2016 Volume 38 Issue 2
ISSN: 0142-0461

03 FEB. 2016

Table of Contents

Opinion

EUROPEAN COPYRIGHT SOCIETY

ECS Position Paper on the Opinion of the Advocate General in the Case *HP Belgium v Reprobel* before the Court of Justice of the EU 71

On 11 June 2015, A.G. Pedro Cruz Villalón delivered his Opinion in the *HP Belgium v Reprobel* case now pending before the Court of Justice of the EU (CJEU). The Advocate General's Opinion and the underlying case raise one important issue: is it permissible for a national copyright law to allocate a portion of the fair compensation for reproductions exempted under art.5(2)(a) and (b) of the 2001/29 Infosoc Directive directly to publishers, although they are not listed among the initial holders of the reproduction right under art.2 of the Infosoc Directive? As a group of academics concerned about the copyright reforms envisaged in the EU as well as by the interpretation and development of the law by the CJEU, the European Copyright Society (ECS) takes this opportunity to share its view on this matter of principle.

Articles

PAMELA SAMUELSON

Extended Collective Licensing to Enable Mass Digitisation: A Critique of the US Copyright Office Proposal 75

This article offers several reasons why the US Copyright Office's recent proposal to create an extended collective licensing (ECL) pilot programme for certain mass digitisation activities is problematic. It considers some alternative approaches that may provide more promising ways to broaden public access to in-copyright works.

NAOMI HAWKINS

A Red Herring: Invalidity of Human Gene Sequence Patents 83

Recent legal developments have reinvigorated the debate around the patenting of human genetic sequences. These cases have been predicated on an assumption that overturning patents on human genes will address a major flaw in the patent system, and that invalidating the patents will solve a serious problem. However, these changes to the law do not adequately address the underlying objections to patenting life and concerns for patient access, and will not "solve" the problem. Instead, a focus on the patentability of DNA alone has to some extent obscured other solutions already existing in patent law, or which could be introduced.

DR ALPANA ROY AND ALTHAF
MARSOOF

The Blocking Injunction: A Comparative and Critical Review of the EU, Singaporean and Australian Regimes 92

This article critically, and comparatively, evaluates the legal basis and key shortcomings of the blocking injunction, which has gained popularity in the EU, Singapore and lately Australia, as an alternative to the extrajudicial "notice and takedown" approach to enforcing intellectual property rights. The article concludes that there are problems not only with the remedy itself, but also in the manner in which the blocking injunction is implemented. The fact that multiple proceedings have to be filed in order to obtain a global level of enforcement and the possibility of blocking measures being circumvented are problems with the remedy itself. In the EU context, at least, not only does the implementation of the blocking injunction fall short of due process requirements, but also the legal basis for the remedy in the context of enforcing trade mark rights is questionable.

HAOCHEN SUN

Hermès in the Lost (Luxury) Paradise: How to Secure Enhanced Well-Known Trade Mark Protection in China 101

A series of cases that Hermès litigated in China provide profound lessons for transnational companies to tap into the potential of trade marks in promoting their businesses in China. The first part of this article takes a close look at the trajectory of the *Hermès v Dafeng* litigation, in which Hermès failed to prove that both the HERMÈS mark and its Chinese transliteration were well-known trade marks in China. By drawing on *Hermès v Dafeng* and other cases Hermès litigated, the second and third parts provide a nuanced analysis of the key issues for protecting trade marks in the Chinese first-to-file system and for determining the well-known trade mark status of a mark in China. The fourth and fifth parts examine the lessons that can be gleaned from a series of *Hermès* cases for securing anti-confusion and anti-dilution protection of trade marks in China.

ANDREW NKUNIKA

Innovating the Enforcement of Offences under Copyright Law in Zambia: The Role of the Attorney-General as Copyright Holder *Ad Litem* 109

This discussion examines the legislative innovations that Zambia has made in order to enhance the enforcement of copyright under TRIPS. The discussion will particularly examine the role of the Attorney-General in Zambia as a copyright holder *ad litem* in criminal matters for the purposes of enforcement of copyright under Copyright Act Ch.406 of the Laws of Zambia.

Comments

EMMA L. FLETT AND JOANNA BALATA

A Grey Sky for Skype: *Skype Uld v OHIM* 116

This article considers the recent decisions of the EU General Court in *Skype Uld v OHIM* (T-423/12, T-183/13 and T-184/13),¹ which upheld rulings of OHIM's Fourth Board of Appeal that the Skype logo and word mark were not registrable as Community trade marks on account of a likelihood of confusion with Sky's earlier registration for the word mark SKY for similar goods and services.

STEPHANIE WICKENDEN

Graffiti Art: The Rights of Landlords, Tenants and Artists: *Creative Foundation v Dreamland Leisure Ltd* 119

Creative Foundation v Dreamland Leisure Ltd results from a dispute between a landlord and tenant over rights to an unsolicited Banksy graffiti work on an external wall. The rights of the landlord prevailed over those of the tenant, as would be expected, but consideration of Banksy's rights was notable by its absence. This article summarises the position between landlord and tenant, and goes on to propose a number of ways Banksy might have attained rights in the work under intellectual property and personal property law.

CHENG TAN

Those are my Checks, Mate! *Louis Vuitton Malletier v OHIM* 122

The EU General Court in two separate judgments upheld the Board of Appeal's decisions and found the chequerboard patterns of Louis Vuitton to be invalidly registered (*Louis Vuitton Malletier v OHIM* (T-359/12 and T360/12)). The marks are said to lack distinctive character. Further consideration of whether the marks have acquired distinctiveness also failed, as acquired distinctiveness was not shown in all the Member States of the Community.

Book Reviews

125