

European Intellectual Property Review

2014 Volume 36 Issue 3

ISSN: 0142-0461

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JANE C. GINSBURG

Hyperlinking and “Making Available” 147

The WCT art. 8 and InfoSoc Directive art.3(1) “making available” right covers the *offering* of the work for streaming or downloading, not merely the receipt of the stream or download. It therefore encompasses deep- or framing-links that enable members of the public to access specific protected content. This characterization should not be confused with determining whether a particular targeted act is *infringing*.

Articles

ASSOCIATION LITTÉRAIRE ET
ARTISTIQUE INTERNATIONALE
(ALAI)

Report and Opinion on the Making Available and Communication to the Public in the Internet Environment: Focus on Linking Techniques on the Internet 149

In 2013, the International Literary and Artistic Association (L'Association Littéraire et Artistique Internationale—ALAI) formed a study group with the mandate to analyse the ramifications regarding linking measures with regard to the communication to the public and making available to the public rights of authors and related right owners. Following the result of the study group the Executive Committee has adopted the Report and Opinion published in this issue of E.I.P.R.

ELLA O'SULLIVAN

International Stem Cell Corp v Comptroller General of Patents: The Debate Regarding the Definition of the Human Embryo Continues 155

This article considers the exclusion of uses of human embryos under art.6(2)(c) of Directive 98/44 on the legal protection of biotechnological inventions in light of the recent decision of the UK Patents Court to submit a preliminary reference to the CJEU in *International Stem Cell Corp v Comptroller General of Patents*.

CHARLES GIELEN

Substantial Value Rule: How it Came into Being and Why it Should be Abolished 164

Signs that consist exclusively of the shape which gives substantial value to the goods are excluded from protection as a trade mark under current EU trade mark law. This provision is found in art.3(1)(e) Trade Marks Harmonisation Directive and a similar provision appears in the Community Trade Mark Regulation. The author argues that this rule results in a lot of uncertainty and suffers from lack of clarity and a legally convincing basis. Prejudicial questions are pending before the Court of Justice of the EU asking for clarification. The author opines that this rule should be abolished. The Max Planck Study suggests the same, but in the latest proposals for revision of the EU trade mark system the rule continues to appear.

AVGI KAISI

Finally a Single European Right for the EU? An Analysis of the Substantive Provisions of the European Patent with Unitary Effect 170

Last year the EU Patent Package became a reality. It includes a regulation on the unitary patent, a regulation on the translation regime and an international agreement on the Unitary Patent Court. In this article, we highlight the contradictions behind the proposed regulation on the unitary patent, showing how considerable freedom is still given to the national legislations of the Member States. We focus on issues related to the substantive provisions, ill regulated in the author's opinion. Exposing the limitations of the regulation, we discuss the possible consequences of such issues, including fragmentation of the European market and legal uncertainty.

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The Informed User in Design Law: What Should he Compare and How Should he Make the Comparison? 181

As a result of the *PepsiCo* judgment of the CJEU, a lack of clarity has arisen regarding the answer to the question what an informed user should compare in invalidity proceedings: should he compare the existing design corpus with the design registration or with the actual marketed article embodying the design? This article puts forward the view that the design registration is still decisive. In the *PepsiCo* judgment the CJEU has also given an answer to the question how an informed user should compare the design registration with the existing design corpus or the allegedly infringing product. The CJEU's answer is that the Community Design Regulation is silent on this point. When possible the informed user will make a direct comparison between the design registration and the existing design corpus or the allegedly infringing product. Under certain circumstances, however, it is also conceivable that such a direct comparison will not be possible and an indirect comparison (based on recollection) may then be made. The author believes that the CJEU has made a wrong decision by allowing indirect comparisons and that courts should always make a direct comparison.

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Trade mark piracy has always been a serious problem in China. However, prior rights on related signs are all protected against piracy under the PRC Trademark Law. Why does a deficiency of related trade mark opposition and invalidation procedures exist? This article analyses the difficulties in the protection of prior trade marks, copyrights, industrial design patents, trade names, personal names and likenesses.

Comments

IONA SILVERMAN AND SARAH ABDELMALEK

The Future of Future Copyright: *PRS v B4U Network (Europe)* 194

On October 16, 2013 the Court of Appeal handed down its decision in *B4U Network (Europe) Ltd v Performing Right Society Ltd*, a case concerning copyright in the music used in Bollywood films—more specifically concerning an agreement to assign copyright in music yet to be written. Lord Justice Moses, Lord Justice Kitchin and Lord Justice Underhill were unanimous in deciding that future copyright could be assigned despite a subsequent agreement that it would vest in a third party. The appeal was dismissed.

ANETTE GÄRTNER AND ANDREAS JAUCH

***GEMA v RapidShare*: German Federal Supreme Court Extends Monitoring Obligations for Online File Hosting Providers** 197

The recent *GEMA v RapidShare* judgment is only the second decision of the German Federal Supreme Court (Bundesgerichtshof—BGH) regarding the liability of online file hosting providers for copyright infringements. The decision is noteworthy because while the BGH applied standards set out by the Court of Justice (CJEU), it considerably broadened the scope of potential monitoring obligations that hosting providers must comply with in order to avoid liability. In particular, the BGH held that RapidShare ought to have monitored third-party websites as well as general search engines and social network sites, because the provider facilitates infringing activities of its users. This comment provides a brief outline of the EU legal framework and the relevant case law of the CJEU regarding the liability of online intermediaries for third-party infringements. Against that background, the German *GEMA v RapidShare* judgment is discussed and its implications for hosting services as well as its compatibility with CJEU case law will be critically analysed. This analysis will reveal that in *GEMA v RapidShare*, the BGH considerably raised the stakes by imposing far-reaching obligations on the file hosting provider at issue. In the wider context, the judgment may however be interpreted as a “one-off decision” based on extraordinary facts.

PAUL BICKNELL

***Société des Produits Nestlé SA v Cadbury UK Ltd*: Single Colour Marks Predominantly Applied to the Whole Visible Surface of the Goods** 200

Single colour marks can take on a number of visual forms. However, that proposition conflicts with the requirements that a mark must, in particular, be clear, precise, self-contained, easily accessible and intelligible. This conflict is illustrated by the High Court and Court of Appeal's decisions in *Société des Produits Nestlé SA v Cadbury UK Ltd*. Should the courts, in the context of single colour marks, recognise that such marks can take on a number of visual forms and therefore not strictly comply with the *Sieckmann* criteria?

MIHAIL VATSOV

The Complicated Simplicity of the DEMO Case: Side Effects of Developments in the Law—*Daiichi Sankyo and Sanofi-Aventis Deutschland v DEMO (C-414/11)* 202

This case note concerns the recent DEMO judgment of the ECJ. The note is very critical of the ECJ's reasoning, which declared the TRIPS Agreement within the EU's exclusive competences. However, the note supports the ECJ's finding that the scope of patents for process of manufacture does not include the medicinal product itself after the law changed and allowed for medicinal product patents.

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