2014 Volume 36 Issue 8
ISSN: 0142–0461

European Intellectual Property Review

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The South African Promotion and Protection of Investment Bill 2013: A Review 477

On November 1, 2013, the South African Department of Trade and Industry published the draft Promotion and Protection of Investment Bill (the Draft Bill) for comments. The Draft Bill comes shortly after South Africa decided to unilaterally terminate its bilateral investment treaties (BITs) with certain European states and specifically Belgium, the Netherlands, Luxembourg, Germany, Spain and Switzerland. [The Government has emphasised that the draft Promotion and Protection of Investment Bill contains "more than enough clarity, transparency and certainty around the domestic investment regime" and that it provides "adequate protection to all investors, including foreign investors".] The authors are of the view that from an intellectual property perspective some provisions of the Bill need to be carefully reworded to incorporate reference to South African intellectual property right laws and clear references included as to the specific international agreements of intellectual property that the Promotion and Protection Bill intends to include. It will have to include a reasonable form of compensation that is aligned with the Constitution, national laws, international intellectual property standards and agreements. Due care will have to be taken that the country does not breach its obligations under the TRIPS Agreement.

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This article discusses the plant variety protection regime in the EU. More specifically, in light of the case law of the Court of Justice of the European Union in this particular field of intellectual property law, the article sheds light on the derogation to plant variety rights which affords farmers certain privileges, in contrast with other licensees, to use protected varieties. However, also issues of broader horizontal interest are considered. These include the plant variety right holder's right to compensation in the case of infringement and the reach of the doctrine of exhaustion of rights in relation to plant variety rights.

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The increasing number of domain name disputes has led to the development of legal and quasi-legal rules relating to the management of internet domain names. While the Uniform Domain Name Dispute Resolution Policy (UDRP) provides the international legal framework for resolving domain name disputes, local authorities are responsible for resolving disputes concerning country code top-level domains (ccTLDs)—such as .au. In Australia, the relevant local policy governing .au domain name disputes is the .au Dispute Resolution Policy (auDRP). This article will focus on the auDRP as a distinct and developing body of law.

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Plant Breeder's Rights and Essentially Derived Varieties: Still Searching for Workable Solutions 499

The 1991 International Convention for the Protection of New Varieties of Plants (UPOV Convention) introduced the concept of "essentially derived varieties" (EDVs) expanding the scope of the plant breeder's right. The purpose of EDVs was to limit "plagiarism", "copycat breeding", "mimic", "imitation" or "cosmetic" varieties, and an unfair free-riding on the original plant breeder's time and investment. This article addresses the meaning and threshold of EDVs in the context of the 1991 UPOV Convention and the technicality issues that have been considered in trying to identify and establish a suitable threshold. The article concludes that the threshold of EDVs is more than a mere quantitative technical question requiring a technical answer, such as a statistical index or a DNA sequence, and includes qualitative elements. Further work is required by the members of the 1991 UPOV Convention to articulate these quantitative and qualitative aspects of the EDV thresholds, and especially the likely standard of "essential characteristics".

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In the current debate on the amendment of EU trade mark legislation, the European Commission proposed to confine the so-called "double identity" rule—regulating protection against the use of identical signs for identical goods or services—to cases affecting the origin function. This proposal has been criticised for various reasons. A closer analysis shows, however, that by putting an end to the unpredictable and inconsistent function theory developed by the CJEU, it would substantially enhance legal certainty for both trade mark owners and users. Moreover, it would avoid imbalanced protection of a trade mark's goodwill functions outside the specific system of anti-dilution protection for marks with a reputation. Against this background, the counterarguments do not have much weight. In particular, the proposal is unlikely to lead to a system of international exhaustion in the EU.

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This article examines the question of patent eligible subject-matter from an Australian perspective. The article considers the legislative framework governing this issue and the historical context of that legislation. It also looks at government reviews, patent office practice, international constraints and case law relevant to this issue, providing a synopsis of the extent to which the Australian patent framework is technology neutral. Finally, the article discusses the potential consequences of seeking to amend Australian patent legislation to clarify the test for patent eligibility.

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ADRIAN SMITH AND BEX HEARD

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JANUSZ PIOTR KOLCZYŃSKI AND PRZEMYSŁAW DOMINIK ANTAS

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Polish copyright law, the Polish Industrial Property Act and the Polish Database Protection Act do not set out separate rules for the protection of claims and preservation of evidence from those provided for in the Polish Code of Civil Procedure. This means that persons seeking precautionary, preliminary protection of IP rights need to demonstrate the general premise, i.e. that absence of protection of this kind will prevent or severely hamper the enforcement of a future judgment or otherwise prevent or severely hamper the achievement of the aim of the proceedings. When seeking preservation of evidence, it needs to be demonstrated that it is not possible or it is too difficult for evidence to be delivered without such preservation. Mere demonstration of the existence of the IP rights that are to be protected on an interim basis is not sufficient. The authors of this article, commenting on the latest judgment of the Court of Appeal in Warsaw of December 2013, feel that it is incorrect and incompatible with the appropriate EU secondary legislation.

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