

European Intellectual Property Review

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Opinion

PROF. DR THOMAS HOEREN

Big Data and the Ownership in Data: Recent Developments in Europe 751

Big data is a catch word which is used now as a denominator for a variety of new data processing services. But one “simple” question behind big data is unsolved: Who owns data? Can data be “owned”? And who is the owner if data are stored for instance in the data recorder of a car—the car producer, the car owner, the driver? Property in data seems to contradict the traditional concepts of civil law which have attributed property to tangible goods since Roman times. These concepts seem to have become undermined in the information society. But the first courts in the United Kingdom and Germany have dealt with the matter and seem to have developed a new intellectual property right to data.

Articles

TATIANA-ELENI SYNODINOU

Database Sui Generis Right and Meta Search Engines: What’s New and What’s Next? 755

Eighteen years after the establishment of the database sui generis right, the ambit of application of this right remains an enigmatic issue for national courts. The CJEU’s judgment in the *Innoweb v Wegener* case highlights a complex aspect of the application of the sui generis right, and more precisely the infringement of the database sui generis right by dedicated meta search engines. The ruling reveals the potential of the database maker’s right to regulate the information market. It also demonstrates the hybrid nature of this right, whose origins lie in unfair competition law, but which has taken the form of a new intellectual property right.

EDDY D. VENTOSE AND TERRY
HARRIS

Managing the “Risky” Business of Patenting in the United States 762

The article examines the issue of patent protection for inventions relating to “risk” in the United States. It does so by exploring leading decisions of the Supreme Court of the United States and recent decisions of the Federal Circuit dealing with the question of whether such patents are eligible under s.101 of the Patents Act. The article also explores in detail the recent decision of the Federal Circuit in *Alice* that directly confronts the issue, with a divided court attempting to explain the parameters of recent Supreme Court decisions relating to patentable subject-matter.

REBECCA BAINES

Prior Art before Patent: The Only Way to Instruct Expert Witnesses in Patent Cases? 778

Expert witnesses can make or break patent cases. Choosing the right expert, and ensuring that their evidence is persuasive, is key. Patent lawyers know that a finding by the court that an expert has exercised hindsight in coming to a view on obviousness is potentially fatal to a claim’s success. But experts must understand both the patent in suit and the prior art. So which should they be shown first? This article considers recent conflicting decisions from the English High Court patent judges which have made the task of ensuring that the expert’s evidence stands up at trial harder than ever.

SÉAMUS DAVID LONG

Regulation 5129/2013: The Protection it Offers Intellectual Property Right Holders 785

This article analyses the new Customs Regulation and discusses the benefits, if any, that it will provide to intellectual property right holders. The article will begin by explaining the need for the new provisions. The research will then go on to discuss each individual change and how it will be of benefit to right holders.

PIERGIUSEPPE PUSCEDDU

Access to Medicines and TRIPS Compliance in India and Brazil 790

This paper analyses access to medicines in India and Brazil after the entry into force of the TRIPS Agreements, covering the different response of both countries as to its implementation. Such International Treaty has introduced deep innovations in the international framework for patents that may create a barrier to the access of more affordable medicines. The paper covers emblematic case law from both countries and concludes with an assessment of the different implementation strategies.

The Missing Spear 802

This article is premised on the elusive quest for the search of appropriate jurisdiction in cases where the matter of dispute is covered both under the Prevention of Money Laundering Act 2002 and the intellectual property laws enforceable in India. Both legislations stand in their own right but prescribe different bodies for adjudicating the disputes that might arise from the infringement of intellectual property rights of the right holders. Whereas intellectual property legislations entrust the Court of Metropolitan Magistrate with trying offences related to the infringement of intellectual property, the Prevention of Money Laundering Act 2002 enjoins the Courts of Sessions to determine scheduled offences and the offence of money laundering under the Act. The determination of jurisdiction becomes all the more essential because, in the absence of jurisdiction, the court has no power to hear or decide the matter and the order passed by it stands null and void. This article endeavours to draw a parallel between the offence of money laundering and the offence of intellectual property infringement.

Comments

DARREN MEALE AND DANIEL
KENDZIUR

Boring Booze Bottle Shape Trade Mark Rejected by the General Court: Even Though it Bore a Registered Word Mark 807

This article examines the General Court's decision in *Franz Wilhelm Langguth Erben v OHIM* (T-66/13) of July 16, 2014 refusing to register a bottle shape because it was not distinctive enough to comprise a badge of origin, even though the bottle shape included a word mark as part of its design which had been separately registered as a trade mark for decades.

JUSTIN DAVIDSON

China: New Rules on Well-Known Trade Marks Become Effective 809

Many international and domestic companies are keen to obtain the status of a well-known trade mark recognition in China, so as to take advantage of the broad protections then available under the Chinese Trademark Law. On August 3, 2014, the Provisions on Recognition and Protection of Well-Known Trademarks 2014 (2014 Provisions) superseded some earlier 2003 regulations and brought the rules into line with the recently revised PRC Trademark Law and the PRC Implementing Regulations for the Trademark Law. Below is a summary of the key changes that may be of significance to both Chinese and foreign rights owners.

ISABEL TEARE

Virgin Escapes Rovi's Clutches Again in the Latest Cable Television Patent Dispute: Lessons in Choosing (and Preparing) an Expert Witness: *Rovi Solutions Corp v Virgin Media Ltd* 810

The California-based Rovi corporation and the United Kingdom's Virgin Media group have crossed swords in a series of patent disputes over cable television technology. In three of these cases the choice and preparation of expert witnesses were key questions. The latest case, involving a relocate feature, addressed the question of an expert being too clever and imaginative to accurately represent the appropriate skilled person or team. Can an overqualified expert properly assess inventive step?

JOSÉ TIZÓN MIRZA

CJEU Expands Trade Mark Law to Include the Design of a Store Layout: *Apple Inc v Deutsches Patent- und Markenamt* (German Patent and Trade Mark Office) 813

This article considers the Court of Justice of the European Union's ruling in *Apple Inc v Deutsches Patent- und Markenamt* concerning the scope of European trade mark legislation. Considering the applicable legislative provisions, the court examines whether it is possible to obtain a trade mark for the design of the layout of a retail store. Justifications for the decision are analysed.

AGATA SOBOL

Claims Limitation in Italy: *Alban Giacomo SpA v Bonaiti Serrature SpA and Giovanni Aschieri* 817

This is one of the first Italian judgments concerning the new provision relating to claims limitation. The patentee can officially ask the judge to take into consideration new claims when the claims as granted are invalid. It raises a number of questions that have been posed by Italian judges as to the way this request should be presented and its effects on pending cases. Curiously, before this provision (before 2010) claims limitation was practised by the parties without all the doubts that now are being discussed.

Book Reviews

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