

European Intellectual Property Review

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The UK Supreme Court and the Trunki Case: Missed Opportunities, Mysteries and Misunderstood 527

The Supreme Court upheld the decision of the Court of Appeal that PMS's Kiddee Cases do not infringe (the greyscale CAD drawings of) the Trunki registered Community design. The Supreme Court had, but failed to take, the opportunity to seek guidance from the CJEU regarding the proper interpretation, in the absence of any words to explain what is claimed, of the representations in a registered Community design. The Supreme Court also declined to decide whether the Trunki registered Community design claimed a positive absence of surface decoration, despite that being the very question on which permission to appeal had been given, and yet managed to conclude that the Kiddee Cases did not infringe.

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Can Antitrust Adequately Assess Patent Settlement Agreements Disconnected from Patent Law Relevant Facts? The Servier Case—Its Public Perception and its Underlying Facts 533

On July 9, 2014, the EU Commission imposed fines on the French pharmaceutical company Servier and a number of generic drug producers for violating arts 101 and 102 TFEU by concluding so-called "pay-for-delay" patent settlement agreements. Despite a length of more than 900 pages, the decision does not address or discuss a number of underlying facts which are equally relevant for antitrust and patent law considerations. Their presentation and analysis in the light of the new Commission's approach are the primary focus of this contribution.

ARTUR GEIER

Hybrid Shapes and Disclaimers in European Trade Mark Law 545

Shape marks consisting of several essential elements which are only partly functional in the sense of art.7(1)(e) EUTMR can be registered. These hybrid shape trade marks can function as a deterrent to competitors just by being in the register because of legal uncertainty over whether functional elements are free to be copied or not. Using disclaimers can decrease legal uncertainty significantly. Instead of deleting art.37(2) EUTMR, the use of disclaimers should have been made mandatory when registering shape marks.

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The Search for a Balance between the Legitimacy of Industrial Property Rights and the Need for Food Security 551

The balance between the legitimacy of industrial property rights and the need for food security must be achieved through the diversification of protection schemes. On the one hand, it is necessary to consider the implementation of alternative models to patents and CPVPs. From this perspective, the African model law and the Indian law protecting plant varieties are pertinent responses to the imbalance in the current system. However, the most successful model is that of Thailand. On the other hand, it is imperative to strengthen the control of patentability requirements and to limit the scope of rights over genetic resources.

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A Useful Test for Trade Mark Use: An Analysis of Current CJEU Guidance and the Difference between Defining Use Online and Offline 563

Within Directive 2008/95 trade mark use remains ill defined. In *Arsenal v Reed* the CJEU offered broad guidance regarding use offline, while in *Google France* they created a new test to establish the same online. The recent case *Flynn Pharma v Drugsrus* suggests the existence of a divergence in approach, questioning the usefulness of this test and making a re-evaluation necessary.

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The Perils of Full Copyright Protection for Tattoos 570

Drawings and paintings, which include tattoos, are protected by copyright, regardless of the medium to which they are applied. The full protection of tattoos raises troubling questions. Should tattoo artists or copyright owners be able to prevent changes to their tattoos or control how people are photographed or filmed? Limits on the extent of copyright protection for tattoos are required.

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This article discusses the Dutch Supreme Court decision in the case of website blocking of The Pirate Bay by internet service providers. In line with the CJEU *Telekabel Wien* judgment, the Supreme Court held that the Court of Appeal had used an incorrect criterion of effectiveness. It also referred questions to the CJEU concerning indirect infringement by the operators of TPB. With this referral the Netherlands remains one of the few European countries in which right holders have tried, but not (yet) succeeded in obtaining such an injunction.

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The *ITV v TV Catch Up* case is about the legality of re-broadcasting content over the internet. It has wide-reaching implications not just for broadcasters but also for anyone who re-uses content online. However, as it has been running for more than five years and has the distinction of having been referred to the CJEU not once, but twice, those who can't quite remember where it has got to are forgiven. With the second CJEU decision hotly anticipated, this article summarises the various courts' decisions to date and analyses the practical implications these will have on broadcasters and content users.

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