

# European Intellectual Property Review

2017 Volume 39 Issue 1  
ISSN: 0142-0461

## Table of Contents

### Opinion

ALEXANDER SCHNIDER

#### **Virtual Reality: From your Home to Everywhere** 1

Virtual reality (VR) equipment has now been launched in many homes, and as a disruptive technology it will soon change how we see the world. While VR's use and business cases seem endless, we have just scratched the surface of its potential today: VR games have been released or announced by nearly all of the major gaming hardware and software providers. As with any disruptive technology, however, it remains to be seen whether our current IP, IT and privacy laws are able to handle this new technology, especially when it progresses and merges with other technologies, such as biometric sensors.

### Articles

SHARON K. SANDEEN

#### **Implementing the EU Trade Secret Directive: A View from the US** 4

The entry into force of the EU Trade Secrets Directive 2016/943 ushers in a new era of breach of confidence and trade secret law in the EU. All EU Member States are required to conform their laws to the requirements of the Directive before 9 June 2018, while also complying with related provisions of the EU Charter of Fundamental Rights. For countries that already have a robust set of trade secret laws, this may require only minor changes; for others, an entirely new statute or code will be required. In either case, all EU countries should carefully consider the requirements and potential flexibilities of the Directive and how they wish to protect trade secrets within their countries. This article briefly summarises arts 1 to 15 of the Directive (arts 16 to 21 concern the implementation of the Directive) and then lists issues that are relevant to each of the articles discussed.

DR PAUL LAMBERT

#### **Computer-Generated Works and Copyright: Selfies, Traps, Robots, AI and Machine Learning** 12

Many copyright laws were expanded to embrace computer-generated works. What was understood by the expansion and what it protected are also referred to. Since the first generation of computer-generated works protected by copyright, the types of computer-generated works have multiplied further. This article examines some of the scenarios involving new types of computer-generated works and recent claims for copyright protection. This includes contextual consideration and comparison of monkey selfies, camera traps, robots, artificial intelligence (AI) and machine learning. While often commercially important, questions arise as to whether these new manifestations of copyright works are actually protected under copyright at all.

DAVID J. JEFFERSON

#### **Ingenuity and the Re-Imagining of Intellectual Property: An Introduction to the *Código Ingenios* of Ecuador** 21

In 2014, Ecuador launched a project entitled the Organic Code for the Social Knowledge and Innovation Economy, known popularly as the *Código Ingenios*. For two years, the initiative was subjected to a drafting and revision process involving public participation through multifarious channels, and the law was ultimately approved by the legislature in October 2016. The *Código Ingenios* endeavours to reinvent the frameworks for intellectual property protections in Ecuador, as well as to reconceptualise how IP interrelates with the Ecuadorian economy, society and culture. This article explores the socio-political underpinnings of the *Código Ingenios* and raises questions for future analysis.

(JERRY) JIE HUA

#### **Incorporation of Incidental Use into Copyright Limitations and Exceptions in China** 30

Film producers, sound recorders and artists sometimes capture copyright material in their new works as incidental use. The Chinese Copyright Law includes 12 situations in which users of the works do not need to obtain prior authorisation from the copyright owner and pay remunerations. Incidental capture of copyright material does not apparently fall within the 12 situations and, thus, can hardly be deemed as fair use of copyright works. To address incidental capture of copyright material for new creations, a couple of jurisdictions have incorporated incidental or de minimis use as an exception against copyright infringement in their legislations and judicial practice. This article will discuss the necessity of incorporating incidental use as a kind of copyright limitation and exception in China through a comparative study of legislations and judicial practice among various jurisdictions, and will suggest proposals for China's amendment of copyright limitations and exceptions by incorporating incidental use.

## Has the Court of Justice of the EU Clarified for Once and for All the Law on Supplementary Protection Certificates? 42

This article explores the key problems in the law on supplementary protection certificates and asks whether the Court of Justice of the EU has been able to clarify the law. It argues that although it has been able to do so to some extent, uncertainties still remain. The article will finally conclude with a discussion on whether there is a need to amend the legislation and whether the future introduction of the Unitary Patent System and the European Commission's proposed review of the current supplementary protection regime will result in changes to the law.

## Comments

DR JANET STRATH

## UK Patents Court Confirms a Dosage Regimen can be Considered Inventive, Even if it would have been Obvious from the Prior Art to Conduct a Clinical Trial 49

This article examines the recent ruling of the Patents Court on the validity of erectile dysfunction drug patents. Of particular interest is the guidance provided by Mr Justice Birss on the role of prior art and the burden of establishing legal priority, the "obvious to try" test, and whether a "clearing the way" revocation action brought by a generic manufacturer can be inferred as a threat to perform an infringing act.

PAUL R. GUPTA, GERARD M.  
DONOVAN AND DAVID S. CHRISTY

## *Halo Elecs Inc v Pulse Elecs Inc*: A New US Supreme Court Opinion Analysed in the Context of Developing Law over the Past 15 Years 54

Over the past 15 years, the US Supreme Court has issued many opinions that have dramatically changed the ways in which patent litigation should be handled. The most recent of those opinions is *Halo Elecs Inc v Pulse Elecs Inc*. This comment will analyse that opinion and discuss its significant impact. This comment will also analyse *Halo* in the context of past Supreme Court opinions, and show that it is squarely in line with the Court's 15-year trend of rejecting rigid rules and adopting flexible tests.

KATERYNA FROLOVA-FOX AND  
JOSEPH JONES

## Getting the Look for Less? The Blocking Cost: *Cartier International v BSKyB* (Court of Appeal) 58

On 6 July 2016, the Court of Appeal of England and Wales upheld the validity of injunctions requiring the five leading internet service providers (ISPs) in the UK to block consumer access to websites marketing counterfeit goods and infringing trade marks. Significantly, the ISPs, as intermediaries for the infringement, were burdened with the costs of implementing the blocking injunctions. The ruling confirms the status of online blocking injunctions as an important tool for brand owners seeking to prevent the online infringement of their trade marks. The decision is a logical extension of the rights afforded to trade mark owners to reflect the rights given to copyright owners, and made express under UK copyright legislation.

## Book Review

66