

eipr

A journal concerning the management of technology, copyrights and trade names

European Intellectual Property Review

OPINION

Copyright in the Age of Access
Professor Brian Fitzgerald

ARTICLES

Copyright Protection for Magic Tricks: A Danger Lurking in the Shadows?
Dr Alison Struthers

Treaties and Realpolitik: An Asian Pacific Perspective on the Artist's Resale Right
Dr Jonathan Barrett

Translation and the International Copyright Crisis: The Sri Lankan Experience During the Early Years of Independence
Chamila Talagala

Catching Patent Trolls in the Net of Abuse of Rights: Applying the General Principle of Union law in the Context of the Unitary Patent Package
Richard Steppe and Amandine Léonard

Software Patents and the Internet of Things in Europe, the United States and India
Guido Noto La Diega

COMMENTS

Common General Knowledge and the Importance of Being Plausible: *Idenix Pharmaceuticals Inc v Gilead Sciences Inc*
Andrew Hutchinson and Dr Janet Strath

Digital Exploitation of Out-of-Print Books and Copyright Law: French Licensing Mechanism for Out-of-Print Books under CJEU Scrutiny
Axel Paul Ringelhann and Dr Marc Mimler

BOOK REVIEWS

European Intellectual Property Review

2017 Volume 39 Issue 3

ISSN: 0142-0461

Table of Contents

Opinion

PROFESSOR BRIAN FITZGERALD

Copyright in the Age of Access 131

Wealthy information age “access corporations” such as Google have shown us how to generate access based revenue from copyright material. The challenge for everyone else is to decide whether they should follow suit. This Opinion outlines how the game has changed and suggests that content owners serious about success in the 21st century marketplace need to learn more about the inner workings of the access based revenue model.

Articles

DR ALISON STRUTHERS

Copyright Protection for Magic Tricks: A Danger Lurking in the Shadows? 136

The historical lack of interaction between IP regulation and the magic profession has entered a new chapter following the ground-breaking judgment in the US case of *Teller v Dogge*. While there has been much commentary about the decision in the US, it has received little attention in the UK. This article therefore explores UK copyright protection for magic tricks and investigates the important question of how magic *should* be protected.

DR JONATHAN BARRETT

Treaties and Realpolitik: An Asian Pacific Perspective on the Artist’s Resale Right 146

Australia is one of few countries in the Asian Pacific region to have adopted an artist’s resale right scheme. However, China’s proposed droit de suite may signal a change in attitude towards resale royalties. This article considers how smaller neighbours in the region, notably New Zealand, might be compelled by *Realpolitik*, if not treaty obligations, to follow the lead of these Asian Pacific powers in relation to the artist’s resale rights.

CHAMILA TALAGALA

Translation and the International Copyright Crisis: The Sri Lankan Experience During the Early Years of Independence 153

Translation rights protected by international copyright law have been a cornerstone of contentions between developed and developing countries for centuries. The freedom to translate is an essential bridge for the free flow of knowledge between the producers in developed countries and users in developing countries who speak non-dominant languages. However, authors’ translation rights guaranteed by the Berne Convention obstruct this freedom to translate in developing countries. Through an examination of the background to and the effect of the reservation concerning translation of educational, scientific and technical books which Sri Lanka purported to make when she acceded to the Berne Convention (in her own right as an independent state) in 1959, this article attempts to expound how this Convention has undermined access to knowledge in Sri Lanka and why the uniform and inflexible copyright protection standards in the Convention are unsuitable for developing countries. Since these standards can exacerbate the deep economic disparities that already exist between developed and developing countries, to prevent this and to make international copyright protection palatable and congenial to developing countries, this article points out that there needs to be a change in the uniform standard setting approach that has been practised in international copyright law for more than a century.

RICHARD STEPPE AND AMANDINE
LÉONARD

Catching Patent Trolls in the Net of Abuse of Rights: Applying the General Principle of Union law in the Context of the Unitary Patent Package 163

The phenomenon of “patent trolling” is recurrently alleged to obstruct the founding purposes of patent law. This contribution assesses to what extent the prohibition of abuse of rights, as a principle of Union law, may serve as a corrective mechanism. First, the article sets out the relationship between “patent trolls” and other (e.g. non-practicing) entities, establishing a behavioural definition of the former. Secondly, EU and national perspectives on abuse of rights are outlined and their applicability to patent rights tested. Lastly, the criteria of abuse are applied to trolls’ behavioural characteristics within the context of the Unitary Patent Package.

Software Patents and the Internet of Things in Europe, the United States and India 173

This article sheds light on the pressing issue of software patents by giving an account of the approaches followed in Europe, the US and India. The occasion of this study is the adoption in 2016 of the final version of the Indian guidelines on the examination of computer-related inventions, which have been surprisingly overlooked in the legal literature. The main idea is that the Internet of Things will lead to a dramatic increase of applications for software patents and if examiners, courts, and legislators are not careful, there is a concrete risk of a surreptitious generalised grant of patents for computer programs as such (in Europe) and for abstract ideas without inventive concept (in the US). The clarity provided by the Indian guidelines, following a lively public debate, can constitute good practice that Europe and the US should take into account. Conversely, the sea of patent software looks very stormy in the US, where, after some reversals of the leading case *Alice Corp v CLS Bank International*, there seems to be the risk of swelling the ranks of speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies. Some good news, however, comes from a dissenting opinion that innovatively suggests bringing free speech into the reasoning on patents.

Comments

ANDREW HUTCHINSON AND DR
JANET STRATH

Common General Knowledge and the Importance of Being Plausible: *Idenix Pharmaceuticals Inc v Gilead Sciences Inc* 185

In *Idenix Pharmaceuticals Inc v Gilead Sciences Inc*, the Court of Appeal confirmed that the threshold for plausibility was low but was nevertheless a potent attack on both obviousness and insufficiency. The court also provided guidance on what constitutes common general knowledge, particularly in the context of information presented in scientific papers and at conferences.

AXEL PAUL RINGELHANN AND DR
MARC MIMLER

Digital Exploitation of Out-of-Print Books and Copyright Law: French Licensing Mechanism for Out-of-Print Books under CJEU Scrutiny 190

In its decision in *Soulier v Premier ministre* (C-301/15), the CJEU looked at the French licensing mechanism for out-of-print books and its compatibility with EU copyright rules. It held that national legislation which replaces the author's express and prior consent with tacit consent or a presumption of consent infringe the author's reproduction and making available rights. The CJEU's decision has far-reaching implications on rights management schemes operating with implicit or presumed consent.

Book Reviews

194