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RICHARD H. STERN

Once More unto the Breach—US Supreme Court Again Addresses Exhaustion Doctrine 197

The Federal Circuit, the US court for patent appeals, has revived a doctrine that effectively nullifies the patent exhaustion doctrine. At the same time, that court has narrowly interpreted and sought to cabin US Supreme Court decisions declaring a broad concept of patent exhaustion. In December 2016 the Supreme Court granted certiorari to review the Federal Circuit's recent *Lexmark* decision which held en banc that disobeying a post-sale restriction—in this case one against refilling patented toner cartridges for printers—creates patent infringement liability. It is widely considered that the Supreme Court will reverse the judgment, ruling that patentees cannot impose conditions on their customers' post-sale use or disposition of patented products. But it is likely that the Supreme Court's desire for unanimity in patent cases will cause it to issue a narrow, fact-specific ruling that leaves unresolved many important questions about the scope of the patent exhaustion and the efficacy of possible ways around it.

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This article discusses the proposed introduction into EU law of neighbouring rights for press publishers for the digital uses of their publications. This proposal is included in the European Commission's Draft Directive on copyright in the Digital Single Market of 14 September 2016, which forms an important part of the ongoing reform of copyright at EU level. This article highlights the challenges for the Digital Single Market associated with the establishment of an additional layer of 28 national rights and their related exceptions and limitations. By reference to the "pie theory", it also shows how this proposal risks redistributing resources from creators to publishers. Further, this article underlines the missing causal link between the proposed reform and market efficiency justifications. In contrast, existing empirical evidence shows negative externalities for smaller publishers and users at large. This evidence—together with the enclosure of the public domain that comes from the creation of new neighbouring rights and their retroactive application—might serve as a warning of the potential negative repercussions of this proposal on the plurality of sources, users' access to information—and more generally on democratisation. In conclusion, this article recommends refraining from the introduction of neighbouring rights for press publishers online because they would (1) hinder—rather than promote—the creation of a Digital Single Market, (2) be detrimental for the interests of creators, smaller market players and users, while (3) not solving any systemic issues of the EU copyright system.

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This piece, the first part of a two-part article, discusses the reverse burden of proof in patent law and trade secret protection in pharmaceutical patent litigation. The first part of the article will focus on a discussion at an international level. After going through a few important principles of international law, and their implications for the research question, the author will move on to discuss the reverse burden of proof as established in art.34(1) of TRIPS. Thereafter, the author turns his focus to the protection of trade secrets. After some general thoughts on the protection of trade secrets internationally, the author will attempt to develop guidelines and alternatives for how to interpret art.34(3) of TRIPS, and discuss how the potential tension between patent and trade secret protection could be resolved in the light of said article. The second part of this article will appear in the next issue of E.I.P.R. and will focus on regional development within the EU.

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This article considers whether creative culinary dishes can be protected as artistic or dramatic copyright works. In doing so, it uses the culinary arts as a vessel for a discourse to explore the boundaries and limitations of the current UK copyright regime, evaluating the closed nature of the authorial works categories. Some modest suggestions are made for reforming the categories to place more emphasis on authorial communication.

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This article considers whether the recent amendments to the European Trade Mark Regulation and Trade Marks Directive (which must be implemented by individual Member States by 14 January 2019) will make it easier to register non-traditional trade marks. The article considers the potential effects the amendments may have in relation to applications for a number of different types of mark such as sounds, motion and holograms, colours, smells, tastes and textures, and the practical difficulties that may be faced by trade mark registries as a result.

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The purpose of this article is to provide a critique of the judgment of the Supreme Court of India in the case of *Eastern Book Co v D.B. Modak*. In India, the Eastern Book case has been taken as a jewel in the crown of copyright law jurisprudence. However, the author of this piece argues that the judgment in that case was per incuriam, as the court erred with regard to the law.

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This comment critically assesses the ECJ's ruling in *VOB v Stichting Leenrecht*. It finds that the scope of the public lending right has always been a matter of interpretation, which used to be fairly traditional. In that light, the court's current stance, allowing certain forms of e-lending with similar characteristics to conventional book lending, constitutes a broader, functional approach.

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