

European Intellectual Property Review

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Can the European Copyright Regime Facilitate Open Access? 605

The basic scope of the EU is the unification and harmonisation of all European Member States' national regulations. Should the EU aim to harmonise and unify national regulations, it is only reasonable to do so through copyright-specific policy provisions implemented by the European countries. The European copyright regime could potentially facilitate open access practice, should this practice be tailored to policy-making actors regarding the European copyright law framework.

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This article comprises edited transcripts from two public lectures on the topic of the proposed new EU right for press publishers, organised by CREATE, the RCUK Copyright Centre based at the University of Glasgow. The lectures were given by Professor Raquel Xalabarder (speaking against) and Professor Thomas Höppner (speaking in favour) in November 2016 and February 2017. The transcripts were edited and updated in June 2017, and in this published format are preceded by an introduction from Professor Martin Kretschmer, Director of the CREATE Centre.

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The article debates on the changes the EC Intellectual Property Enforcement Directive brings about for the law of an account of profits in the UK. It also examines case law to establish how the courts take the account and what methods they use in allocating the profits. Inter alia, it criticises the court's approach toward remuneration for the infringers' skills and labour. Furthermore, it argues against the UK court's refusal to change the principle of election between an account of profits and damages. It yet again takes issue with some courts' approach to apportioning profits.

MATTHEW FISHER

Second Medical Indications and the Swiss-Form Claim: Taming Frankenstein's Monster: Part 2—Putting the Problem in Context 639

Few patent claim formats present more interpretative difficulties than that of the so-called Swiss form. Taking shape as purpose-bound process claims—i.e. claims directed towards a manufacturing process applied for a particular end—the Swiss form was originally conceived as an attempt to navigate treacherous waters: waters bordered by two seemingly immutable prohibitions on patenting: the excluded, and the old. A jury-rigged solution to a thorny problem, the Swiss-form claim promised to extend patent law's incentives to the discovery of new and useful functions of existing medicaments: repurposing the old to create the new. For inventions known in other fields, inventions with no prior medicinal purpose, a solution had already been given in statute; art.54(5) of the European Patent Convention (EPC) 1973 allowed discovery of the first medical use of a known compound to be claimed as a purpose-bound product. Once, however, a first medical use was known, that was it. Secondary indications, arguably no less beneficial than the first, were left out in the cold. The Swiss form was devised to bridge this gap: its purpose undoubtedly noble; its proposed effects glittering. However, this virtuous façade conceals a darker underbelly: an underbelly in which the text of the Convention was mutilated and warped, leaving knotty, perhaps intractable, problems in its wake. This then is the story of the Swiss form: of its birth, its execution and the more recent attempts to disentangle the legacy of its creation. Part 1 of this series discussed the adoption of the Swiss-claim format within the jurisprudence of the European Patent Office and questioned the fundamental legitimacy of the circumstances of its hatching from art.54(5) EPC 1973. This story forms the background for much of what is to come, and sets up significant elements of the criticism levelled at the *Warner-Lambert v Actavis* litigation that is made in Part 3. This part (Part 2), by contrast, begins by briefly outlining aspects of the regulatory framework for prescription medications in the UK—a topic that is necessary to understand a number of the issues that will be raised later on. Following this, the remainder of this part is dedicated to the question of infringement and the problems raised by retro-fitting use limitations into this arena.

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In its 30 May 2017 decision in *Impression Products Inc v Lexmark International Inc*, the US Supreme Court reaffirmed the vitality of the exhaustion doctrine, as to both domestic and foreign sales of patented products.

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Book Review