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Decoding the Kodi Box: To Link or not to Link? 733

The judgment of the CJEU in the *Filmspeler* case adds another piece to its complex conceptual construction of the right of communication to the public. The court was invited to answer whether the concept of “communication to the public” should be interpreted so widely as to cover the sale of multimedia players (so-called “Kodi boxes”), which come with pre-installed add-ons, available on the internet, containing hyperlinks to websites on which copyright-protected works have been made available to the public without the right holders’ consent. By opting for a flexible definition of the right, the CJEU affirmed in principle the inclusive nature of the right of communication to the public to cover hyperlinking as a form of offering copyright-protected works, and elaborated further on the circumstances of the linkers’ liability. The emphasis on the actual or constructive knowledge of the fact that the hyperlinks gave access to works published illegally on the internet and on the profit-making nature of the activity of the user mutate the absolute character of the rights granted by copyright by subjective elements and on the special circumstances of the linking activity.

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In its 2017 judgment in *The Pirate Bay* (C-610/15) the CJEU developed further its construction of the right of communication to the public within art.3(1) of Directive 2001/29 (the InfoSoc Directive), and clarified under what conditions the operators of an unlicensed online platform are potentially liable for copyright infringement. The court held that the operators of a platform that makes available to the public third-party uploaded copyright content and provides functions such as indexing, categorisation, deletion and filtering of content may be liable for copyright infringement, jointly with users of the platform. For a finding of liability it is not required that the operators possess actual knowledge of the infringing character of the content uploaded by users. The decision encompasses different types of platforms and operators with different degrees of knowledge of the character—lawful or unlawful—of the content made available therein. It calls into consideration the relationship between liability for (harmonised) primary copyright infringement and (unharmonised) secondary copyright infringement. In relation to the current EU policy discussion of the so-called “value gap proposal”, the judgment reinforces the position of the European Commission, especially the basic idea that the making available, by a hosting provider, of third-party uploaded copyright content may fall within the scope of the right of communication to the public. The court’s reasoning also prompts a reflection as to whether a hosting provider that is primarily responsible for acts of communication to the public is actually eligible for the safe harbour within art.14 of Directive 2000/31 (the E-Commerce Directive).

DR DEMING LIU

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The Court of Appeal in *Hollister Inc Dansac AS v Medik Ostomy Supplies Ltd and Design & Display Ltd v Ooo Abbott* visited the issue of what proportion of general overheads can be deducted in accounting for profits. The court held that such a proportion of the general overheads as attributable to the infringement can be deducted; in making such a calculation, the court adopts the concept of the opportunity cost. To what extent is that test correctly applied by the lower courts, and what techniques do the courts employ in apportioning the overheads in practical terms? The article discusses these questions.

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In *Cartier v BSKyB* the Court of Appeal upheld the granting of website blocking injunctions against internet service providers (ISPs) where the target websites were selling counterfeit goods contrary to EU law. Owing to Kitchin LJ finding a purely domestic basis on which to grant this remedy, the case raises the prospect of these injunctions being used against other tortious acts.

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In a decision that will have an impact on all patent-rich industry sectors, the English Supreme Court has changed the approach to determining patent infringement by a variant and has introduced a “doctrine of equivalents” into UK patent law. This case comment explores the decision in *Actavis v Eli Lilly* and considers its wider implications for both patent enforcement and freedom to operate.

JOSEPH JONES

Can’t get a Break, Can’t Have a Kit Kat: Court of Appeal Rejects Acquired Distinctiveness for Kit Kat Shape 783

In the latest instalment of a 10-year battle to register the shape of the Kit Kat bar as a UK trade mark, the Court of Appeal dismissed Nestlé’s appeal. The Court of Appeal upheld the High Court’s decision in finding that Nestlé is not permitted to register a UK trade mark for the shape of the four-fingered Kit Kat chocolate bar as Nestlé failed to demonstrate acquired distinctiveness in that shape.

LOUISE THORNING AHLE AND LASSE SØNDERGAARD CHRISTENSEN

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There still seem to be considerable differences in how the EU legislation protecting GIs is administered within the EU. Some Member States (e.g. France) appear to be doing a better job than others (e.g. Denmark). In the latest case of *Mengozi v EUIPO – Consorzio per la tutela dell’olio extravergine di oliva Toscano IGP (TOSCORO)* (T 510/15), the mark applied for was declared partially invalid.

DR PAUL LAMBERT

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In *Google Inc v Equustek Solutions Inc*, a technology company brought an intellectual property infringement action against a previous distributor for unlawful use and sale of its intellectual property through infringing products on internet websites. It was granted various interlocutory injunctions against the infringer. The infringer moved jurisdiction. An injunction was also granted against Google, a non-party to the action, to cease indexing or referencing certain infringing search results on its internet search engine. The issue on appeal to the Canadian Supreme Court was whether Google could be ordered, pending trial of action, to globally de-index websites of the infringing distributor who was in breach of several court orders, and continuing to use its websites and even new websites to unlawfully sell infringing intellectual property products. An issue was whether Supreme Court of British Columbia had jurisdiction to grant an injunction with extraterritorial effect and if it did, if it was just and equitable to do so.

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