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PROF. DR THOMAS HOEREN AND
PHILIP BITTER

Data Ownership is Dead: Long Live Data Ownership 347

Some time ago, we were wondering who owns the data in a car and whether it has to belong to anyone at all. Since then, there has been a huge debate about whether there should be a general data ownership. In the meantime, at least in Germany, there almost seems to be a consensus that a comprehensive general data ownership *de lege ferenda* does not lead to the desired results. However, this does not solve the question of the ownership of data for the original purpose.

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Collective management organizations (CMOs) are, first and foremost, copyright and related rights licensing bodies managing vast sums of money. That does not, however, define the entire scope of their activities. For example, the 2014 EU Directive on collective management notes that CMOs “play, and should continue to play, an important role as promoters of the diversity of cultural expression”. This article explains and evaluates the cultural functions that CMOs play.

VIKAS KATHURIA AND JESSICA C.
LAI

Royalty Rates and Non-Disclosure Agreements in SEP Licensing: Implications for Competition Law 357

Requiring a non-disclosure agreement (NDA) is a common business practice used to safeguard the commercial interests of a licensor and a licensee in intellectual property licensing matters. The recent litigation involving standard essential patents (SEPs) has, however, raised doubts over the practice of patentees requiring NDAs before licensing SEPs to putative licensees. It has been argued that the inclusion of royalty rates in NDAs leads to discriminatory pricing of technology—a violation of the commitment to license under fair, reasonable and non-discriminatory (FRAND) terms. That is, licensees cannot know if they receive non-discriminatory terms, if they cannot compare their licences owing to NDAs. This article examines this issue from both the theoretical and practical perspectives, and concludes that the inclusion of royalty rates in NDAs may be justified in view of the technological and commercial realities involved in SEP licensing.

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The “Fall-Back” Rules under the EU Trade Mark Regulation 368

In disputes concerned with infringement and invalidity of an EU trade mark (EUTM) the forum rules—also known as the “cascade” rules—in the EU Trade Mark Regulation (EUTMR) apply. It is the purpose of this article to examine whether the Brussels I Regulation, the Lugano Convention and the Member States’ own international forum rules also apply in addition to these “cascade” rules and in that case to what extent. The analysis shows that the Brussels I Regulation applies as a “fall back” under the EUTMR. The analysis further shows that the Lugano Convention applies as a “fall back” under the EUTMR if the action is brought in the EU, whereas the Lugano Convention applies in full if the action is brought in the EFTA. The analysis finally shows that the Member States’ own international forum rules do not apply at all.

TOMRUK ÜSTÜNKAYA

A Counterfeit Catastrophe: Considerations of Illegal Prescription Drugs produced by 3D-Printing Technology 374

This article aims to highlight the legal challenges presented by the production of counterfeit pharmaceutical medication derived from 3D printing technology. With the recent approval of the first 3D printed drug Spritam (prescribed for the treatment of seizures), the primary focus of the article is to investigate the potential threat of illegal counterfeit prescription drugs produced by the 3D printing process permeating the market and posing a risk to public health. Matters connected to intellectual property law and regulatory control in existing pharmaceutical practice are investigated. The article presents the serious consequences to public health when regulation and manufacturing processes prove inadequate. With this scenario hypothetically applied to the potential production of counterfeit medicines constructed by the 3D printing process, the article aims to establish the hazardous threat which ensues. The significance of trade agreements such as the Anti-Counterfeiting Trade Agreement (ACTA) and international regulatory bodies such as the World Health Organization (WHO) and the new Medicrime Convention are discussed. Recommendations for reform are put forward in the conclusion.

Extraterritorial Jurisdiction vis-à-vis Sovereignty in Tackling Transnational Counterfeits: Between a Rock and a Hard Place? 381

Transnational counterfeiting has grown tremendously with the increasing interdependence of global economy. The process of illicit financial flow has outpaced the growth of mechanisms for global governance, and the resultant deficiency produces a regulation vacuum where cross-border crime can thrive. It is necessary to consider the effect of service process of foreign defendants getting evidence. As illustrated in the Gucci case, the US courts face great challenges in addressing extraterritorial jurisdiction. In the context of extraterritorial discovery, it remains unresolved how to prioritise competing jurisdictional claims. Remediation is compromised owing largely to sensitivities over national sovereignty. The broad interpretation of sovereignty makes the Bank of China (BoC) operate behind a firewall that keeps it immune from the jurisdiction of US courts, leaving brand owners vulnerable. A deadlock arises between the proper exercise of extraterritoriality and a critical response to the current increasingly complex cross-border counterfeiting. At stake are fundamental questions of conflict of laws. A valid nexus is indispensable to justify a US court applying the Federal Rules of Civil Procedure (FRCP) 45. Given the unviable course of action via the Hague Evidence Conventions, it is argued that greater legal protections for US entities via subpoenas are a more feasible solution. In response to the global challenge, more multipronged approaches should be adopted to combat the transnational counterfeiting crime.

ANNE-CATHERINE CHIARINY

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Article 8(1) of the Brussels Ibis Regulation confers jurisdiction on the judge of the domicile of one of the co-defendants provided that a connection between the claims is shown. Whereas the demonstration of a nexus of related actions seemed, until now, impossible for industrial property right owners who are victims of plurilocalised acts performed by different defendants established in various Member States, recent European decisions, especially in the 2017 Nintendo case, and French rulings, concerning unitary titles, illustrate a clear desire to appreciate loosely the related actions concept, opening up favourable horizons for the owners of industrial property rights portfolios.

Comments

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Not "Alright": Mungo Jerry Singer Found to Have Misrepresented Ownership of the Copyright 407

The High Court has ruled that the singer misrepresented to a music publisher that he owned copyrights in the song "Alright, Alright, Alright". In reliance on that, the publisher had taken a purported assignment of a share of the copyright and then licensed what it thought to be its share to Sony/ATV. Eventually the publisher had to pay £33,600 to the true copyright owner to settle an infringement claim. The High Court ordered the singer to pay that amount to the publisher as damages for misrepresentation, but rejected its claim for lost royalties that it would have earned, had the assignment been valid.

ENRICO BONADIO

Graffiti Gets VARA Protection: the 5Pointz Case 409

This comment considers the decision of the New York District Court of February 2018. This case, involving the demolition of a graffiti centre known as "5Pointz", is of seminal importance. This is the first time graffiti artists have been protected under the Visual Artists Rights Act (VARA), a piece of legislation introduced in the US in 1990 to offer visual artists' moral rights, including the right to prevent destruction of their works.

MARTIN OCHS AND KIRSTY LAWRENCE

The Importance of Injunctions for Copyright Infringement 413

This comment examines the case of *Phonographic Performance Ltd (PPL) v JJPB Ltd* in which the High Court considered applications for judgment in default for injunctions against infringers of PPL's rights. A legal point arose regarding the necessity for an injunction if licence fees have subsequently been paid covering the unlawful acts. This article highlights the relevant test for injunctions for copyright infringement and the lessons that should be taken from it by infringers.

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