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Opinion

RICHARD VARY

The Prodigal Licensee 691

Recent decisions on FRAND have used a comparable licences methodology. Some licensees argue that non-discrimination means that they should get the lowest of all previous rates. But would that discriminate against the licensees who took out a licence in the past? When comparing past licences, we also need to price in the risk taken by early licensees in agreeing rates at a time when they had less information.

Articles

DINUSHA MENDIS

In Pursuit of Clarity: The Conundrum of CAD and Copyright—Seeking Direction Through Case Law 694

Through the application of selected statutes and case law drawn from the UK, this article will explore the copyright status of three-dimensional design files and will particularly question whether they can be protected as literary and/or artistic works. In responding to this question, the article highlights gaps and challenges inherent in the law and adopts a “coherentist” and “regulatory instrumentalist” analysis in providing recommendations for the future.

AURELIEN PORTUESE

From Non-Disclosure Agreements to Trade Secrets: Antitrust Implications 706

Non-disclosure agreements are inserted (or annexed) in contracts of employment of employees by employers in order to secure the appropriate use of the company’s crucial and strategic information by employees vis-à-vis competitors, but also vis-à-vis the employees via so-called “non-compete clauses”. Non-disclosure agreements also entail trade secrets, where firms communicate on the confidential nature of some of the information they possess. Non-disclosure agreements can also have antitrust implications since trade secrets can be concluded among competitors. While the breach of non-disclosure agreements, and of trade secrets, may lead to the grant of compensation damages, these agreements can nevertheless be sometimes breached with damages due to the pro-competitive effects of such breaches. This article aims at deciphering the complex relationship between non-disclosure agreements in general, and trade secrets in particular, and antitrust law. We argue that non-disclosure agreements should be more fiercely enforced, with the enhanced deterrent effect of breaching provided by the grant of punitive damages. However, we resort to the theory of efficient breach for the grant of no damages when there are net pro-competitive effects of the breach of trade secrets. We conclude, on the basis of a comparative analysis of the regulatory frameworks provided in Europe and in the US, that there is a need for further regulatory convergence with respect to the antitrust implications of trade secrets and non-disclosure agreements.

PRATAP DEVARAPALLI

Machine Learning to Machine Owning: Redefining the Copyright Ownership from the Perspective of Australian, US, UK and EU Law 722

Machine learning is a major class of artificial intelligence that enables machines to learn from their experiences without being explicitly programmed. The programs and machines that are equipped with this path-breaking technology have been producing creative works that have given rise to one of the major research questions of this article: “Who owns the rights over intelligent machine-created works?” This article has tried to answer this question by interpreting the copyright laws of different jurisdictions from an authorship and ownership perspective. Secondly, it provides an analysis of the case law of different jurisdictions that have defined copyright ownership and authorship with respect to machine-generated works. Additionally, this article sheds some light on different arguments and expert opinions in relation to the authorship and ownership aspects of works generated by artificial intelligence systems. Finally, this article provides the author’s opinions and recommendations in relation to the issue and proposes a future model for the protection of creative works generated by intelligent machines.

SACHIN SATHYARAJAN

Protecting Geographical Indications in the “Old World” Developing Countries: The Cases of Basmati Rice, Jinhua Ham and Ethiopian Heritage Coffees 729

This article attempts to study how the interests of the “Old World” developing countries are addressed by international legal instruments covering geographical indications (GIs). The article will discuss three case studies, analysing specific problems faced by these countries in protecting their GIs. In terms of territoriality and the role of governments in protecting GIs, the first case study is that of India’s attempts at protecting Basmati rice. The second case study is that of Jinhua ham, where the Chinese three-tier system creates consumer confusion, overlap and conflict of rights between GIs and trade marks. The final case study is the Ethiopian model on heritage coffees as an adaptive system that was designed outside the GI framework.

Science and Art in Islam: The Protection of Traditional Intellectual Property Rights in Muslim Communities in Africa 736

Islamic law is an integral part of many regions in Africa, affecting the personal, cultural, political and commercial activities of the people. How traditional intellectual property (intellectual property linked to traditional knowledge systems) is perceived in Islamic law in Africa is investigated in this article, which proposes that appropriate protection should recognise traditional intellectual property rights of people in Muslim communities in Africa.

Comments

BENJAMIN LOTZ AND LUTZ REULECKE

Advancing Content Protection in Germany: Munich Courts Pave Way for Website Blockings 745

A recent decision of the Munich Court of Appeal (judgment of 14 June, 29 U 732/18) confirmed the first-ever blocking order in Germany against a copyright-infringing website. The question of whether implementation costs of €150,000 are acceptable to a provider, answered in the affirmative by the Regional Court, was no longer subject to legal action.

MIRKO BRÜB

“Glen Buchenbach”: CJEU Further Clarifies the System of Prohibited Acts with Regard to Geographical Indications 746

Can the name of an (alcoholic) product infringe a registered geographical indication, even if the name has no visual or phonetic similarity? This was the central question the CJEU had to decide upon in a recent case that is now headed back to the originating District Court of Hamburg, Germany. The CJEU’s judgment provides clarification on a number of issues that go beyond geographical indications for spirit drinks. What constitutes a direct or indirect commercial use of a geographical indication? Does such a use require a use of the geographical indication in identical form, or is it sufficient that the disputed element evokes some kind of association with that indication? Can the evocation of a geographical indication occur even when no visual or phonetic similarity between the designation and the indication exists? And, finally, can false or misleading indication on the product be refuted by accompanying it, for example, with information about the true origin of the product? The CJEU answers these questions with regard to Regulation 110/2008; however, the judgment’s findings apply to other products such as agricultural products and foodstuffs, wine and aromatised wine products as well, because the regulations regarding those products must be interpreted in such a way as to ensure that they are applied consistently.

DR RITA MATULIONYTE

Roadshow Films Pty Ltd v Telstra Corp Ltd and the Recent Development of Blocking Injunctions in Australia 750

This comment considers the recent Australian case *Roadshow Films Pty Ltd v Telstra Corp Ltd* and provides some information on the development of blocking injunctions in Australia.

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