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PROF. P. BERNT HUGENHOLTZ

The WIPO Broadcasting Treaty: A Conceptual Conundrum 199

The Broadcasting Treaty that has been discussed at WIPO for over 20 years seems to be reaching a dead end. The Treaty, which aims at extending the legal protection of broadcasters to the digital realm, suffers from three major flaws: one economic, one conceptual, and one pragmatic. Owing to the decreasing technical costs of broadcasting, the economic case for granting special rights to broadcasters is weakening. Moreover, properly defining the act of “broadcasting” that would give rise to legal protection is highly problematic. Finally, no real and urgent need for a new right seems to exist, in light of current legal regimes that broadcasters already rely on under national law. Perhaps the time has come to abandon work on the WIPO Broadcasting Treaty, and move on.

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The past decade has witnessed an increase in the use of regional trade agreements (RTAs) to drive trade and the economy by fostering co-operation within a region. The benefits and limitation of RTAs have been widely discussed in extant literature; however, this article analyses the rationale for the recent introduction of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTTP), following the withdrawal of the United States from the Trans-Pacific Partnership Agreement (TPP). More specifically, this article examines the necessity for renegotiating the TPP from the perspective of Australian copyright law. In this article, the author argues that although there are clear theoretical benefits of co-operating regionally through RTAs, RTAs are governed by the limitations of power balances that are often present during their negotiation. This article draws on the theory of international co-operation together with case studies of the Australia-United States Free Trade Agreement (AUSFTA) and the TPP, to examine the benefits and limitations of negotiating RTAs. The author concludes that, owing to the presence of power imbalances, the TPP required renegotiation, which significantly reduced the original copyright provisions. The agreement overwhelmingly represented the US copyright agenda at the expense of Australian copyright law interests, thus failing to promote the copyright balance.

LORNA RYAN

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Council Regulation 723/2009 on the Community Legal Framework for European Research Infrastructure Consortium (ERIC) provides for the inclusion of policies, including an intellectual property rights policy, in the statutes of ERICs. The manner in which research infrastructures with ERIC status have responded to this requirement varies. This article reports findings of a preliminary study of the treatment of intellectual property rights in ERICs (2011–2018). The tension between the existence of IPRs and their exercise is a familiar one in competition law; the article suggests that the “fifth freedom” imports this issue into the European Research Area and the balance of rights forms the backcloth of considerations of IPRs and ERICs.

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This article summarises and comments on an Evaluation Report prepared by the European Commission in relation to the Database Directive (96/9). The value of the Evaluation Report is twofold: first, in its detailed review of EU and national jurisprudence on the interpretation of the Database Directive, in particular pivotal decisions confirming that the sui generis right only covers databases that contain data obtained from external sources; and, secondly, in confirming the impact of the Directive, or lack of it, on the production of databases and the competitiveness of the database industry.

JOSHUA YUVARAJ AND REBECCA
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This article examines the development and removal of the 1911 Imperial copyright reversion right. We find that this right was spuriously removed in the UK, Australia and New Zealand. We then find that criticisms of the right in Canada (where it still exists) can help teach us what an effective 21st-century reversion right might look like.

A Local (Residual) Right or a Future Trend for All? An Outline of a Legal Character of Audiovisual Royalties for the Broadcasting of an Audiovisual Work 241

This article deals with selected issues regarding the statutory and unwaivable remuneration for the use of audiovisual works, applicable in Poland since 1994 and previously not known here. It seems that the analysed issues arouse particular practical controversy. It also seems that—at least in Poland—the said remuneration is (as some statistical data indicate) a significant, if not the main, source of income for the rightholders of an audio-visual work. Unwaivable rights to authorial royalties have also become popular in the European Union, especially in connection with the planned copyright reform on the so-called Digital Single Market. It seems that they could be a special remedy for an attempt to reduce the copyright territoriality principle through “mechanisms” such as the portability of online content services, strengthening the country of origin principle and “acquisition” of copyrights at source. Unwaivable remuneration rights—such as the model law—could also be used (*de lege ferenda*) for rewarding authors of computer programs “for their” artificial intelligence creations, etc. The author of this article tends to share the view about the inter-partes character of the right to the remuneration in question, rather than perceiving it as an element of an absolute author’s economic right. It would be an independent right, a legal norm that modifies the contractual relationship between the producer (or the rightholders themselves) and the users of audio-visual works for the benefit of the joint authors of audio-visual works or artistic performers. In this sense one can speak of an extended effect of the right to royalties. Based on the Polish example this article raises wider questions, namely whether the right to audio-visual royalties was included in the Bern Convention as *ius conventionis* or is a separate (“future” or residual) right surviving the transfer of the right to an audio-visual work. Furthermore, how strictly is the “Polish right” connected to the author him/herself in terms of its protection *post mortem*? The author of the article believes that the right to royalties influences directly the limit of the application of the Bern Convention’s assimilation principle that authors enjoy.

KATIE CAMERON

The Great British Break Off: Trade Marks and Designs through the Brexit Transition 249

The Withdrawal Agreement negotiated by Theresa May between the EU and the UK provides for continuity for holders of registered EU trade mark rights, Community design rights and Community plant variety rights. In the event of no deal, the UK Government has published a series of guidance notes on continuity of these rights in the UK. This article summarises how granted and pending EU trade marks and designs will be affected in the two scenarios, and what each scenario means for rightholders and applicants.

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AND SPARTAK KODRA

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On 21 November 2018, the CJEU issued an important decision in *Novartis Farma v Italian Medicines Agency and Roche Italia* (C-29/17). The case was referred to the CJEU by the Italian Council of State and regarded an Italian law that allows the national healthcare insurance system (NHS) to reimburse a medicinal product for a use not covered by its marketing authorisation (off-label use) in order to reduce expenditure, notwithstanding the existence and market availability of a valid therapeutic alternative. The court answered, in essence, that such law is not contrary to EU law on medicinal products.

JOHN A. TESSENSOHN

Godzilla Crushes Guzzilla in Demolition Equipment Trade Mark Battle 252

On 12 June 2018, the Intellectual Property High Court of Japan (IPHCJ) reversed the decision of the Board of Appeals of the JPO and ruled in favour of the legendary maker of the Godzilla monster movies, Toho Co Ltd, in a trade mark invalidation dispute between the movie studio and a manufacturer of Guzzilla cutting and concrete crusher machines, Taguchi Industrial Co Ltd: *Toho Co Ltd v Taguchi Industrial Co Ltd*, Heisei 29 (gvo-ke) 10214. This is an interesting pro-brand owner decision because the IPHCJ did not hesitate to protect the movie studio owner of the world famous GODZILLA mark against the registration of a mark that is owned by a business that specialises in manufacturing cutting, crushing and demolition attachments for construction equipment.

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In early 2018, the UK Court of Appeal found that Regeneron Inc’s (Regeneron) European (UK) patent EP1360287, and the related divisional EP2264163.2 were valid and infringed by Kymab Ltd (Kymab), a small Cambridge (UK) based biotechnology company. The “David versus Goliath” battle between Kymab and the large US biotechnology company Regeneron has significant commercial implications for Kymab and potentially serious ramifications for its research and development within a number of disease areas. The judgment also appears to lower the bar for the sufficiency of disclosure of biotechnological inventions. Following on from the landmark UK Supreme Court decision in *Actavis v Eli Lilly* last year, this Court of Appeal judgment is thus yet another decision from the UK courts that swings the balance in favour a patentees in infringement disputes, particularly within the pharmaceutical and biotechnological fields.

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The recent decision of the High Court of England and Wales in *Glaxo Group Ltd v Vectura Ltd* features some interesting points in relation to litigation strategy, in particular in relation to the relationship between claim ambiguity under art.83 of the European Patent Convention and proving infringement; and the value of declaratory relief where a licensee decides to terminate a patent licensing arrangement.

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