European Intellectual Property Review

2020 Volume 42 Issue 3 ISSN: 0142–0461

Table of Contents

Opinions

MARCO RICOLFI AND ESTELLE DERCLAYE

Opinion of the European Copyright Society in Relation to the Pending Reference before the CJEU in *Brompton Bicycle v Chedech/Get2Get* (C-833/18) 205

The European Copyright Society has issued an opinion in *Brompton Bicycle v Chedech/Get2Get*, case C-833/18 (pending, on reference from the enterprise court of Liège). The opinion recommends that the Advocate General and the Court of Justice of the European Union reject both the multiplicity of shapes and the causality approach applying to designs (*Doceram* (C-395/16)) but, instead, apply its well-established case law on the copyright principles of idea/expression dichotomy, merger doctrine, the non-protection of functionalities and the originality requirement to reject the copyright protection of the famous foldable Brompton bicycle.

Articles

PAMELA SAMUELSON

Regulating Technology Through Copyright Law: A Comparative Perspective 214

The EU's recently adopted DSM Directive marks a break after 30-some years of general convergence in the way EU and US copyright laws have regulated digital technologies. Given the differences in underlying rationales for IP rights and in the legal cultures of the EU and US, the two might pursue divergent paths going forward, particularly in respect of ISP liability and press publisher rules.

MARIE HADLEY

Whitmill v Warner Bros and the Visibility of Cultural Appropriation Claims in Copyright Law 223

This article outlines the controversy that surrounds the Whitmill tattoo, a Māori-inspired, tribal tattoo design, before discussing the property rights framework deployed throughout the Whitmill v Warner Bros legal proceedings. The article will then discuss how the formal legal system entrenches the marginalisation of cultural claimants as a class of potential property owners in Indigenous-inspired imagery.

DR CHERYL FOONG

Volition and the "New Public": A Convergence of US and EU Judicial Approaches to Communications to the Public 230

US and EU judicial approaches to the right to communicate to the public in copyright are converging towards a common factor—the consideration of the defendant's fault or mental state. This article highlights this under-appreciated commonality between the two jurisdictions and critically analyses the negative impact that this trend brings to the advancement of copyright's core objectives.

PROFESSOR TAINA PIHLAJARINNE AND ASSOCIATE PROFESSOR ROSA MARIA BALLARDINI

Paving the Way for the Environment: Channelling "Strong" Sustainability into the European IP System 239

This article explores the emerging need for embedding environmental sustainability into the European IP law system by focusing on few important examples. We argue that, at the moment, societal values such as environmental sustainability are primarily incorporated into the IPR regime indirectly as part of general argumentation on competition, or only as exceptions to strong property rights. We shed light over major reasons for why sustainability could face insurmountable obstacles if being channelled into the IPR framework only or primarily via exceptions and limitations, and we develop recommendations for how environmental sustainability could be better considered directly into the scope of the exclusive rights.

Comments

JAMES CROSS AND JANET STRATH

Patents Court finds Conversant Patent Invalid in Smartphone Interface Dispute 251

Conversant Wireless Licensing Sarl v Apple Retail UK Ltd concerned a patent entitled "Computing device with improved user interface for application" for an invention developed to solve the problem of user interface constraints due to the small screen size of mobile phones in the late nineties/early noughties. Following a debate over whether the invention concerned mobile phones or computers in general or somewhere in between, the Patents Court confirmed that identity of the person skilled in the art can change where a patentee applies to amend its patent so as to narrow the technical field.

JANE CORNWELL

Shnuggle v Munchkin: Don't Throw the Baby out with the Bathwater! 255

In Shnuggle v Munchkin, Clarke J sitting in IPEC has delivered a judgment which provides an interesting illustration of registered Community designs and UK unregistered design right in action. The case also engages with, but does not resolve, important ongoing points of legal uncertainty in relation to the definition of protectable "design" and the requirement of originality in UK UDR.

WINFRIED TILMANN

Hungary's Constitutional Court Decision on the UPCA 261

Hungary's Constitutional Court decision of 26 June 2018, stating that a ratification of the Unified Patent Court Agreement (UPCA) by Hungary would violate Hungary's Fundamental Law is based on assumptions which, with all due respect, are not correct. The UPCA is not part of an enhanced co-operation. It deprives Hungarian national courts only in rare cases from their competence to decide private law cases on the basis of Hungarian national law. Hungary already today adheres to international agreements which create entities deciding private law issues between private parties in place of the Hungarian national courts. The EU law principle of sincere co-operation obliges Hungary to ratify the

BRAD SPITZ

The *Le Point* Case: For the First Time Since the *Deckmyn* Case, the French Supreme Court sets out the Characteristics of Parody 263

For the first time since the *Deckmyn* case of 2014, in which the ECJ clarified the "autonomous Concept of parody under art.5(3)(k) of Directive 2001/291, the French Supreme Court (Cour de Cassation) has set out the criteria of the copyright exception of parody in a judgment handed down on 22 May 2019. Under art.5(3)(k) of the said Directive, Member States may provide for exceptions or limitations to the rights provided for in arts 2 and 3 in the case of "use for the purpose of caricature, parody or pastiche". In the light of the *Deckmyn* case, the French Supreme Court broadens the traditional characteristics of the exception of parody under French copyright law.

Book Reviews
CHARLES OPPENHEIM

Copyright for Archivists and Records Managers by Tim Padfield 267