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Table of Contents

Editorial

HUGH BRETT AND JOE JONES

Intellectual Property and COVID-19: Reflections on the Current Crisis and Future Developments 529

Opinions

JUSTINE PILA

Reflections on a Post-pandemic European Patent System 530

Against the backdrop of COVID-19, this Opinion proposes three ways to improve the European patent system without legislative reform. Each has particular implications for drug patenting, and reflects an interpretive conception of law and legal legitimacy as requiring the application of legislation in accordance with moral values, including those expressed constitutionally. They would: restrict the patentability of second medical indications and anchor assessments of inventive step more firmly to patent policy; expand assessments of the moral and public policy implications of patenting inventions and extend the disclosure duties of applicants; and adapt the FRAND licensing system to cover essential medical technologies.

DR PAUL LAMBERT

A Slippery Slope with Contract No Longer Regal? Pandemic Pressures on Intellectual Property Freedom and the Need for Clarity as King 535

Few will have fully appreciated the imminence and impact of the present COVID-19 pandemic. It is truly international and affecting every aspect of society—from schools, universities, corporations, retirement homes, sporting events, commerce, and stock markets. Yet, among the fear, chaos and humanity, there are a growing number of examples of restrictions on the freedom of intellectual property commercialisation, relationships and contracts. On one hand there is the argument for immediate necessity, yet on the other one wonders whether some of these change interventions go too far against the very nature of what intellectual property is—and, worse, whether there is a potential erosion or even a slippery slope which will have lasting impacts on our understanding of what intellectual property is and our ability to commercialise and contract as normal for the exploitation of various forms of intellectual property. It is far too early to say what the lasting (adverse) impacts of COVID-19 will have for the intellectual property rights family, but there are arguably some potential worrying developments already which should be researched further.

Articles

DHANAY CADILLO CHANDLER

Uh-Oh We are in Trouble! Compulsory Licences v Data Exclusivity in the EU: One More Challenge to Overcome in the Race to Find a COVID-19 Vaccine? 539

What if a global public health emergency takes place? This question stopped being a hypothetical one or a matter of semantics while interpreting TRIPS or patent law exceptions, to become a reality. As we live in uncertain and trying times, things have become real and it is time to address the elephant in the room: that is, the power of data exclusivity regimes to deter or interfere with the use of TRIPS flexibilities, such as compulsory licenses for public health emergencies. This article's objective is twofold. First, addresses the challenges in making effective use of a compulsory licence according to art.31 of the TRIPS in the EU, given its incompatibility with the EU data exclusivity regime deriving from the rules governing the regulation of pharmaceutical products in Directive 2001/83. And, second, this article makes a lege deferenda suggestion to include public health exceptions to data exclusivity at the EU level regardless of the chosen route to obtain a marketing authorization. To achieve its objective, the article starts by explaining what data exclusivity is, and its relation to marketing authorisations for patented pharmaceuticals. Subsequently, it shows why a patent compulsory licence will not be sufficient to address a global health crisis in the EU unless the data exclusivity issue is solved. Finally, the article concludes that public health exceptions are not only relevant in the context of patent law, and this why any exclusivity regime complementing the patent system cannot be insulated from those exception affecting patent law.

LÉO PASCAULT, BERND JUSTIN JÜTTE, GUIDO NOTO LA DIEGA, GIULIA PRIORA

Copyright and Remote Teaching in the Time of COVID-19: A Study of Contractual Terms and Conditions of Selected Online Services 548

The spread of the COVID-19 virus forced educational institutions to transition to online education. This contribution analyses, through the lens of copyright law, the terms and conditions of some selected online services used to deliver remote teaching. The study highlights the most problematic terms and their detrimental effects on remote teaching by focusing on copyright ownership, liability, and content moderation.

DAVID MULDER, PAUL ENGLAND, CHRISTIAN DEKONINCK, DR ANJA LUNZE, PATRICK BOHÁČEK AND DR AGNIESZKA SZTOLDMAN

Pharmaceutical Patent Law in Times of Crisis: A Comparative Study Part I 556

The first part of this study discusses the role of and exceptions to patent law in emergency situations in view of the corona pandemic of 2020. The authors elaborate on the application of the experimental use exemption, related exemptions and compulsory licensing, both from a broader EU law perspective as well as from the national perspective of six jurisdictions. Having regard for their practical implications, the similarities and differences in the approaches of these jurisdictions are set off against each other and further discussed in light of the general principles of EU law. Finally, the potential influence of the legislative gap concerning regulatory exclusivity rights and the protection of trade secrets is addressed. Part 2 will be published in a forthcoming issue of E.I.P.R.

CHELUCHI ONYEMELUKWE, AYOYEMI LAWAL-AROWOLO AND CHINAKA EMMANUEL

Patents, Access to COVID-19 Vaccines and Medicines, and Traditional Medicine: A Dilemma for African Countries 569

The COVID-19 pandemic has created global tension, spreading like wildfire, ravaging public health systems and constantly taking lives of those that become its victim. Africa is not spared by this pandemic, though initially it appeared not to be a disease for the black race owing to the terrain. The situation has since changed and causalities are on the increase. Consequently, there is a rat race for a cure, medicine, vaccines and whatever can battle effectively COVID-19. The reward for the race has always been incentives based on patent protection, which grants a monopoly, thereby restricting access to medicines in poor countries, mostly in Africa. Even if patent rights are waived or compulsory licences granted, Africa is still faced with the dilemma of lacking the required technology to produce medicine or vaccines. Conversely, traditional medicine and the resources for it are abundant in Africa. Some countries are considering it alongside scientific methods. Could traditional medicine be the light at the end of the tunnel for Africa regarding COVID-19? The issues of patents and the development of medicine, vaccines and traditional medicine faced by Africa in the COVID-19 era are explored in this article.

DR VICKI HUANG

"COVID-19" as a Trade Mark in Australia: Issues and Implications 576

This article discusses the registrability of trade mark applications for "COVID-19" (and other "tragedy trade marks") under Australian law. The Australian approach is instructive as it proceeds on doctrinal principles (such as distinctiveness), a common threshold for trade mark registrability across the globe. The bar to "scandalous" marks relating to obscenity and blasphemy, and options for reform are also discussed.

OLASUPO OWOEYE

Intellectual Property and Equitable Access to COVID-19 Vaccines and Therapeutics 584

As scientists and the global community continue to intensify efforts towards finding vaccines and therapeutics for COVID-19, it has become important to highlight the intellectual property hurdles that must be taken into account in ensuring equitable access to affordable treatment for the infection. This article examines how intellectual property rights may impact on the clearly defined research actions for finding a solution to the pandemic and the options nations may explore in ensuring patents and patent related rights do not inhibit access to equitable treatment for COVID-19.

ALTHAF MARSOOF AND RAJIV PERERA

Legitimate Advertising or Trade Mark Infringement? An Analysis of the Practice of Keyword Advertising amid the COVID-19 Crisis 589

Keyword advertising, an advertising technique that targets users of search engines, is popular around the world. It has also attracted a certain degree of controversy in the world of trade marks. This article focuses on the legality of this advertising practice under trade mark law applicable in Sri Lanka. The focus on Sri Lanka is motivated by three factors. First, the ongoing COVID-19 crisis has forced businesses to shift online, and, for those already with an online presence, to further expand. Second, and as a natural consequence, businesses have had to invest more in advertising on the internet to become more visible on search engines. To that end, some businesses have embraced the practice of keyword advertising and have employed it in controversial, if not unlawful, ways—giving rise to an emerging keyword war. Third, the health crisis has almost instantly compelled Sri Lankan consumers to rely heavily on online platforms to purchase essential goods and services. As such, consumers are now increasingly exposed to search engines and, in turn, the practice of keyword advertising. For these reasons, determining the legality of keyword advertising, as an advertising practice, in the Sri Lankan context is a matter of public importance.

BANKOLE SODIPO

Government Use of Patented Medicines in Securing Access to Essential Medicines in a Post-COVID-19 Nigeria 604

This article analyses the Nigerian Government's use regime to exercise patent rights without recourse to patentees, for public access to medicines and medicinal products. It interrogates the right to health and the constitutionality of government interventions for public health, in the light of Nigeria's patent related and human rights treaty obligations. Government use of patents without compensation to patentees is not only unconstitutional, it is a breach of treaty. It argues that the regime must be reviewed to balance public interest and health and the private interests of patentees.

Comments

SIMON CLARK, SARA SEFTON AND MARC LINSNER

A Fabric Design Has Been Found to be a Work of Artistic Craftsmanship: Will Response Clothing Cause a Shift in How UK Copyright is Assessed? 612

This comment discusses the Response judgment in which HH Judge Hacon has found that a piece of fabric cannot be protected by copyright as a graphic work but can be protected as a work of artistic craftsmanship. This is an interesting development in UK copyright law which gives a relatively narrow interpretation of "graphic work", a much wider interpretation of "work of artistic craftsmanship" than we have seen previously, and a very wide interpretation of "public". It is also the first UK decision which begins to consider the implications of the CJEU ruling in *Cofemel.*

ENRICO BONADIO AND LUKE MCDONAGH

***Sisvel v Xiaomi*: An SEP Dispute in The Netherlands Highlights the Global Challenge of FRAND Licensing** 618

This comment examines the patent litigation battle over standard-essential patents (SEPs) that took place between Sisvel and Xiaomi at The Hague Court of Appeal in the Netherlands in early 2020. The case is an indicator that courts in different European jurisdictions will continue to go their own way when it comes the crucial decision of whether to grant injunctions on SEPs. The UK, which a decade ago was viewed as a jurisdiction better known for revoking patents than for issuing injunctions, appears to have become more "patentee-friendly" (at least in the case of SEP-owners). The Netherlands, meanwhile, applies an approach that appears more critical of the activities of NPEs, taking their lack of manufacturing productivity into account when determining the balance between whether to grant an injunction or not. This approach could well prove influential on other courts, and perhaps even the CJEU, if the rate of NPE litigation of SEPs increases in Europe in the years to come.