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European Intellectual Property Review

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DR TOBIAS VOLPERT AND MARCEL RIEPE

Malting Barley and Impotence Drugs: How Patents Hinder Progress 775

Since 1998, the EU has allowed the patenting of plant material. In 2018, the breweries Carlsberg and Heineken made use of this and were granted a patent on a new type of malting barley. This patent could inhibit the further development of this type by third parties. These limitations can be problematic for the economy if the original invention shows a lot of potential for further developments. This can be expected when dealing with seeds, as they have been continuously cultivated and improved by farmers for centuries. Here, the original intent of patenting—promoting technical progress—is not coming into effect.

Articles

TED SHAPIRO

Remuneration Provisions in the DSM Copyright Directive and the Audiovisual Industry in the EU: The Elusive Quest for Fairness 778

EU Member States have until 7 June 2021 to implement the Directive on Copyright in the Digital Single Market into their national legislation. This article focuses on the issue of "fair remuneration in exploitation contracts of authors and performers" and its impact on the audiovisual industry in the EU. The issue of how (not whether) to remunerate authors and performers often pits them against producers usually to the detriment of all concerned. Based on national experience, this type of legislation tends to engender legal uncertainty and disputes which beget litigation.

MARK DAVISON AND PATRICK EMERTON

Appellate Body of the WTO Affirms Australia's Tobacco Plain Packaging Laws 789

The Appellate Body of the World Trade Organization has dismissed the appeal relating to the complaints against Australia's plain packaging laws for tobacco products. In doing so, the Appellate Body ended any argument that there might be a right to use a trade mark or even a presumption against regulatory requirements concerning the use of trade marks.

MARTIN SENFTLEBEN AND LAURENS BUIJTELAAR

Robot Creativity: An Incentive-Based Neighbouring Rights Approach 797

Today, texts, paintings and songs need no longer be the result of human creativity. Advanced artificial intelligence (AI) systems are capable of generating creations that can hardly be distinguished from those of authors of flesh and blood. This development raises the question whether AI-generated works could be eligible for copyright protection. In the following analysis, we explore this question. After a discussion of the traditional copyright requirement of human creativity, the rationales underlying copyright protection—in particular the utilitarian incentive theory—will serve as a compass to decide on the grant of exclusive rights and delineate the scope of protection. In addition, the analysis will address the question who the owner of protected AI creations should be. Finally, the discussion of pros and cons of protection will be placed in the broader context of competing policy goals and legal obligations, such as the prospect of enriching the public domain, the need to prevent interferences with human creativity and the question of liability for AI creations that infringe the rights of third parties.

SIMRAN JAIN

Patent Pools and Anti-Competitive Practices: An Analysis of Legality in the Indian Context 813

A patent pool is an agreement between two or more patent owners, in order to license their patent to one another. Even though such agreements have resulted in providing necessary technical solutions, they have often come within the purview of legal scrutiny. This is because the patent pool involves a substantial risk of collusion of the entities involved and may violate antitrust rules. In almost all countries, patent pools are not prohibited under the law. However, most jurisdictions such as the US, Japan, EU etc prescribe various guidelines, which lay down the situations wherein a particular patent pool shall not violate the antitrust laws. The concept of patent pool is relatively new in India, and there is a lack of jurisprudence of its legality under the Indian laws. This article attempts to analyse the present laws related to patent and antitrust in India in order to determine whether creation of patent pools may face any legal impediment. Further, it seeks to analyse the guidelines laid down by other countries which could be adopted by India, and also seeks to explore any other possible method of creating a patent pool which would not violate the antitrust laws.

PHILLIP JOHNSON

Copyright Infringement and Damages for Injury to Reputation 819

Copyright infringement can cause more than economic harm. It can also cause damage to the reputation of the copyright owner. The courts have recognised this form of damage for over a hundred years, but it has largely fallen out of the literature and jurisprudence in England; this is not the case in Australia, where such awards have had a renaissance. This discussion evaluates how reputational damages for copyright infringement have developed in both countries, and sets out how the boundaries have evolved.

NINA DORENBOSCH

Protecting Your Shop Interior: What Are the Options? 828

This article looks at the various options for protecting the interior design of shops and store fronts. After a quick look back at the CJEU's decision about the Apple store, this article will delve into the possibility of copyright protection for shop interiors, as accepted in the recent Dutch decision in *Shoebaloo v Invert*, and will explore whether the doctrine of unfair competition provides any further options. Subsequently, this article will take a closer look at a number of EUIPO Board of Appeal decisions on Parfois's Community Design Right registrations for its store layout. The conclusion will examine the pros and cons of each of these intellectual property rights and claims for the protection of store interiors.

AYOYEMI LAWAL-AROWOLO AND YINKA OLOMOJOBI

Intellectual Property Rights, Orthodox Medicine and Traditional (Medicine) Knowledge Systems: The Protected and the Neglected in (Nigeria) Africa 833

Orthodox medicine was introduced to Africa during colonisation as new medicine, along with Western culture and education. The old medicine (traditional medicine) was regarded as witchcraft, black magic or voodoo, and herbalists or traditional medicine practitioners (TMPs) were tagged "witch-doctors". Investigations in various medical reports show traditional medicine was and still is beneficial to health care in Africa. As a result, TMPs and their knowledge systems should not be neglected in Africa, both at the national and regional levels at the expense of orthodox medicine. A bottom-up approach which investigates the use of traditional medicine knowledge and protection mechanisms is proposed. A top-down approach cannot be avoided owing to interactions with countries of the North in matters relating to knowledge and resources found in Africa. Consequently, intellectual property rights should not be regarded as an instrument alien to the protection of traditional knowledge systems generally and traditional medicine knowledge specifically. Africa should aspire to develop the use of traditional medicine knowledge systems through available protection mechanisms for health care delivery.

Comments

RUTH HOY AND KATIE ZACHARCZUK

On the Trail of the Trade Secrets Directive: Shining a Light on English Law 842

Trailfinders Ltd v Travel Counsellors Ltd is the first English case to have specifically considered the Trade Secrets Directive since its implementation into English law. The case concerned information taken by two ex-employees from proprietary databases used by Trailfinders, a successful, well-established travel agent. Both ex-employees were found to be in breach of: (1) an implied term in their employment contracts; (2) an equitable obligation of confidence to Trailfinders; and (3) the Directive. Pre-Directive English law appears to be unaffected by this decision, although the Directive's true significance may be tested further in less straightforward cases.

MARINA COUSTÉ, FRANÇOIS JONQUÈRES AND MICKAËL DA COSTA

Forget Unitary, Think New French Patent System! 844

This comment will consider the recent changes to the French patent system. The reform aimed to strengthen the French patent, which is inexpensive and granted quickly, but the validity of which was sometimes considered too weak, in the absence of serious examination. The introduction of a procedure for third parties to oppose a granted patent in France—which is the major change of this reform—will be examined in further detail in this article.

MICHAEL HOWARD AND DR MARK HYLAND

The Boundaries of "Use": When Do E-Commerce Platforms Become Liable for Trade Mark Infringement? Coty Germany GmbH v Amazon Services Europe Sarl (C-567/18) 849

This comment discusses the case of *Coty Germany GmbH v Amazon Services Europe* and the CJEU's interpretation of Directive 2007/1001 when dealing with a claim for trade mark infringement against a service provider on goods held in storage by a third-party seller using its services. The court answered the questions: Does storage of the goods amount to ownership? Whether additional services can constitute a "use" of the goods? It also deals with the differences between pure wholesale services providers and parties acting as a seller. The potential for a new interpretation of the Enforcement Directive in relation to the provision of services for trade mark infringing goods is also examined.

Book Review

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