

European Intellectual Property Review

Table of Contents

2021 Volume 43 Issue 9
ISSN: 0142–0461

Opinion

PROFESSOR THOMAS RIIS

Is a Technical Invention Protectable under EU Copyright Law? 555

In *Lenova Hengelo*, the court held that copyrightable subject-matter depends exclusively on two conditions: originality and precise and objective identification. The court rejected copyright protection of a taste because the taste of a food product with the available technical means cannot be pinned down with precision and objectivity. Nevertheless, the decision opens up a potentially very broad range of different types of copyrightable subject-matter. In *Cofemel*, the court elaborated on the notion of objective identification by stating that an additional requirement of aesthetic effect is incompatible with the concept of a copyrightable work because it relies on the subjective sensation of beauty experienced by each individual. This opinion suggests that “aesthetic effect” ought to be re-introduced in EU copyright law in order to delimit copyrightable subject-matter in the same way as “technical effect” delimits patentable subject-matter in patent law.

Articles

WINFRIED TILMANN

UK Adherence to the Lugano Convention under the Aspect of International European Patent Jurisdiction 559

The UK has applied for membership to the Lugano Convention. Iceland, Norway and Switzerland agree. The EU Commission does not advocate a membership of the UK in Lugano. It refers to the Hague Choice of Court Convention 2005 and to the Hague Judgments Convention 2019, not yet in force, as possible alternatives. However, both Conventions do not cover IP matters. Therefore, for an important part of international litigation, there seems to exist no alternative to the Lugano Convention. Parliament and the Council will have to consider this important aspect. The author discusses the arguments for and against UK adherence from the viewpoint of international patent litigation.

TIM W. DORNIS

Of “Authorless Works” and “Inventions without Inventor”—The Muddy Waters of “AI Autonomy” in Intellectual Property Doctrine 570

AI has entered all areas of our life, including creative and inventive activity. It is used, inter alia, for production of newspaper articles and weather or stock market reports; composition of music; creation of visual arts; and pharmaceutical and medicinal research. Whether the output of AI processes—i.e. AI-generated “works” and “inventions”—should be protected under copyright or patent law, is contested. The European Parliament and the EU Commission have now put the topic on their agenda. Yet, their positions seem to contradict each other—one in favour of, one against creating new instruments of protection for AI-generated output. This and the rising debate in legal scholarship invites more analysis. A closer look at the doctrinal foundations and economic underpinnings of “authorless work” and “invention without inventor” scenarios reveals that neither the law as it stands nor scholarly debate is up to the challenges posed by AI creativity and inventiveness.

LEILA MODDEL, SHARIQA MESTRONI,
SIMON SHOOTER AND SOPHIE
STONEHAM

How Can Brands Respond to the Re-prioritisation of Values Being Led by Consumers? 586

A challenge facing consumer brands around the world is promoting consumer-driven sustainability practices and ethical supply chains, while complying with a changing legal and regulatory landscape. The COVID-19 pandemic has, in many ways, fast-tracked the need for brands to shift their focus to transparency, modern slavery laws and conscious consumerism. This article examines the practices adopted by numerous brands to address some of these issues, with varying degrees of success. In comparing some aspects of the legal frameworks in the UK, Europe and in Australia, we highlight some key considerations for brands navigating these topics.

How Much Is Too Much? Anti-counterfeit Measures and Access to Medicines in the East African Community 594

Falsified and substandard medical products (FSMPs) now constitute a serious threat to both developed and developing (and least-developed) countries, with likely consequences ranging from treatment failure, anti-microbial resistance, to death. Many of the parties to the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) have adopted an intellectual property (IP)-based approach in response to this threat. Their justification is that, since FSMPs imitate registered IP rights, a response built around enforcement of IP will drastically reduce trade in FSMPs. The East African Community (EAC), an epicentre for FSMPs, also subscribes to this approach. However, while an IP-based approach to anti-counterfeit measures may be justifiable for developed countries, can it be so justified for low and middle-income countries (LMICs) like the EAC? This article seeks to untangle the prevailing anti-counterfeit measures in the EAC with a view to ascertaining how much of them may be too much to derail access to medicines in the region.

Comments

MARK SHERWOOD-EDWARDS

Google v Oracle: Copyright Myths and the Evisceration of Copyright 609

Oracle spent years developing a programming library that successfully attracted software developers, thus enhancing the value of Oracle’s products. Google sought a license to use the library in Android, the operating system it was developing for mobile phones. But when the companies could not agree on terms, Google simply copied verbatim 11,500 lines of code from the library. As a result, it erased 97.5% of the value of Oracle’s partnership with Amazon, made tens of billions of dollars, and established its position as the owner of the largest mobile operating system in the world. Despite this, the majority of the US Supreme Court holds that this copying was fair use.

JOHN A. TESSENSOHN

University of Oxford Trumped by Unauthorised Clothing-related Oxford Mark in Japanese Trade Mark Opposition 612

This comment explores an interesting trade mark opposition decision which demonstrates that the outsized reputation and fame of the opponents’ senior marks per se will not guarantee success in Japanese trade mark opposition proceedings if the senior and famous mark is not considered to have the source-identifying function in relation to the designated goods of the challenged mark. This article will also revisit the procedural pitfalls and strategic shortcomings regarding Japan’s trade mark opposition system that will demonstrate why brand owners of famous marks would be better served by using Japan’s invalidation appeal system to police competitors’ trade marks in the world’s third-largest economy, Japan.

DR ANETTE GÄRTNER AND MICHAEL PLAGGE

Employee Inventor Remuneration and the Rendering of Accounts—A Source of Constant Woe? 617

Employee inventors have an unusually strong position under German law. They are entitled to extra remuneration and enjoy additional rights, such as the right to demand that protection be sought. The burdens imposed on employers can hamper patent portfolio management, unless they put well-designed incentive systems in place. Further, a recent decision of the Regional Court of Mannheim illustrates that the claim for information and rendering of accounts needs to be limited. If a dispute ends up in court, the defendant will find it difficult successfully to argue that a request for information is disproportionate.

Book Review

RACHEL CLAIRE BRADY

Intellectual Property Law and Human Rights 621