

# European Intellectual Property Review

2015 Volume 37 Issue 3

ISSN: 0142-0461

## Table of Contents

### Opinions

JONATHAN GRIFFITHS, CHRISTOPHE  
GEIGER, MARTIN SENFTLEBEN,  
RAQUEL XALABARDER AND LIONEL  
BENTLY

**The European Copyright Society's "Opinion on the Judgment of the CJEU in Case C-201/13 *Deckmyn*"** 127

EUROPEAN COPYRIGHT SOCIETY

**Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European Union: Opinion on the Judgment of the CJEU in Case C-201/13 *Deckmyn*** 129

In this Opinion, the European Copyright Society (ECS) puts on record its views on the issues raised by the judgment of the Court of Justice of the European Union (CJEU) in *Deckmyn* (C-201/13), which departs from the doctrine of strict interpretation of exceptions and limitations in cases in which fundamental rights such as freedom of expression are involved. The Opinion welcomes this development for the following reasons: first, because of the importance of exceptions and limitations in facilitating creativity and securing a fair balance between the protection of and access to copyright works; secondly, because of the Court's determination to secure a harmonised interpretation of the meaning of exceptions and limitations; thirdly, because of the Court's adoption of an approach to the interpretation of exceptions and limitations which promotes their effectiveness and purpose; and, finally, because of the CJEU's recognition of the role of fundamental rights in the copyright system: in particular, its recognition that the parodic use of works is justified by the right to freedom of expression. At the same time, the ECS recommends caution in constraining the scope of exceptions and limitations in a manner that may go beyond what might be considered necessary in a democratic society.

SABINE JACQUES

**Are National Courts Required to have an (Exceptional) European Sense of Humour?** 134

This Opinion addresses the recent interpretation of the parody exception in the *Deckmyn* case. Given the impact of the CJEU case law on Member States, it is pertinent to reflect upon the teachings of this decision. The Opinion will demonstrate how this decision is to be welcomed, while advising the courts to adopt extreme care in the assessment of the requirement of humour and the balancing of fundamental freedoms.

### Articles

THEODOROS CHIOU

**Lifting the (Dogmatic) Barriers in Intellectual Property Law: Fragmentation v Integration and the Practicability of a European Copyright Code** 138

This article contains some reflections about the election of a structural paradigm for European intellectual property law. Having as a starting point the project for the creation of a European copyright code and the shortcomings related with such codification, this article aims to promote the paradigm of integration for the construction of the future EU IP law.

DR ANNA KINGSBURY

**Trade Secret Crime in New Zealand Law: What Was the Problem and is Criminalisation the Solution?** 147

This article is an analysis of the New Zealand criminal law provision providing for an offence of taking, obtaining or copying trade secrets, in the context of current international debates about criminal liability for the taking of trade secrets. It argues that criminalisation has not proved to be necessary or desirable, and recommends repeal or reworking of the criminal provision.

GANG MEI

**Royalty Awards in Intellectual Property Infringement** 155

The award of royalties in intellectual property infringement, like other civil remedies, must be understood with regard to its remedial goals, i.e. the bases of the relief. This article questions the existing case law authorities regarding these bases. It proposes two models for royalty awards: one is based on compensation for actual loss, the other on the user principle.

PAOLO GUARDA

### **Consortium Agreement and Intellectual Property Rights within the European Union Research and Innovation Programme** 161

The Intellectual Property Enterprise Court has rejected a claim by Orvec International Ltd, a supplier of textile products to airlines, that its agreement with Linfoots Ltd, the defendant advertising agency, contained an implied term giving Orvec an exclusive and perpetual licence of the copyright in certain photographs created for Orvec by Linfoots. Applying the minimalist approach to the implication of terms in a contract, the court found that Orvec had no more than a non-exclusive licence of copyright in the photographs. An additional claim of passing off was also rejected on the facts.

CHEN QIONGDI

### **Strategies for Drafting and Prosecuting Invention by Diversion Patent Application in China: A Case Study of Clean Technology** 172

For clean technology enterprises, obtaining patent rights is not only a way to protect innovation, but also the first step in deploying a patent strategy. Much of today's clean technology is derived from and built upon technical advancements from other industries. New uses of known processes, called "invention by diversion" in the China Patent Law, will face big challenges when we seek patent protection for them in China. This article discusses how patent law in China attempts to determine invention by diversion, and suggests strategies to overcome non-novelty rejections and non-inventive step rejections in clean technology patenting.

## **Comments**

SARAH BURKE AND JOEL SMITH

### ***Interflora III*: Court of Appeal Sends Case Back to the High Court for a Retrial** 178

On November 5, 2014, the Court of Appeal handed down its judgment in the long-running case between Interflora Inc and Marks & Spencer Plc. This judgment represents the third judgment from the Court of Appeal in this case, with the previous two judgments relating to the admissibility of survey evidence. In this instance, the Court of Appeal has allowed Marks & Spencer's appeal in part and remitted the case to the High Court for a retrial of the infringement claims under art.9(1)(a) of the Community Trade Mark Regulation 207/2009. The court made a strong statement in relation to initial interest confusion, finding that it was unhelpful to import this concept into EU trade mark law. In a further judgment on November 12, 2014, the Court of Appeal gave its judgment on the form of Order, directing that the retrial in the High Court take place before a different judge of the Chancery Division, so the retrial will not take place in front of Arnold J.

ALEX BORTHWICK

### **The Scope of Registered Design Protection Following *Magmatic v PMS International*** 180

This article considers infringement of registered designs following the Court of Appeal's decision in *Magmatic Ltd v PMS International Ltd*, which was handed down in 2014. *Magmatic* follows a line of cases—*Procter & Gamble Co v Reckitt Benckiser (UK) Ltd*, *Samsung Electronics (UK) Ltd v Apple Inc*, and *Dyson Ltd v Vax Ltd*—in which owners of registered designs have lost before the Court of Appeal on the basis of the "overall impression" test. The court's findings in *Magmatic* in respect of colour contrasts and surface decoration have potentially further narrowed the scope of registered design protection.

CLAIRE LIVINGSTONE

### ***Orvec International Ltd v Linfoots Ltd*** 185

The Intellectual Property Enterprise Court has rejected a claim by Orvec International Ltd, a supplier of textile products to airlines, that its agreement with Linfoots Ltd, the defendant advertising agency, contained an implied term giving Orvec an exclusive and perpetual licence of the copyright in certain photographs created for Orvec by Linfoots. Applying the minimalist approach to the implication of terms in a contract, the court found that Orvec had no more than a non-exclusive licence of copyright in the photographs. An additional claim of passing off was also rejected on the facts.

## **Book Reviews** 188