European Intellectual Property Review

2017 Volume 39 Issue 6
ISSN: 0142–0461

Table of Contents

Opinion

PROFESSOR DR. MATTHIAS LEISTNER

Closing the Book on the Hyperlinks: A Brief Outline of the CJEU's Case Law and Proposal for European Legislative Reform 327

This Opinion briefly recalls the CJEU's case law on hyperlinks with particular emphasis on the most recent GS *Media v Sanoma* case. The article then specifies certain situations and problems where the results of this case law still seem unbalanced or impractical from the viewpoint of the author. Finally, the article suggests a proposal for targeted legislative reform of art.3 of the InfoSoc Directive with respect to hyperlinks.

Articles

ASANKA PERERA AND PAUL SUGDEN

***Myriad Genetics Inc*: Patenting of Isolated Human DNA—A Missed Policy Opportunity or Judicial Interpretation Supporting a Judicial Minimalist Status Quo (Part 1)** 334

This article argues that the *Myriad Genetics Inc* decisions in the US and Australia missed an opportunity to include social policy objectives in patentable subject-matter. This, it is argued, arose from a judicial minimalist support of separate legal policy objectives of certainty, clarity and consistency in the interpretation of law. These legal policies, Burke and Lemley argue, mean that courts are themselves making economic and social policy decisions through their determinations of the boundaries of patentable subject-matter, even though they do not believe they are directly applying policy. The courts' deference minimalism, and the status quo concentration on economic policy overrides social policy objectives.

PLAMEN DINEV

Regulatory Chill and the TTIP: An Intellectual Property Perspective 344

This article explores the theory of regulatory chill from an intellectual property perspective. It assesses the implications of some of the most controversial investor-state disputes involving intellectual property rights. It argues that the threat to regulatory freedom posed by the inclusion of an investor–state dispute settlement mechanism in the TTIP should not be underestimated.

ROYA GHAFELE

Counting the Costs of Expanding Copyright Levies to Cloud Computing 350

The question whether copyright levies should be applied to cloud computing has been raised multiple times in different EU Member States, as well as at the pan-European level; however, no definite policy decision has been taken so far. Against this background, this study assesses what the direct cost of expanding copyright levies to cloud storage could be. It finds that in eight EU countries alone the direct costs associated with doing so could be well over €2.4 billion over the next five years in a sample of eight European countries. The estimates further suggest that potential extra costs significantly outweigh potential revenues. It would thus be unlikely that cloud storage providers would be in a position to internalise extra costs and would be likely to pass on those costs to users. This could potentially lead to an increase in the digital divide.

EMILY TOCK

Art, Books, and Equal Rights: The Case for an Inclusive List for Literary Works in Irish Copyright Law 359

That the island which spawned such writers as Joyce and Yeats should lack an inclusive list of what constitutes "literary work" in copyright legislation is in need of remedy. The article addresses this lack, discusses legal reasoning for a proposed remedy, and formulates a guideline to deal with the ever-proliferating array of "literary works" in the world of electronic/mass-media technology.

GIANLUCA CAMPUS

Legal Aspects of the Video Buffering Process: The Uncertain Line between Acts of Reproduction and Acts Accessory to a Communication to the Public 366

The aim of this work is to analyse the EU copyright laws and CJEU case law on acts of temporary storage of data and digital contents that, after storage, are to be used for other purposes, such as on-screen display, either in real time or with a temporary delay. In more detail, among the different types of temporary storage, the so-called video buffering process will be examined. The term "buffering" refers to the use of a buffer, which in computer language indicates a temporary memory, i.e. an intermediate memory which is temporarily used for input or output of data or for speeding up certain data activities. A typical example of buffering in the telecommunications sector is video buffering, which is also used in internet video on-demand services. The acts of temporary reproduction via buffering can be interpreted: (1) traditionally, as an exception to the exclusive right of reproduction; (2) more recently, as an act falling within a wider definition of communication to the public; (3) in between (1) and (2), as an act falling within a wider definition of communication to the public only when temporary reproduction has an economic value of its own (where there is no such economic value, an exception to the exclusive right of reproduction could apply). The analysis of the case law of the Court of Justice shows that, in the court's opinion, temporary reproduction in technological processes (and therefore also buffering) falls within the traditional interpretation of the exception to the right of reproduction, provided that the requirements of art.5.1 Infosoc Directive (as implemented in the different national legal systems) are met. Notwithstanding the above, there are some signs that new interpretations are emerging, at least for those acts of reproduction that are accessory to acts of communication to the public.

Comments

TOM BRAZIER

***Antrax It Srl v EUIPO* (T-828/14): The General Court Tackles the Notion of a Saturated Field of Prior Designs in the Assessment of Individual Character** 375

The saturation of a design field means that the informed user is more likely to notice small differences between two designs. In a saturated design field, designs are more likely to be valid, and less likely to be infringed. Despite finding on two occasions that the Third Board of Appeal had not properly decided the case, the General Court's latest judgment in a long line of *Antrax* (T-83/11 and T-84/11) EU:T:2012:592 decisions confirms that parties seeking to take advantage of a saturation argument now face a steep uphill evidential battle.

MATTHEW LINGARD

Click and Consent: Argos UK Loses Trade Mark Battle—Guidance Provided by the High Court on the Issue of Targeting and Consent with Regard to Google AdSense Advertising 378

This case is highly unusual and sets a definitive mark for online advertisers. The decision and direction of the court have been eagerly awaited by digital marketers and advertisers not just in the UK, but also in Europe. The case provides new guidance on how to approach the questions of targeting and consent when considering a matter involving Google AdSense advertising.

TANVI SHAH, DR BIRGIT CLARK, ELEANOR WALLIS AND ALEXANDER RITTER

"Too Big to Pay" or Just not that Outstanding? English Court of Appeal Decides on Employee Inventor Compensation—A Comparative Case Review under English and German Law 381

This article will discuss the recent English Court of Appeal decision in Shanks v Unilever and, to illustrate the differences, consider what might have been the outcome if the same case had been decided under German law.

JOEL SMITH, VICTORIA HORSEY AND ADAM GODDARD

Law Catches Up with Free TV Streaming Sites: CJEU Ruling in *ITV v TV Catchup*—Section 73 CDPA Defence Inapplicable to Online Streaming of Live TV Broadcasts 386

The CJEU has issued its decision on the latest reference to it in the dispute between ITV (and other broadcasters) and TV Catchup (which provides a free, online streaming service for public service broadcasts). The CJEU found that a s.73 defence cannot apply to live online streaming services, which probably means that TV Catchup will not be able, legally, to provide live streaming of free-to-air broadcasts via the internet in the UK. The decision confirms the protections afforded to TV broadcasters and copyright holders in the UK, and we are likely to see public service broadcasters seeking payment of retransmission fees from cable operators in the future.

Book Reviews 388