

European Intellectual Property Review

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HUGH DUNLOP

Compulsory Licensing under a Unitary Patent 393

Expectations are high that the European Unitary Patent and the Unified Patent Court will get off the ground very soon. The new court will have jurisdiction over unitary patents (and “traditional” patents granted under the EPC that are not opted-out) for actions in relation to patent infringement and licences of right, but compulsory licences are supposed to be left to national courts. This article explores whether this assumption may be challenged and, even if it stands, whether national courts may take an EU-wide view of compulsory licences under unitary patents.

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The article addresses the capacity of the current copyright law framework to work as hindrance or help to the collaborative practices—belonging to the sharing economy—that are increasingly acquiring relevance for the market economy. In particular, the TripAdvisor platform is analysed. The sharing of experiences that this platform enables generates value for the territory, yet the lawfulness of the user-generated content through which it takes place has not yet been fully assessed.

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This part continues the examination of the *Myriad* decision which was started in Part I of the article that appeared in the previous issue of E.I.P.R. This commences with the examination of the *Myriad Genetics Inc* appeal to the Australian High Court. This decision is compared with the US Supreme Court *Myriad Genetics Inc* decision, followed by a discussion of policy objectives for patentable subject-matter. An examination of the conflict between social economic policies and judicial minimalism as the legal policy in both jurisdictions is developed to explain why this is a missed opportunity to change the legal considerations of policy by the judiciary.

URSULA SMARTT

Are Privacy Injunctions Futile in The Digital Age? Why Scottish Papers Choose to Name the Super Injunction A-Listers—and Why they Cannot Do so Online 413

This article discusses super injunctions and privacy orders and how the Scottish media continues to reveal and identify English gagging orders taken out by celebrities, including the “celebrity threesome” *PJS* order. It will further be argued that celebrities often use their children as privacy shields in the courts. In the light of the recently failed David Beckham super injunction against *The Times* and the *Daily Mirror*, do privacy orders remain significantly valid in the social media age? Are celebrities not entitled to the same respect for their private lives as anyone else? The article further examines the misuse of private information as demonstrated in the *David Axon* case, whereby the court in *Axon* established a new approach to the granting of privacy injunctions for the potential loss of reputation and constraints inherent in art.8 ECHR. Finally, the question will be raised whether the UK judiciary is out of touch, as so eloquently expressed in the dissenting judgment by Lord Toulson in *PJS*. The notion of personal autonomy will be discussed in the conclusion, which stands alongside art.8 ECHR and the freedom of media expression and how the courts have taken a proportionate approach.

SARI SHARONI

The Mark of a Culture: The Efficacy and Propriety of Using Trade Mark Law to Deter Cultural Appropriation: Part 1: Social Science Theories of Cultural Appropriation 421

This two-part article draws from social science literature on cultural appropriation and legal texts on trade mark law to examine whether trade mark law is suited to grappling with cultural appropriation. Part 1, contained in this article, defines “cultural appropriation”, highlights commonplace examples of cultural appropriation in the marketplace, and describes the harms and benefits of cultural appropriation, and the potential harms and benefits of policing it. Part 2 will appear in the next issue of E.I.P.R.

History of Intellectual Property in Africa 428

This article examines the historical evolution of industrial property and copyright systems in Africa from the colonial period until 2000. The findings reveal that the IP system (industrial property and copyright and related rights) was introduced to Africa through colonisation. As a general rule, the colonial powers extended the application of their IP laws to the colonies, unless otherwise prescribed. The extension of application of British, French, Spain and Portuguese IP laws to their colonies served the interests of the colonial powers and aimed to facilitate commerce with the colonies. At the international level, a notification or a declaration from a colonial power was the condition sine qua non to make the Paris Convention or Berne Convention applicable to the colonies. After independence, former colonies had to opt for the continued application of those treaties in their territories, or denunciation. Most of the African countries accepted the continued application by acceding to these treaties. In addition, a great number of African countries adopted new IP laws after their independence, repealing the colonial laws inherited from the colonial powers. OAPI and ARIPO were set up as part of the solution for both French-speaking and English-speaking African countries. This study of IP developments in Africa brings to light the reason why African countries were not favourable to IP systems from independence up to 2000. IP was considered to be a foreign concept and the system was seen as serving foreigners to the detriment of nationals. The "extension system" applied during the colonial period could be considered to be one of the causes of the unpopularity of the IP system in Africa. Nowadays, Africa has changed. African countries have gained a place on the international scene by becoming very active actors.

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JOEL SMITH AND LAURA DEACON

Live Blocking Orders: The Next Step for the Protection of Copyright in the Online World 438

Following on from a number of decisions in the English courts in which internet service providers (ISPs) were ordered to block their customers from accessing websites whose content infringed the rights of intellectual property owners, on 8 March 2017 the High Court granted an order sought by the Premier League that requires six major UK ISPs to block access by their customers to servers that stream live unauthorised footage of Premier League matches. On 13 March 2013 Arnold J delivered the judgment setting out his reasons for making that order (*Football Association Premier League Ltd v British Telecommunications*). This article considers those reasons and comments on their business impact.

SANTANI ANIL, LEE SEY CHEE, LEON TAN KOK LEONG AND WONG JI INN

Copyright Protection for Variety Shows in China 440

The first season of the popular Chinese reality talent show, *Sing! China* concluded on 7 October 2016. Behind the success of the show lies a controversial copyright dispute between Talpa Holdings (Talpa), owner of *The Voice* franchise, and Star China Media (SCM), *Sing! China's* production company, which produced the earlier four seasons of *The Voice of China* under a licence from Talpa. What is seemingly a typical legal dispute between two television show production companies underscores a broader issue of copyright protection for reality shows. Without a full script, variety shows lack the reproducibility found in other protectable forms of work, and are therefore poorly protected under the copyright regime. Nonetheless, with the variety show industry proving to be an increasingly lucrative business, there is a need to investigate deeper into the current state of copyright protection as applied to variety shows, and look at how the law can better protect variety shows from exploitation.

JOHN A. TESSENSOHN

The God of Ramen Rebuffed: Trade Marks and Full Names in Japan 445

A pair of interesting Intellectual Property High Court of Japan decisions confirming the non-registrability of one's full name as a registered trade mark is a cautionary tale warning that one's full name, no matter how famous, is not necessarily the best choice for a registered trade mark in Japan. The duo of IP High Court decisions, *Taishoken KK v Commissioner of the Japan Patent Office* (the *Kazuo Yamagishi* cases) vividly illustrated the risks associated with choosing one's full name as a trade mark, especially when such a name, even when it becomes so famous that it is revered as a God, is denied trade mark registration. The article will examine the decisions' rationale and provide branding practice tips for trade mark owners considering personal names as Japanese trade marks. It will also review the comparative law position of such personal name marks in the US and Europe.

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For manufacturers of steam engines in the late 19th century, the tactics of systematically threatening to sue your competitors' customers for infringement of intellectual property rights were fair game. Nowadays, businesses in the UK have to contend with the laws on unjustified threats which prohibit such unscrupulous practices. While this undoubtedly protects businesses from being bombarded by spurious claims, on the flip-side it can make enforcing legitimate brand rights dangerous territory. While it would be comforting to assume that such concerns are confined to the UK, the recent case of *Nvidia Corp v Hardware Labs (GTX)* has made it clear that there are risks and implications for businesses seeking to protect their brands across the EU, and those who incur their wrath within the UK.

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