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Opinion

CHRISTOPHE GEIGER AND ELENA IZYUMENKO

Freedom of Expression as an External Limitation to Copyright Law in the EU: The Advocate General of the CJEU Shows the Way 131

This article analyses the recent opinion delivered by A.G. Szpunar of the CJEU in the *Afghanistan Papers* case. It highlights, in particular, four crucial points that stand out in the opinion. First, the adoption of a fundamental rights perspective when evaluating copyright regulation in general. Secondly, the need to ensure that copyright's internal mechanisms designed to take into account the fundamental right to free expression (i.e. the idea/expression dichotomy, the criteria for protection such as the originality requirement and the exceptions and limitations) are interpreted in a manner that gives full effect to freedom of expression. The presence of such mechanisms should, thirdly, by no means be understood as immunising copyright from any further freedom of expression scrutiny: according to the Advocate General, if on the contrary fundamental rights are not sufficiently taken into account by the existing copyright system, there are circumstances when the exclusive rights "must yield to an overriding interest relating to the implementation of a fundamental right or freedom"—an explicit admittance (for the first time at EU level) of the admissibility of an external limitation to copyright by freedom of expression. This approach is not called into question by the Advocate General in his two other opinions that shortly followed *Afghanistan Papers—Pelham* and *Spiegel Online*. If at first sight he seems to take a more restrictive approach towards the opening of the closed list of limitations in EU copyright law by the use of fundamental rights, he still considers that such an external limitation is possible "in exceptional cases", specifying that this is in particular the case when the "essence of a fundamental right" is at stake. This article concludes by addressing the final focal point of the *Afghanistan Papers* opinion—the unacceptability of misusing copyright for the purposes not corresponding to its rationales and its social function. Such reference to the concept of copyright misuse is particular noteworthy since this notion has never been applied before by the EU courts in such an explicit way.

Articles

ALPANA ROY AND ALTHAF MARSOOF

The Brave New World of ICANN's "New gTLDs": An Analysis of Trade Mark Disputes During and Post Delegation 138

The aim of this article is to provide a comprehensive and critical analysis of trade mark disputes concerning new generic top-level domains or "new gTLDs" that have arisen both during and after the process of their delegation. In its first part, the article considers pre-delegation disputes, which mainly determine whether or not a particular "string" becomes delegated resulting in its inclusion in the root zone of the hierarchical namespace of the Internet's Domain Name System. Essentially, these disputes concern the "right" side of the dot. The second part of the article considers post-delegation disputes, particularly between trade mark owners and third parties who have registered domain names with a new gTLD. These are disputes concerning the "left" side of the dot. A consideration of disputes concerning new gTLDs reveal a problematic interplay between ICANN's dispute resolution mechanisms that apply during and after the delegation process.. The outcome is that those who own non-fanciful trade marks are at a significant disadvantage in a world of new gTLDs.

CRAWFORD JAMIESON

In Defence of a UK Doctrine of Equivalents 147

This article considers whether the UK Supreme Court was right in *Actavis v Eli Lilly* to introduce a doctrine of equivalents when determining the infringement of patents in the UK. *Actavis v Eli Lilly* is undoubtedly among the most significant patent cases in recent years. It has accordingly attracted considerable academic commentary, which has identified several unsatisfactory elements of the UK's formulation of the doctrine of equivalents. In this article, I argue that these ought not to detract from the force of the argument in favour of a UK doctrine of equivalents. An analysis of the UK's approach to contractual interpretation indicates that determining whether a patent is infringed and construing a patent's claims are logically distinct matters. When the underlining statutory framework is examined, a doctrine of equivalents flows logically from a thorough-going distinction between infringement and construction. I therefore argue that the Supreme Court was correct to adopt a doctrine of equivalents, regardless of the reservations some have with its current formulation.