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Table of Contents

Opinion

TOLULOPE ANTHONY ADEKOLA

Should Covid-19 Treatment Be Patented? Rethinking the Theoretical Justification for the Grant of Pharmaceutical Patent 695

As the world continues to battle the Covid-19 pandemic, innovation and technology have found a new battleground. Against the backdrop of the emerging patent controversies surrounding Covid-19 vaccines and therapeutics, this opinion reconsiders the theoretical justification for the grant of pharmaceutical patents.

Articles

CORINNE TAN

Copyright, Interrupted: Building Trust in Blockchain-Based Content Platforms 698

Are blockchains the solution to the disruption of copyright on digital content platforms? While the fundamental features of blockchains, being permanence, transparency and their quality of being decentralised records, may appear suited to fill the gaps left by copyright laws and alleviate some problems for content owners, there are challenges to their use. I argue in this article that trust is a necessary element for blockchain-based content platforms to fulfil their revolutionary potential in the copyright realm.

JOANNA WISNIEWSKA

Epigenetic Inventions: Lessons for the European Patent System 707

US scholars argue that the European Patent Convention, while compared with the US case law, offers more opportunities for patenting epigenetic inventions that are used in the detection and treatment of diseases. However, these statements overlook a detailed evaluation of the European patent system with its restrictions on patenting diagnostic methods, which need to be analysed in relation to epigenetics.

TILL KREUTZER

The EU Copyright Directive and Its Potential Impact on Cultural Diversity on the Internet 715

Article 17 of the European Directive on Copyright in the Digital Single Market reorganises the liability regime for platform and host providers fundamentally. For almost 20 years their legal responsibility for copyright and other legal infringements of their users based on the principle "notice-and-take-down". Hence, their liability was generally limited to reactive measures. They had to block or delete illegal content on their platforms only if an infringed party asked them to. According to art.17, though, "online content-sharing service providers" (like YouTube) carry a primary liability for copyright infringements of their users. If they want to prevent full liability they need to obtain licences for every piece of copyrighted work that is uploaded. At least they have to prove that they "made best efforts to obtain" the required rights. Unlicensed content has to be blocked before it goes online. Since manual legal checks will be impossible in most cases, this obligation inevitably leads to the use of algorithmic "upload filters". They will block all user contributions that cannot be detected as obviously legal. This dangerous legislative decision can severely impair the cultural diversity on the internet. However, the national legislators of the EU member states can still reduce potential collaterals in the now ongoing transposition process. This article explains the risks and possible measures to prevent them.

Compensation for a Wrongful Enforcement of a Preliminary Injunction under the Enforcement Directive (2004/48/EC) 721

This article explores legal mechanisms for compensating a wrongful enforcement of a preliminary injunction under the Enforcement Directive 2004/48/EC. Special focus is given to the recent judgment of the Court of Justice of the European Union in the case of *Bayer Pharma* of 12 September 2019. This article argues that the test proposed by the Court of Justice in national cases for compensating for a wrongful enforcement is incorrect in the view of art.9(7) of Directive 2004/48/EC. Despite art.9(7) of Directive 2004/48/EC, which strikes a balance of competing interests of a potential infringer and the intellectual property right holder, the Court of Justice held that, when the patent was ultimately invalidated, it does not automatically follow that the preliminary injunction was unfounded. As for specific issues, this article, notably, discusses whether the test for compensating a wrongful enforcement takes into account an abuse of a preliminary injunction and the behaviour of the defendant who launched a product without first challenging the patent. This article argues that it would be contrary to the aim of Directive 2004/48/EC if the compensation of defendants could be routinely refused when they do not wait for the invalidation of the enjoined patent. Otherwise this would encourage the misuse of preliminary injunctions. Finally, this article questions the applicability of national correction instruments to assessing of damage resulting from a wrongful enforcement of a preliminary injunction, implied in the case law of the Court of Justice.

URSULA SMARTT

Are Bloggers and YouTubers Journalists? 728

This article looks first at the definition of “journalism” in various cases and preliminary rulings by the Court of Justice of the European Union (CJEU), specifically at the *Sergejs Buivids* judgment (2019) whether a citizen journalist YouTuber falls under the legal definition of “journalist” and the related freedom of expression and processing of personal data exemption and derogation under (former) art.9 of Directive 95/46, now replaced by art.85 GDPR. The CJEU held in *Buivids* that art.9 of the Data Protection Directive must be interpreted as meaning that a video recording (for YouTube) may constitute a processing of personal data solely for journalistic purposes, and consequently rely on the derogation for journalistic purposes in relation to data protection law and freedom of expression. Second, we will examine the trilogy of significant CJEU judgments, all referred by the German *Bundesgerichtshof*—in *Funke Medien*, *Spiegel Online* and *Pelham (Kraftwerk)*—all concerned with the interplay between copyright and fundamental rights within the scope of EU data protection law. While EU law has already “harmonised” copyright law, we will look at the national copyright systems in the UK and Germany and how domestic legislation has historically defined the skill and labour approach (“sweat of the brow”). The overall focus will be on journalistic practices and press freedom in relation to modern media practices, such as blogs, YouTube videos and social media.

MCLEAN SIBANDA AND JOSEPH STRAUS

The Intellectual Property System as a Catalyst for Socio-Economic Development for Middle Income Countries: Lessons from South Africa 738

For low and middle-income countries increasing their R&D and technological base, international technology transfer could be an effective tool to accelerate their development. This article looks at South Africa's patent system and development aspirations as set out in the National Development Plan (Vision 2030), and discusses these within the context of the changes in the macroeconomic environment as well as intellectual property landscape over the period 1996–2015. Based on South Africa's technological capabilities as reflected in patent data, this article proposes a number of interventions that could ensure that the intellectual property system becomes a catalyst for fostering South Africa's development goals. This article places specific emphasis on transfer of technology, including the adaptation of foreign developed intellectual property to supplement South Africa's new technological capabilities in a few technological areas, in order to build new industries and catalyse development. This article advocates that the South African Government should support genuine innovation and the import of important technologies with a range of incentives to propel the private sector in order to realise the country's developmental objective. The case of South Africa could be particularly useful for low and other middle-income countries on how to use the intellectual property system for their socio-economic development.

JYH-AN LEE AND JINGWEN LIU

Prior-Use Defence in the Chinese Trade Mark Law 751

While the registration-based trade mark regime is known for its simplicity in finding an objectively recognisable basis for granting trade marks, it could lead to some unfair scenarios of trade mark squatting. If a party has been using a disputed mark long before its registrant, yet for whatever reason failed to register the mark before the registrant, the party may be subject to the legal risk of infringing the registrant's trade mark. China has three mechanisms in the Trademark Law (TML) for prior users to protect their unregistered trade marks: well-known marks, prior rights and prior use. This article focuses on the prior-use defence in art.59(3) of the TML. In addition to analysing the elements of the prior-use defence, this article also discusses its similarity and dissimilarity with well-known marks and prior rights followed by a legislative proposal to the TML.

Comments

DR ILANAH FHIMA

The CJEU Decision in Brompton Bicycle (Case C-833/18): An Original Take on Technical Functionality? 761

In *Brompton Bicycle*, the CJEU considered copyright protection of functional product designs. Protecting such artefacts through copyright law raises difficult questions of whether subject-matter previously protected by patent or design law, but which has since entered the public domain, should be re-enclosed via copyright. However, unlike trade marks and designs, EU copyright has no functionality exclusion, nor, following *Cofemel*, can technical works be excluded from copyright per se. Nonetheless, using basic copyright principles of originality and the designer's creative freedom, the *Brompton* court crafted a functionality exclusion in the absence of a legislative basis. It is argued that, while this decision demonstrates a degree of convergence in the approach to functionality across the different IPRs, how the functionality exclusions apply in practice is different. Also, questions remain about how this decision will be applied in practice—in particular, what will be considered to be a relevant design constraint and regarding the approach to subject-matter consisting of a mixture of technical and non-technical features?

TANGUY DE HAAN

The CJEU Sides with IP Right Holders: The Bayer Pharma Judgment (C-688/17) and the Consequences of the Europeanisation of Provisional and Precautionary Measures Relating to IP Rights 767

With its interpretation in the Bayer Pharma judgment of the concept of "appropriate compensation" under the Enforcement Directive, the CJEU did not only grant a significant protection to intellectual property right holders, but also confirmed that, as far as civil law liability is applied to intellectual property, national courts in the EU can only apply their national law provided that the latter is in line with EU law.

Book Review

PAUL L.C. TORREMAN

Terrell on the Law of Patents 774