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EU update

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ABSTRACT

This is the latest edition of the DLA Piper column on developments in EU law relating to IP, IT and telecommunications. This news article summarises recent developments that are considered important for practitioners, students and academics in a wide range of information technology, e-commerce, telecommunications and intellectual property areas. It cannot be exhaustive but intends to address the important points. This is a hard copy reference guide, but links to outside web sites are included where possible. No responsibility is assumed for the accuracy of information contained in these links.

1. Trademarks and copyright

1.1. *Draft report presented to European Parliament on copyright harmonisation in Europe*

MEP Julia Reda has presented to the Committee on Legal Affairs of the European Parliament a report on the implementation of the InfoSoc Directive (2001/29/EC), also known as the Copyright Directive. Julia Reda, a Pirate Party MEP, also proposes a number of significant reforms to EU copyright law in her report, which is likely to be unpopular with rightholders.

The report observes that the InfoSoc Directive introduced a minimum level of copyright protection across the EU, but did not lead to EU-wide harmonisation of copyright. In particular, the report notes that the optional nature of the exceptions and limitations within the Directive have led to continuing fragmentation of national copyright laws among member states.

Ms Reda's report acknowledges the responses to the European Commission's consultation on the review of the EU copyright rules, noting that a majority of 'end user' respondents reporting problems in accessing cross-border online services, particularly where technological protection measures are used to enforce territorial restrictions.

The report makes a number of recommendations, including:

1. appropriate remuneration for all categories of rightholders, and an improvement in the contractual position of authors and performers in relation to other rightholders and intermediaries;
2. the introduction of a single European Copyright Title, possible under Article 118 of the Treaty on the Functioning of the European Union;
3. harmonising the term of protection of copyright to a duration not exceeding the current international standards of the Berne Convention (that is, to 50 years);
4. making all exceptions and limitations in the InfoSoc Directive mandatory; and
5. adopting an 'open norm' allowing flexibility in the interpretation of exceptions and limitations in certain special cases, subject to the 'three step' test, limiting authorised uses to those that don't conflict with the normal exploitation of the work and which do not unreasonably prejudice the legitimate interests of the author or right holder.

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The Legal Affairs Committee will vote on the report, and any amendments, on 16 April, and the European Parliament will vote on the report on 20 May 2015.

To access the report, please click on the following link: https://juliareda.eu/2015/01/report-eu-copyright-rules-maladapted-to-the-web/

1.2. The issue of jurisdiction in cases of copyright infringement on the Internet: the ECJ holds onto the "accessibility" approach

On January 22, 2015, the European Court of Justice (ECJ) ruled on the jurisdiction of Member States' courts in cases of copyright infringement occurring on the Internet (Case C-441/13, *Pez Hejduk v EnergieAgentur.NRW GmbH*).

In the case at hand, an Austrian photographer domiciled in Austria had sued a German company before an Austrian Court (Handelsgericht Wien) for the unauthorized use of her photographs on its website (display and download).

The German company argued that Austrian courts lacked jurisdiction, as the website used a German top-level domain (.de), and was therefore not directed at Austrians.

The claimant, on the other hand, justified the jurisdiction of the Austrian court by referring to Art. 5 (3) of Reg. 44/2001 of 22 Dec. 2000 ("Brussels I"), which states that "a person domiciled in a Member State may, in another Member State, be sued … in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur", rather than those of the country where the defendant is based, if the claimant so chooses.

The Austrian court decided to stay the proceedings and referred the following questions to the ECJ for a preliminary ruling:

"*Is Article 5(3) of Reg. 44/2001 to be interpreted as meaning that [in these circumstances] there is jurisdiction only: i) in the Member State in which the alleged perpetrator of the infringement is established; and ii) in the Member State(s) to which the website, according to its content, is directed?*"

According to the ECJ ruling, there is no requirement that a website be "directed to" the Member State where the damage occurred to trigger competence of the courts of this Member State: the mere accessibility of content protected by copyright is sufficient to establish the occurrence/likelihood of damage.

Consequently, and contrary to the view of the Advocate-General advising the ECJ in this case, the ECJ stated that where a work protected by copyright in a Member State is made available online, without the right-holder's consent, in another Member State, jurisdiction over the infringement claim may be given to the courts of the Member State where the damage occurs, *i.e.,* where the protected content is made accessible, no matter where the infringement took place. The Court hereby confirms its ruling from October 2013 in the Pinckney case (C-170/12).

However, according to the ECJ and pursuant to the "*mosaic principle*", the Court having jurisdiction over a copyright infringement claim pursuant to this interpretation of Article 5(3) shall have jurisdiction "*only to rule on the damage caused in the Member State within which the court is situated*", i.e. not on the damage caused in any other foreign jurisdiction.

2. Patents

2.1. Jurisdiction of Unified Patent Court extends to non EU countries

According to latest rumors, the new European patenting system (introduction of the Unitary Patent based on EU Regulations No. 1257/2012 (UPR) and No. 1260/2012 (UPTR) including the establishing of a Unified Patent Court with divisions located throughout Europe) will start in 2017.

As a new significant development, the jurisdiction of the Unified Patent Court shall extend even to non EU countries. This is due to several amendments to the "long arm jurisdiction provision" which was introduced by the Brussels I Regulation and extended by EU Regulation No. 1215/2012. These amendments are announced as Regulation No. 542/2014 of 15 May 2014. According to IP specialist Pierre Véron, the amendments will have a substantial influence in practice as "the proprietor of a European Patent infringed across several countries, including non EU countries like Turkey, will obtain compensation through a single suit in the EU, before the UPC. It is also important from a theoretical standpoint as it introduces in EU law the concept of asset-based jurisdiction".

Another key point involves the question of costs compared to the current European patenting system. Until today, the amount of the renewal fees for the Unitary Patent has not been announced. The industry is very critical on high fees, as it does not want to subsidize countries with small markets where patent protection is not attractive. Moreover, Spain and Italy will not be part of the new UP and additional patent protection will be necessary in these countries.

The UPR does not determine any fee, but only mentions some general criteria in Article 12 UPR. Now, for the first time, a document proposed by the President of the EPO to the Select Committee of the Administrative Council specifies several standard values for the upcoming renewal fees. These values adopt the most important criteria of Article 12 UPR like (a) geographical coverage of current European Patents, (b) reflection on the renewal rate of current European Patents; and (c) the reflected market size covered by the patent.

According to the proposal, the fees shall be set at the following levels: From year three to five the fees demand the level of the EPO's internal renewal fees (fees payable to the EPO for pending patent applications currently). From year six to nine a transitional level between the internal renewal fees level and the year 10 level is estimated. For year 10 onwards the fee level is equivalent to the total sum of the national renewal fees payable in the states in which European Patents are most frequently validated. Relating to "the Year 10 onwards level", two different suggestions are in discussion: The fee reflects either the current renewal fee levels for FOUR or FIVE European countries (TOP 4 or TOP 5 level). In the TOP 4 scenario the total sum of renewal fees will amount to EUR 37.995. The TOP 5 proposal could include a 25% reduction for years two to ten, so that in total the total fees will be either EUR 41.655 or EUR 43.625.

In addition to the renewal fees, the costs for the application costs have to be considered as well. According to practitioners, the amount for a European Patent under the current system –