

Intellectual Property Liability of Consumers, Facilitators and Intermediaries

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IEEM and International Intellectual Property Law

The involvement of the Institute of European Studies of Macau (IEEM) in matters of intellectual property is based on annual conferences that take up topical issues of intellectual property from a comparative perspective with a particular focus on Asia and Europe. The first of these conferences was held back in 2000, and has meanwhile become an annual event complemented by an Intellectual Property School and IP Master Classes. All three venues serve as a platform for academic teaching and discussion on intellectual property awareness and the proper place and function of intellectual property law in the context of society and public interest.

From the very start, the intellectual property conferences, the IP Law School and the Master Classes have enjoyed the support, assistance and commitment of Mr Gonalo Cabral, who is an advisor to the Government of Macau, of Ms. Maria do C u Esteves, past president of the IEEM and the IEEM's current president Dr Jos  Luis de Sales Marques. The latter was also instrumental in setting up an IEEM chair for intellectual property law at the University of Maastricht, which was held by Anselm Kamperman Sanders, thereby further contributing to IEEM's academic commitment to the field of intellectual property law.

The conference papers, as revised and updated, are edited by Christopher Heath and Anselm Kamperman Sanders as an IEEM Intellectual Property Series the volumes of which are listed at the end of this book.

Preface

This book addresses issues such as ISP liability, contributory and secondary liability for trademark, copyright and patent infringement, Google ads and trademark infringement, liability for transporters and freighters, time and geo-shifting devices and services, eBay and trademark infringement.

In the last couple of years and to a large extent spurred by the internet, attempts have been made by right owners to broaden the liability for infringement to parties that do not directly infringe, but that in one way or another facilitate and profit from the infringement by others. Main examples for this development are facilitators of peer-to-peer file sharing schemes in the field of copyright, or the platform eBay that profits and facilitates both the sale of original and counterfeit goods and in the latter case has been made responsible for trademark infringements.

However, sailing close to the wind and committing an infringement is often difficult to distinguish. Does the sale of copy-facilitating soft-or hardware with significant potential for legitimate uses also infringe? Is it of relevance in this respect that the vendor turns a blind eye to widespread infringement, or refuses to cooperate with right owners? Is Google's profitable practice of adwords being displayed for searches an infringing use of trademarks, or in the absence of confusion just a legitimate practice? Can the professional assistance to acts of private copying become infringing due to its commercial character, or does it enjoy the same privileges as those applicable to act of private copying? Should ISPs be forced to become the long arm of IP right owners?

It is remarkable that in order to determine responsibility and thus liability, traditional principles of civil law such as tort and no-fault liability for potential sources of danger have been applied, in other words, concepts of domestic law that, however, often reveal striking similarities regardless of whether applied in Europe, Asia or the US. The book critically analyses whether in drawing on such principles of general civil law, the baby has not been thrown out with the bathwater, disregarding established IP principles such as territoriality, freedom to operate and freedom of competition, and a scope of protection commensurate to the contribution to society and conducive to social interests.

The book analyses the above issues that relate to trademark and copyright law in a general introduction, and in country reports for all major jurisdictions where the

issues of responsibility of facilitators and intermediaries for copyright and trademark infringement have been litigated:

- The Community level (ECJ/CFEU)
- Germany
- France
- Italy
- The United States
- Japan
- Korea
- Australia and New Zealand.

Finally, a comparative chapter on patent issues (that have fared less prominently so far, with decisions from the UK, Germany, the Netherlands and the US) concludes the book and takes a look at constellations of contributory patent infringement of facilitators and intermediaries. All chapters have included case law and legislative developments until 1 June 2012.

The list of cases and the alphabetical index were kindly prepared by Alberto Bellan.

*Christopher Heath &
Anselm Kamperman Sanders*

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