



International Intellectual Property Law

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International Intellectual Property Law

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I. Patents

A. UNITED STATES

In *Bilski v. Kappos*, the Supreme Court found the machine-or-transformation test a useful and important tool, but not the sole test, for determining whether inventions are patent-eligible processes.¹ The Court found the claims at issue unpatentable as abstract ideas.²

The Federal Circuit ruled that 35 U.S.C. §112 contains a written description requirement separate from enablement.³ The description must “clearly allow” persons of ordinary skill in the art to recognize that the inventor invented what is claimed.⁴ In two cases,⁵ it gave additional guidance on the circumstances that establish justiciable cases or controversies following the Supreme Court’s 2007 *MedImmune*⁶ decision.

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1. *Bilski v. Kappos*, 130 S. Ct. 3218, 3227 (2010).

2. *Id.*

3. *Ariad Pharm. Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1334 (Fed. Cir. 2010).

4. *Id.*

5. *See Innovative Therapies, Inc. v. Kinetic Concept, Inc.*, 599 F.3d 1377 (Fed. Cir. 2010); *Hewlett-Packard v. Acceleron LLC*, 587 F.3d 1360 (Fed. Cir. 2009).

6. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007).

The Court held that a contract between two U.S. companies for performance in the United States may constitute an offer to sell within the United States under §271(a) despite the offer having been negotiated or the contract having been signed abroad.⁷

The Federal Circuit held in a design patent case that, in light of Supreme Court precedent and *Egyptian Goddess*,⁸ the ordinary observer test is the sole test for anticipation as well as infringement.⁹

In three cases, the Court gave guidance on sufficient evidentiary support needed to support damage calculations in infringement actions.¹⁰

The Court addressed §292 false patent marking issues. First, “the plain language of §292 requires courts to impose penalties for false marking on a per article basis.”¹¹ Second, “false marking, combined with knowledge of falsity, merely creates a presumption of intent to deceive, rebuttable by a preponderance of evidence showing there was no purpose to deceive” (even though the article was covered by an expired patent and therefore “unpatented”).¹² Third, “a *qui tam* provision operates as a statutory assignment of the United States’ rights, and the assignee has standing to assert the injury suffered by the assignor” without the individual plaintiff being required to have suffered any injury.¹³

Lastly, for patent misuse to be a valid defense against patent infringement, the patent in suit must significantly contribute to the practice under attack.¹⁴

B. EUROPE

1. *European Union*

The Council of the European Union (EU) approved a Draft Regulation for a unitary European Patent and a unitary Patents Court.¹⁵ The proposal provides for national or regional trial courts, and a central appeal court. The European Court of Justice held a hearing on the proposal’s constitutionality.¹⁶

7. See *Transocean Offshore Deepwater Drilling, Inc. v. Maersk Contractors USA, Inc.*, 617 F.3d 1296, 1309 (Fed. Cir. 2010).

8. *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 678 (Fed. Cir. 2008) (holding the ordinary observer test is the sole test for design patent infringement).

9. See *Int’l Seaway Trading Corp. v. Walgreens Corp.*, 589 F.3d 1233, 1240 (Fed. Cir. 2009) (expanding the use of the ordinary observer test to anticipation analysis).

10. See *Wordtech Sys., Inc. v. Integrated Network Solutions, Inc.*, 609 F.3d 1308 (Fed. Cir. 2010); *Resqnet.com, Inc. v. Lansa, Inc.*, 549 F.3d 862 (Fed. Cir. 2010); *Lucent Tech. Inc. v. Gateway, Inc.*, 580 F.3d 1307 (Fed. Cir. 2009).

11. *Forest Group, Inc. v. Bon Tool Co.*, 590 F.3d 1295, 1304 (Fed. Cir. 2009).

12. *Pequignot v. Solo Cup Co.*, 608 F.3d 1356, 1360-64 (Fed. Cir. 2010).

13. *Stauffer v. Brooks Bros., Inc.*, 619 F.3d 1321, 1325 (Fed. Cir. 2010).

14. *Princo Corp. v. Int’l Trage Comm’n*, 616 F.3d 1318, 1331 (Fed. Cir. 2010).

15. The Council effectively consists of the appropriate cabinet members from the governments of the member states of the EU. *2982nd Competitiveness Council Conclusions*, EUROPEAN COUNCIL (Dec. 4, 2009), http://consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/intm/111744.pdf.

16. European and Community Patents Court, Advocates General Opinion 1/09 (July 2, 2010) 5 J. INTELL. PROP. L. & PRAC. 826 (2010), available at <http://jiplp.oxfordjournals.org/content/5/12/826.full?sid=7602e8fc-7493-49e0-b922-c56ef8cf8b52>.

Major changes to the European Patent Convention (EPC) Implementing Regulations came into force.¹⁷ The deadline for filing divisional applications is twenty-four months from the first Office Action on the merits in the family of applications, or in response to a later restriction requirement, twenty-four months from the restriction requirement. It will now be mandatory to respond to a negative Patent PCT (Patent Cooperation Treaty) or European search opinion. The existing ban on multiple independent claims will be enforced before search.

An EPO Board of Appeal held that there is no general prohibition on double patenting in the EPC.¹⁸

The Court of Justice of the EU (ECJ) ruled¹⁹ that under the Directive on the legal protection of biotechnological inventions, known as the “Biotechnology Directive,”²⁰ a DNA sequence patent applies only when the genetic information performs its function in the material and is not infringed by its residual presence in processed soy meal, which is a dead material.²¹ The Directive constitutes an exhaustive harmonization and preempts any contrary national law.²²

2. *Switzerland*

In a patent civil dispute, the Federal Supreme Court (FSC) appointed an attorney as court expert, but later decided that the expert could not be considered “neutral,” holding that the same partiality rules for court members apply to court experts. Partiality is presumed if one of the parties in a dispute has an important business relationship to the court expert, even if indirect.²³

3. *Germany*

The German Supreme Court ruled²⁴ that an importer of in vitro diagnostic devices from another EU member state who adds German-language labels and instructions must obtain a conformity evaluation under Section 6(2) of the Medical Devices Act, and that the new labels and instructions change the condition of the product, infringing the owner’s rights in the original trademarks. This decision may conflict with EU rules on free circulation of goods.²⁵

17. See generally Council Regulation 2/09, 2009 O.J. (L 296) (EC); EPO Regulation 3/09, 2009 O.J. (299); Council Regulation 20/09, 2009 O.J. (L 582) (EC).

18. Case T-1423/07-3.3.02, *Cyclic amine derivative*, Boehringer Ingelheim Vetmedica GmbH, (Apr. 19, 2010), <http://legal.european-patent-office.org/dg3/pdf/t071423eu1.pdf> (patent board of appeals decision not to be published in the official journal of EPO).

19. Case C-428/08, *Monsanto Tech. LLC v. Cefetra BV*, 2010 E.C.R. 000, ¶¶ 37-38 (July 6, 2010).

20. Directive 98/44, O.J. 1998 (L 213) 13 (EC).

21. Case C-428/08, ¶ 39.

22. *Id.* ¶¶ 62, 69.

23. Bundesgericht (BGer) [Federal Court] July 26, 2010, 4A_256/2010 (Switz.).

24. Bundesgerichtshof (BGer) [Federal Court] May 12, 2010, I ZR 185/07 (Switz.).

25. See Council Directive 93/42, 1993 O.J. (L 169), 1 (EC).

4. *United Kingdom*

The House of Lords held²⁶ that when a patent claims a novel and inventive compound *per se*, the patentable contribution to the art is the compound *per se*, even though the desirability of that compound was foreseen and the core inventive concept was how to provide it, distinguishing *Biogen*.²⁷ Therefore, patent protection remains commensurate with the patentee's contribution to the art.

For the first time, U.K. Courts have awarded compensation to an employee inventor on the single ground that the patent was of outstanding benefit to the employer.²⁸ The U.K. law has been amended²⁹ and now also allows an award if the invention, and not merely the patent, is of outstanding benefit to the employer.

The English Court of Appeals,³⁰ holding a patent was not infringed, reviewed and rejected an earlier decision of a German appeals court,³¹ which held the same patent was infringed by the same product. The English court rejected the German court's approach on the ground that a patentee may choose to limit his claims more narrowly than his original disclosure and should be understood to mean what he says in his claims.³²

The English High Court held that when an application for a U.K. patent (in this case, a European Patent Application) claims priority under the Paris Convention but is filed by a person who is not at the filing date the successor in title of all the applicants for the priority application, the claim to priority is incurably invalid.³³

C. CANADA

Following the Supreme Court's *Apotex* decision,³⁴ the IP Office has issued a Practice Note³⁵ on examination for obviousness. The Canadian approach differs from the *Graham*³⁶ factual inquiries in U.S. law by requiring that the "inventive concept of the claim" should be identified and compared with the cited prior art. Only where that is not possible is the claim as a whole construed and compared with the prior art.³⁷

The Federal Court held an applicant's disclosure that glossed over an unfavorable reference to be inequitable conduct and argued on the basis of other references that "the teachings of the prior art as a whole" taught away from the claimed invention.³⁸

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26. *Generics (UK) Ltd. v. H. Lundbeck A/S*, [2009] UKHL 12 (A.C.) (appeal taken from EWCA).
 27. *Biogen Inc v. Medeva Plc* [1997] R.P.C. 1 (Eng.).
 28. *Kelly & Chiu v. GE Healthcare Ltd.*, [2009] EWHC 181 (Pat) (Eng.).
 29. Patents Act, 2004, c.37, §§ 40-41 (U.K.).
 30. *Occlutech v. AGA Medical Corp.*, [2010] EWCA (Civ) 702 (Eng.).
 31. *Oberlandesgericht [OLG] [Higher Regional Court of Düsseldorf] Dec. 22, 2008*, available at http://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2008/L_2_U_65_07urteil20081222.html.
 32. *Occlutech v. AGA Medical Corp.*, [2010] EWCA Civ. 702.
 33. *Edwards Lifesciences AG v. Cook Biotech Inc.*, [2009] EWHC 1304 (Pat) (Eng.).
 34. *Apotex Inc. v. Sanofi-Synthelabo Can. Inc.*, [2008] 3 S.C.R. 265 (Can.).
 35. Practice Note on the Examination for Obviousness, CANADIAN INTEL. PROP. OFFICE, Nov. 2, 2009, http://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/h_wr02152.html.
 36. See *Graham v. John Deere Co.*, 383 U.S. 1 (1966).
 37. *Apotex Inc. v. Sanofi-Synthelabo Can. Inc.*, [2008] 3 S.C.R. 265, 2008 SCC 61.
 38. *Lundbeck Canada Inc. v. Ratiopharm Inc.*, [2009] F.C. 1102, ¶¶ 311-12 (Can.).

It also ruled that inducement to infringe a Canadian patent does not require knowledge of the patent, but only knowledge that the inducement will result in the acts of the direct infringer.³⁹

A third case held⁴⁰ that a computer-implemented business method, whether claimed as a method or as functionally-defined apparatus, is not unpatentable under the Patent Act.⁴¹ Specifically, (i) there is no general exclusion of “business methods” from patenting and (ii) computers, as an essential element of the apparatus claims and use of “stored information and ‘cookies’” in the method claims, are sufficiently “tangible” to avoid rejection as “simply a scheme, plan, or disembodied idea.”⁴²

D. AUSTRALIA

IP Australia has launched a pilot program for peer review of pending patent applications, allowing third parties to cite prior art and comment on the cited art.⁴³

A hearing officer decided⁴⁴ that when a document is in a foreign language, without an English abstract, and the skilled reader has no reason to believe it sufficiently relevant to translate, the document does not qualify as prior art for purposes of obviousness.

E. CHINA

Implementing regulations to China’s Patent Law 2009 amendments include a requirement for a national security review, expansion of grounds for invalidation, and default employee award amounts.⁴⁵

A new Judicial Interpretation sets out rules for interpreting the scope of claims in a patent and specifically provides for a narrow reading of means-plus-function claims, as in the United States.⁴⁶ For design patents, the standard for assessing confusion is now the “general consumer” (see Article 10) rather than the “relevant public.” For a prior art defense, there must be at least one piece of prior art, which need not be exactly the same, but must not be substantially different.

39. *Bauer Hockey Corp. v Easton Sports Canada Inc.*, [2010] F.C. 361, ¶¶ 196-203 (Can.).

40. *Amazon.com, Inc. v. Att’y Gen. of Canada and the Comm’r of Patents*, [2010] F.C. 1011 (Can.) (relating to Amazon’s “one-click” ordering system).

41. See generally Patent Act, R.S.C. 1985, c. P-4 (Can.).

42. *Amazon.com, Inc. v. Att’y Gen. of Can. & the Comm’r of Patents*, [2010] F.C. 1011.

43. See generally *IP Australia*, PEER-TO-PATENT AUSTR., <http://www.peertopatent.org.au> (last visited Jan. 20, 2011).

44. *Euroceltique S.A. v. Sandoz Pty Ltd.* [2009] A.P.O. 21 (Nov. 12, 2009) (Austl.).

45. Guowuyuan guanyu xiugai zhonghua renmin gongheguo zhuani fa shishi xi ze (国务院关于修改〈中华人民共和国专利法实施细则〉的决定) [Revisions to the Rules for Implementation of the Patent Law of the PRC], available at http://www.gov.cn/jwqk/2010-01/18/content_1513398.htm (last visited Jan. 20, 2010) (full text of revisions appears in Chinese).

46. Guanyu Shenli Qin fan Zhuanli Quan Jiufen Anjian Yingyong Falu Ruogan Wenti de Jieshi (最高人民法院关于审理侵犯专利权纠纷案件适用法律若干问题的解释) [Supreme People’s Court Law Interpretation No. 21 on Patent Infringement Disputes], SUP. PEOPLE’S CT. (2009), http://www.law-lib.com/law/law_view.asp?id=305372 (China).

The State Intellectual Property Office (SIPO) released draft measures for the registration of security interests in patents.⁴⁷

F. LATIN AMERICA

1. *Chile*

Notice 001⁴⁸ clarified the grace period in effect after the Patent Cooperation Treaty entered into force. During the twelve months before the filing date certain disclosures do not affect the novelty of the invention or the application of the non-obviousness standard.

2. *Argentina*

Now applicants may file divisional patent applications only if requested by the examiner.⁴⁹ Failure to comply with such requests results in abandonment of the application. This resolution modifies prior administrative practices and may restrict the rights of patentees in an unlawful way.

3. *Mexico*

The bi-annual Linkage Gazette (*Gaceta de la Propiedad Industrial*) of the Mexican Institute of Industrial Property (IMPI) listed existing patents on pharmaceutical active ingredients, but not patents on formulations, despite an earlier Supreme Court decision.⁵⁰ This publication is the essential tool composing the Mexican system linking IMPI and COFEPRIS (the Mexican Health Authority), the authority in charge of granting marketing approval to commercial pharmaceuticals. Under Mexican law, neither administrative authority is required to follow the Supreme Court's ruling.

Executive regulations implementing statutory amendments included: refining the standard of industrial application; establishing possibilities for third parties to file "non binding" or "informal" oppositions against published applications and granted patents; modifying the procedures for granting preliminary measures to include the opportunity for an infringer to post a higher bond than the right holder in order to continue using or

47. Yijian Zhengqiu "Zhuanli Quan Zhiya Deng ji Banfa" Cao'and Xiuding Shuoming (意见征求:《专利权质押登记办法》草案修订说明) [Consultation on the Amendment of the "Interim Measures for the Registration of Security Interests in Patents"], STATE INTELL. PROP. OFFICE OF P.R.C. (2010), http://www.sipo.gov.cn/sipo2008/tfs/dtxx/jndt/201005/t20100519_519092.html (China).

48. *Circular No. 001/2010*, INSTITUTO NACIONAL DE PROPIEDAD INDUSTRIAL, (Feb. 4, 2010), <http://www.inapi.cl/images/stories/Documentos/circulares/CIRCULAR001DIVULGACIONESINOCUAS.pdf>.

49. Law No. 147/2010, July 2010, Instituto Nacional de la Propiedad Industrial (Arg.).

50. See Maricarmen Cortes, *IMPI y Cofepris niegan extension de patentes [IMPI and Cofepris deny patent extension]*, EL UNIVERSAL OPINION, Jan. 25, 2010, <http://www.eluniversal.com.mx/columnas/82028.html>; Hilario Ochoa Movis, *Industria farmacéutica mexicana*, en 11vo lugar a nivel internacional [*Mexican Pharmaceutical Industry, in 11th Place Internationally*], EL MEXICANO GRAN DIARIO REGIONAL, Jan. 25, 2010, <http://www.el-mexicano.com.mx/informacion/noticias/1/3/estatal/2010/01/25/353587/industria-farmacéutica-mexicana-en-11vo-lugar-a-nivel-internacional.aspx>; Bianca Valadez, *La Corte cierra el camino a medicamentos genericos [Court Blocks the Way to Generic Drugs]*, MILENIO.COM, Mar. 23, 2010, <http://www.milenio.com/node/387760>.

commercializing the invention; criminalization of certain activities and their penalties; and Power of Attorney requirements.⁵¹

G. RUSSIA

The Russian patent law introduced a six-year period of exclusive protection to patented pharmaceuticals owners for data submitted to the government in support of clinical trials.⁵²

The U.S. Patent and Trade Office (PTO) signed an agreement with Rospatent, designating the latter as an International Searching Authority and International Preliminary Examining Authority under the Patent Cooperation Treaty for U.S. applications.⁵³

II. Trademarks*

A. UNITED STATES

The Supreme Court held that an agreement among the National Football League (NFL) teams to license their separately owned trademarks collectively and exclusively to a single vendor constituted “concerted action” in violation of Section 1 of the Sherman Act.⁵⁴ The Court held that the teams were not a single entity formed to promote the NFL brand but competing suppliers and that the exclusive arrangements “deprive the marketplace . . . of actual or potential competition.”⁵⁵

In *Pernod Ricard USA LLC v. Bacardi U.S.A., Inc.*, the U.S. District Court for the District of Delaware held that “Havana Club” on a Puerto Rican rum did not misrepresent “geographic origin” because it indicated the rum’s Cuban heritage and the label clearly stated that the rum was produced in Puerto Rico.⁵⁶ “Geographic origin” can encompass some aspect of a product’s history rather than refer exclusively to the place of production.⁵⁷

In *Federal Treasury Enterprise Sojuzplodoimport v. Spirits Intern. N.V.*, the Second Circuit held that incontestability of the “STOLICHNAYA” mark did not foreclose a challenge to

51. Decreto por el que se reforman y adicionan diversos artículos de la Ley de la Propiedad Industrial [Decree That Amends and Adds Various Articles of the Industrial Property Law], Diario Oficial de la Federación [DO], June 18, 2010 (Mex.), available at http://dof.gob.mx/nota_detalle.php?codigo=5147288&fecha=18/06/2010.

52. *State Duma Adopts Civil Code Amendments on a Copyright Protection*, RUSS. & CIS BUS. L. WEEKLY, Sept. 28, 2010.

53. Jalena Jankovic, *Rospatent to Serve as ISA, IPEA under PCT for US*, MONDAQ, Nov. 12, 2010, available at 2010 WLNR 22636706.

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54. *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201 (2010).

55. *Id.* at 2211-12.

56. *Pernod Ricard USA LLC v. Bacardi U.S.A., Inc.*, 702 F.Supp.2d 238 (D. Del. 2010).

57. *Id.* at 250.

its ownership from a series of assignments, finding “incontestability” does not affect the issue of whether a subsequent transfer was valid and recordation is not conclusive of its validity.⁵⁸

In *Crash Dummy Movie, LLC v. Mattel, Inc.*, the Federal Circuit held cancellation of a mark does not equate abandonment, finding that Mattel had overcome the statutory presumption of non-use by demonstrating intent to resume use.⁵⁹

B. EUROPEAN UNION

The ECJ ruled in *Google/Louis Vuitton*,⁶⁰ regarding the AdWords function, that Google does not violate trademark law by allowing advertisers to purchase keywords that include their competitors’ trademarks. Google does not use third party trademarks in the “course of trade,” but instead merely stores them without using them in its own commercial messages to consumers. As a service provider, Google may also benefit from the Safe Harbor Provisions of the Electronic Commerce Directive.

The ECJ ruled Anheuser-Busch may no longer sell beer named “Budweiser” in Austria, the Czech Republic, or Germany, and may not register the word Budweiser as a Community Mark.⁶¹ The ECJ upheld the General Court ruling that the 2005 rules regarding production of evidence of renewal were not to be applied retroactively.⁶²

The ECJ rejected the practice of the Office for Harmonization in the Internal Market (OHIM) to systematically refuse registration of a single letter as a trademark, such as the Greek letter “a,” because it would be “devoid of any distinctive character.” The Court found OHIM had violated trademark law by not undertaking an examination of the facts to determine whether the mark had “distinctive character.”⁶³

The ECJ affirmed cancellation of Lego’s 1999 registration of its iconic three-dimensional brick, finding the studs on the Lego brick were essential to the intended functionality or “technical result” of the product and therefore not entitled to registration as a trademark. The ECJ explained that granting trademark protection would violate public policy by indefinitely extending the time-limited monopolies Lego had enjoyed under U.K. patents.⁶⁴

C. CHINA

The Supreme People’s Court issued an opinion⁶⁵ to consolidate a number of past decisions. The past decisions include: (i) foreign language trademarks must be evaluated for

58. Fed. Treasury Enter. Sojuzplodoimport v. Spirits Int’l N.V., 623 F.3d 61, 68 (2d Cir. 2010).

59. *Crash Dummy Movie, LLC v. Mattel, Inc.*, 601 F.3d 1387, 1391 (Fed. Cir. 2010).

60. Cases C-236/08 to C-238/08, *Google v. Louis Vuitton*, 2010 ECJ CELEX LEXIS 62008J0236 (Mar. 23, 2010).

61. Case C-214/09, *Anheuser-Busch Inc. v. OHIM*, 2010 ECJ CELEX LEXIS 62009J0214 (July 29, 2010).

62. Case T-191/07, *Anheuser-Busch Inc. v. OHIM*, 2009 ECJ CELEX LEXIS 62007A0191 (Mar. 25, 2009).

63. Case C-265/09, *OHIM v. BORCO-Marken-Import Matthiesen GmbH & Co. KG*, 2010 ECJ CELEX LEXIS 62009C0265 (May 6, 2010).

64. Case C-48/09, *Lego Juris AIS v. OHIM*, 2010 ECJ CELEX LEXIS 62009J0048 (Sept. 14, 2010).

65. *Zuigao renminfayuan guanyu shenli shangbiao shouquan que quan xingzheng anjian ruogan wenti de yijian* (最高人民法院于审理商标授权确权行政案件若干问题的意见) *Supreme People’s Court Opinion on*

distinctiveness based on the relevant public perception in China; (ii) courts should determine the breadth of a famous foreign trademark's recognition in China and adjust the scope of protection accordingly; (iii) if distributors and sales agents of foreign goods in China are not authorized to file Chinese trademark applications for such goods, the unauthorized applications are "pirate" applications.

The General Administration of Quality Supervision, Inspection and Quarantine of the People's Republic of China (AQSIQ) announced a phase-out of the "China Top Brand logo."⁶⁶ Use of the logo must cease after previously granted rights expire in 2012. This program is distinct from the "well-known mark"⁶⁷ status that is still available to foreign and domestic companies alike.⁶⁸

The PRC Trademark Office issued guidelines on examination of trademarks using the characters "中国" ("*zhongguo*" means "China") or simply "国" ("*guo*" means "state," "nation," or "China").⁶⁹ SAIC and the PRC Trademark Office used these grounds to reject an application from the Wuliangye liquor Group⁷⁰ for the mark "国酒" or "national liquor."⁷¹

D. SWITZERLAND

In its *Easyweiss* decision, the Swiss Federal Administrative Court (FAC) upheld refusal to register "easyweiss" ("weiss" means "white" in German) for colors, varnish, and plaster, holding the use misleading as suggesting that a surface can effortlessly be painted white.⁷² It also held that the use of "SINO" with goods not originating from China is misleading.⁷³

The FAC confirmed refusal to register "IPHONE" for mobile electronic devices able to send/receive phone calls and data on descriptiveness grounds,⁷⁴ stating that the average consumer understands "i" as an abbreviation of internet and "PHONE" as telephone and

Several Issues Concerning the Trial of Administrative Cases Involving the Granting and Confirmation of Trademark Rights (Apr. 26, 2010) (China), available at http://rmfyb.chinacourt.org/paper/html/2010-04/26/content_8167.htm.

66. Zhuan fa guojia zhi jian zong ju guanyu zhongguo mingpai chanpin youxiao qiman hou biao zhi shiyong wenti de tong zhi (转发国家质检总局关于中国名牌产品有效期满后标志使用问题的通知) *Notice regarding the Use of the Famous Brand Logo After Expiration*, July 1, 2010, <http://www.bjtsb.gov.cn/infoview.asp?ViewID=22234> (China).

67. See *Shangbiao Fa* (中华人民共和国商标法) [Trademark Law] (promulgated by the Standing Comm. of the 5th Nat'l People's Cong., Aug. 23, 1982, as amended in 1993 and 2001), arts. 13-14 (China).

68. *Id.* (proposed amendments are now being circulated for discussion) (China), available at <http://www.chinaiprlaw.com/english/laws/laws11.htm>.

69. Han zhongguo shou zi wei guo zi shangbiao de shencha shenli biao zhun (含“中国”及首字为“国”字商标的审查审理标准) [Standards for the Examination of Trademarks using the Characters "Zhongguo" or "Guo" as the First Word, Trademark Office of the State Admin. for Indus. and Commerce], July 28, 2010 (China), available at http://sbj.saic.gov.cn/tz/201007/t20100728_93651.html.

70. WULIANGYE GROUP, <http://www.wuliangye.com.cn/en/pages/index.xml> (last visited Jan. 20, 2010).

71. Guo jiu shangbiao bohui wei hao ("国酒"商标驳回为好) ["National Liquor" Trademark Rejected for Good], SHANXI NEWS ONLINE-SHANXI DAILY, Aug. 31, 2010, http://www.cnipr.com/news/ywdd/201008/t20100831_120596.html (China).

72. Bundesverwaltungsgericht [BVGE] [Federal Administrative Court] Nov. 11, 2009, B-4053/2009 (Switz.), available at <http://www.bundesverwaltungsgericht.ch>.

73. Bundesverwaltungsgericht [BVGE] [Federal Administrative Court] Nov. 11, 2009, B-6740/2008 (Switz.), available at <http://www.bundesverwaltungsgericht.ch>.

74. Bundesverwaltungsgericht [BVGE] [Federal Administrative Court] Nov. 24, 2009, B-6430/2008 (Switz.), available at <http://www.bundesverwaltungsgericht.ch>.

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Apple had failed to claim that “iPhone” had achieved distinctiveness through intensive use in the marketplace.

The FAC refused registration of “MADONNA” for violation of morality,⁷⁵ finding the religious significance of *Madonna* as the Mother of Christ overshadowed use of the term in art history and as the name of a famous pop star.

The FAC held that “5 A DAY” used in connection with Classes 5 (pharmaceutical, cosmetic articles) and 32 (beer, other beverages) is a generic phrase and cannot be registered as a trademark, reasoning that it would be understood as a dosage instruction with Class 5 products and as a consumption recommendation in Class 32 and therefore constitutes a general promotion slogan that cannot be monopolized.⁷⁶

Distinguishing design protection from trademark protection, the FAC refused to register packaging in the form of a wave as a three-dimensional trademark in International Classes 29 (fish, fish products) and 43 (food and drink services) in the “three-dimensional trademark” case on the grounds that the packaging lacked distinctiveness and was generic.⁷⁷

E. RUSSIA

The principal Russian trademarks development occurred in the U.S. Court of Appeals for the Second Circuit, which reinstated the claim of the Russian government to the famous STOLICHNAYA vodka trademark in the United States.⁷⁸ See discussion under Section II.A, *supra*.

PepsiCo had owned the U.S. registration pursuant to an agreement that required transfer back to the Soviet Union upon completion of the agreement term. Upon the collapse of the Soviet Union, it was unclear who had standing to assert the agreement on behalf of the Soviet Union. Plaintiffs contended that the U.S. court was obligated to give force and effect to previous decisions of the Russian courts holding that registrations of STOLICHNAYA in Russia had been fraudulently procured. But, trademark rights are geographic, and foreign court decisions regarding validity and scope are irrelevant and inadmissible in a dispute regarding trademark rights in the United States.

F. LATIN AMERICA

Puerto Rico’s new trademark law is a compilation of the previous Puerto Rican Trademark Law and United States Trademark Laws, namely the Lanham Act and the Model State Trademark Act. Relevant new provisions include: (i) definitions of “dilution,” “trade dress,” and “secondary meaning,” (ii) the requirement that a statement of continuing use be filed during the fifth year of registration as well as at the time of renewal, (iii)

75. Bundesverwaltungsgericht [BVGE] [Federal Administrative Court] Apr. 12, 2010, B-2419/2008 (Switz.), available at <http://www.bundesverwaltungsgericht.ch>.

76. Bundesverwaltungsgericht [BVGE] [Federal Administrative Court] Apr. 12, 2010, B-3650/2009 (Switz.), available at <http://www.bundesverwaltungsgericht.ch>.

77. Bundesverwaltungsgericht [BVGE] [Federal Administrative Court] Oct. 15, 2010, B-6313/2009 (Switz.), available at <http://www.bundesverwaltungsgericht.ch>.

78. Fed. Treasury Enter. Sojuzplodoimport v. Spirits Int’l N.V., 623 F.3d 61, 63 (2d Cir. 2010).

elimination of the ability to obtain a Puerto Rican registration based on an existing U.S. registration, (iv) recognition of famous marks, and (v) anti-cybersquatting provisions.⁷⁹

Pursuant to the U.S.-Peru Trade Promotion Agreement, the Peruvian Legislature issued Decree No. 1075, which introduced: (i) acceptance of multi-class trademark applications, (ii) recognition of collective trademarks, (iii) a requirement that licensees be responsible for the quality of products or services offered in Peru, and (iv) introduction of cancellation procedures.⁸⁰

In Brazil, the number of trademark applications filed using the local digital system, “E-Marcas,” reached record levels during the first half of 2010, representing seventy-two percent of all trademark filings and 2010 may surpass the 111,724 applications filed in 2009.⁸¹ E-filing systems are becoming prevalent in Latin America, and their quality is improving quickly.

G. DOMAIN NAMES

By mid-2010, the number of domain name registrations worldwide increased to 196 million, thirty-nine percent of which were country code top-level domains (ccTLDs). Following the ICANN (the Internet Corporation for Assigned Names and Numbers) Board’s approval of the Internationalized Domain Name (IDN) ccTLD Fast Track Process, there have been thirty-three requests in twenty-two different languages resulting in sixteen IDN ccTLDs in the DNS (Domain Name System) root zone. IDNs consist of letters or characters from non-ASCII (American Standard Code for Information Interchange) scripts, such as Arabic or Chinese.⁸²

ICANN’s existing generic (gTLD) suffix expansion appears imminent despite numerous objections raised to the application and delegation procedures in the Draft Applicant Guidebook (DAG).⁸³ Trademark owners fear that the new gTLDs will allow increased abuse and on-line infringement. As a result, three trademark protection mechanisms have been incorporated into the DAG: (i) the Trademark Clearing House, (ii) the Uniform Rapid Suspension System, and (iii) the Rapid Trademark Post-Delegation Dispute Resolution.⁸⁴ The comment period for the final DAG draft closed on December 10, 2010, and ICANN’s Board at its December meeting in Cartagena, Colombia directed staff to make revisions to the DAG as appropriate based on the comments received during the public comment period.⁸⁵ Consequently, the first round of gTLD applications is likely to open

79. Government of Puerto Rico Trademark Act, 2009 P.R. Laws 169, §§ 2, 12, 18, 28, 29.

80. Law No. 1075, Junio 28, 2009, DIARIO OFICIAL [D.O.], available at http://www.indecopi.gob.pe/repositorioaps/0/10/par/leg_nornacio/decretolegislativo1075-c.pdf (Peru).

81. See *Sistema e-Marcas chega a 72% do total de pedidos* [System-Marks and reaches 72% of total orders], Instituto Nacional da Propriedad Industrial, <http://www.inpi.gov.br/noticias/sistema-e-marcas-chega-a-72-do-total-de-pedidos> (Braz.) (last visited Feb. 6, 2010).

82. See INTERNET CORP. FOR ASSIGNED NAMES AND NOS., <http://www.icann.org/en/tlds/select.htm> (last visited Dec. 3, 2010).

83. *The Proposed Final New gTLD Applicant Guidebook is Available for Public Comment*, INTERNET CORP. FOR ASSIGNED NAMES AND NOS., Nov. 12, 2010, <http://www.icann.org/en/announcements/announcement-2-12nov10-en.htm>.

84. *Id.*

85. See *Adopted Board Resolutions*, INTERNET CORP. FOR ASSIGNED NAMES AND NOS., Dec. 10, 2010, <http://www.icann.org/en/minutes/resolutions-10dec10-en.htm#2>.

in May or June of 2011 with new registries to become operational a year later in mid-2012.

III. Copyright*

A. UNITED STATES

A U.S. District Court denied a preliminary injunction motion challenging the constitutionality of the Librarian of Congress' appointment process for the three-judge Copyright Royalty Board (CRB).⁸⁶ The CRB sets royalty rates for various copyright statutory licenses. The court determined Live365's argument was not substantially likely to succeed on the merits,⁸⁷ stating "the Librarian is seemingly a principal officer that heads an Executive Department, and therefore, has the power to appoint inferior officers."⁸⁸

The Supreme Court held that copyright registration is not a prerequisite for federal court subject-matter jurisdiction over settlements in copyright infringement claims, stating, "[j]urisdiction refers to a court's adjudicatory authority."⁸⁹ The registration requirement in §411(a) is like a claim-processing rule and not jurisdictional in nature; if Congress does not specifically indicate a certain requirement is jurisdictional, it does not impair the court's authority to hear such matters.⁹⁰

Viacom's long-running copyright infringement suit against Google's YouTube online video service was dismissed.⁹¹ Viacom alleged Google was responsible for the numerous videos posted on YouTube that infringed Viacom's copyrights in movies and television shows. The court ruled that the safe harbor provision of the Digital Millennium Copyright Act (DMCA) protected Google from liability because Google was not aware of specific instances of copyright infringement and promptly removed videos upon notification that they were infringing copyrights.⁹² Holding that "mere knowledge of prevalence of such activity in general is not enough,"⁹³ the court distinguished *Grokster*.⁹⁴ *Grokster's* file-sharing service was secondarily liable for the infringing activities of its users because *Grokster* effectively supported and promoted infringement, whereas YouTube removed infringing videos promptly upon notice, and *Grokster* was ineligible for DMCA safe harbor provisions.⁹⁵

Joining the Fifth and Seventh Circuits, the Ninth Circuit ruled that a copyright registration is effective as of the date the registration application is filed, rather than the date

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86. *Live365 v. Copyright Royalty Bd.*, 698 F. Supp. 2d 25, 48 (D.D.C. 2010).

87. *Id.* at 43.

88. *Id.*

89. *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1243 (2010).

90. *Id.* at 1243-45.

91. *Viacom Int'l v. YouTube, Inc.*, 718 F. Supp. 2d 514, 529 (S.D.N.Y. 2010).

92. *Id.* at 526.

93. *Id.* at 523.

94. *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919 (2005).

95. *Viacom Int'l*, 718 F. Supp. 2d at 525-26.

the registration is issued.⁹⁶ The case involved alleged infringement of a necklace design. The lawsuit was filed after filing a registration application but before the Copyright Office had issued its approval. Section 411(a) requires a work to be registered before commencement of an infringement suit. The Tenth and Eleventh Circuits have held that the issuance date is the effective date of registration. The split in holdings may require legislation to resolve.

The Copyright Office issued new regulations allowing consumers to “jailbreak” their smartphones, a procedure that allows users to install and use programs that have not been approved by the manufacturer.⁹⁷ Such modification, the Copyright Office found, constitutes fair use. The ruling means that software in iPhones may be altered to allow use of unapproved applications that are not offered for sale in the Apple iTunes Store.

The Second Circuit has held that downloading a copy of a musical work does not constitute a “public performance” under the Copyright Act.⁹⁸ The court drew a distinct line between reproduction and public performance. “Music is neither recited, rendered, nor played when a recording (electronic or otherwise) is simply delivered to a potential listener,” the court stated, distinguishing the separate question of fees payable by Yahoo! and RealNetworks for Internet streaming performances.⁹⁹

B. CHINA

Following 2009’s report from the WTO panel¹⁰⁰ finding that Article 4 of China’s Copyright Law¹⁰¹ denied protection to commercial works still being reviewed by China’s censors, the Copyright Law was amended. Now Article 4 reads: “Copyright owners shall neither violate the Constitution and the relevant laws and regulations, nor damage the public interest. The State shall supervise and administer the publication and distribution of copyrighted works in accordance with the law.” An amendment was also made in Article 26 regarding registering copyright pledges.

The State Council issued a Notice¹⁰² requiring that government agencies at all levels use legitimate software, carry out inspections to ensure that all software is licensed, and that any newly purchased equipment have legitimate pre-installed software. The National Copyright Administration released two new regulations regarding collection of fees for

96. *Cosmetic Ideas Inc. v. IAC/InteractiveCorp.*, 606 F.3d 612, 621 (9th Cir. 2010), *cert. denied*, *IAC/InteractiveCorp. v. Cosmetic Ideas Inc.*, No. 10-268, 2010 WL 4811301 (U.S. Nov. 29, 2010).

97. *See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, 75 Fed. Reg. 43,825 (July 27, 2010) (to be codified at 37 C.F.R. pt. 201).

98. *United States v. Am. Soc’y of Composers, Authors, and Publishers*, 627 F.3d 64, 68 (2d Cir. 2010).

99. *Id.* at 73.

100. *WTO Issues Panel Report on U.S.–China Dispute Over Intellectual Property Rights*, WORLD TRADE ORG., http://www.wto.int/english/news_e/news09_e/362r_e.htm (last visited Feb. 6, 2011).

101. *Zhuzuoquan Fa* (中华人民共和国著作权法) [Copyright Law] (promulgated by the Standing Comm. of the 7th Nat’l People’s Cong., Sept. 7, 1990, as amended in 2001, art. 4 (China), *available at* http://news.xinhua.net.com/politics/2010-02/26/content_13058016_1.htm).

102. *Guowuyuan bangongting guanyu jinyibu zuo hao zhengfujiguan shiyong zheng ban ruanjian gongzuo de tongzhi* (国务院办公厅关于进一步做好政府机关使用正版软件工作的通知) [State Council General Office Notice On Further Improving the Work of Government Agencies by Using Legitimate Software] *Str. COUNCIL GAZ.* (China), *available at* http://www.gov.cn/zwjk/2010-10/28/content_1732603.htm.

the use of films provided on the Internet, airplane flights, and public transport.¹⁰³ It is common for even city buses to have video screens. Presently, the regulations target only Chinese movies. Collection and distribution mechanisms for foreign movies are to be considered at a later date. The China Film Copyright Association¹⁰⁴ will start collecting the fees on January 1, 2011, and has called on foreign copyright organizations to discuss ways to collect royalties in co-operation with the Association.¹⁰⁵

C. SWITZERLAND

The Federal Supreme Court (FSC) issued a decision in the “Guide Orange” case.¹⁰⁶ In 1979, Mr. de Siebenthal started working on the “guide orange,” an index of hazardous substances, for the civil service of the City of Geneva. He updated the index in 1985, 1992, and 2003, but it was always published without indication of authorship. When de Siebenthal discovered that Geneva planned to sell the publishing rights, he demanded the publishing rights for himself. The FSC held that: (i) because the guide orange is an index illustrating by means of colors and symbols the hazardousness and characteristics of substances and indicating possible safety measures, it therefore constitutes a work of individual character that is copyright-protected and (ii) because authorship is a personal right, the right to request a declaratory judgment based on the right cannot expire.

The Supreme Court of the Canton of Zurich (SCZ) issued a decision on the “Love” case.¹⁰⁷ A watch manufacturer integrated a copy of the artist Robert Indiana’s famous “LOVE” motif in clock-faces, except that it replaced the alphabetic character “O” of “LOVE” by a heart shape. The SCZ held that the overall impression of the artwork remained the same. Thus, the clock-faces infringed Robert Indiana’s copyright.

103. Dianying Zuopin Zhuzuoquan Jiti Guanli Shiyongfei Zhuanfu Banfa (电影作品著作权集体管理使用费转付办法) [Film Work Collective Copyright Management Use Fee Transfer Payment Rules] (Oct. 14, 2010), <http://news.cnfol.com/101014/101,1587,8590850,00.shtml>, translated in CHINA COPYRIGHT AND MEDIA BLOG (Oct. 14, 2010, 12:00 AM), *Film Work Collective Copyright Management Use Fee Transfer Payment Rules*, <http://chinacopyrightandmedia.wordpress.com/2010/10/14/film-work-collective-copyright-management-use-fee-transfer-payment-rules/>; Dianying Zuopin Zhuzuoquan Jiti Guanli Shiyong Feishouqu Biaozhun [Film Work Copyright Collective Management Use Fee Collection Standards], <http://news.sohu.com/20101014/n275644880.shtml>, translated in *Film Work Copyright Collective Management Use Fee Collection Standards*, CHINA COPYRIGHT AND MEDIA BLOG (Oct. 14, 2010, 12:00 AM), <http://chinacopyrightandmedia.wordpress.com/2010/10/14/film-work-copyright-collective-management-use-fee-collection-standards/>.

104. ZHONGGUO DIANYING ZHOUZUOQUAN XIEHUI (中国电影版权协会) [CHINA FILM COPYRIGHT ASS'N], <http://www.cfca-c.org/> (last visited Feb. 6, 2011).

105. Qiu Bo & Chen Xin, *New Move to Protect Film Copyright*, CHINA DAILY, Oct. 15, 2010, http://www.chinadaily.com.cn/china/2010-10/15/content_11412828.htm.

106. Bundesgericht [BGer] [Federal Supreme Court] Apr. 1, 2010, ENTSCHIEDUNGEN DES SCHWEIZERISCHE BUNDESGERICHTS [BGE] 4A 638/2009 (Switz.).

107. Obergericht des Kantons Zürich [OGer] [Supreme Court of the Canton of Zurich] July 7, 2009, LK060009 (Switz.).

D. RUSSIA

Russia began the final stage of its seventeen-year quest for WTO accession with enactment of amendments to Part IV of the Civil Code governing intellectual property¹⁰⁸ pursuant to the 2006 Bilateral Agreement on Protection and Enforcement of Intellectual Property Rights between Russia and the United States. Copyright owners will receive remuneration for reproduction of phonograms and audio-visual works for personal use. The remuneration will be paid from fees charged to manufacturers and importers of equipment and physical media used for reproduction.¹⁰⁹ Although the right was established by the 1993 Copyright Law,¹¹⁰ no implementation occurred until now.¹¹¹ The resolution contains a list of equipment and physical media on which production/import fees are to be assessed and a procedure for collection and distribution of payments to copyright owners.

Amendments to the law on circulation of medicines will protect data submitted by pharmaceutical companies in clinical trials. It forbids generic drug producers from using such data for a period of six years.¹¹²

Russian accession to the WTO remains controversial due to concern among copyright owners regarding lack of adequate IP enforcement.¹¹³ In its Special 301, the U.S. Trade Representative retained Russia on the Priority Watch list, faulting the country for its continued failure to fight optical disc and Internet piracy, to deter piracy and counterfeiting through enhanced criminal penalties, and to strengthen border enforcement.¹¹⁴

Notwithstanding, there has been significant progress in the struggle against software piracy as a result of the 2008 decision by the Russian Ministry of Education to legalize software in Russian schools, including the government-funded purchase and distribution

108. O VNESENII IZMENENII V CHAST' CETVERTUUI GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Russian Federal Law Amendments to Part IV of the Civil Code of the Russian Federation] Oct. 4, 2010, No. 782 (Russ.), available at http://www.systema.ru/search.phtml?d1=&d2=04.10.2010&dp=0&ctx_v=&ctx_u=0&sort=0&sp=1&pg=0&Alldoc=.

109. Dmitry Pozharny, *KPMG: Remuneration for Reproduction of Media for Personal Use*, RUSSIAN LAW ONLINE, available at <http://www.russianlawonline.com/content/kpmg-remuneration-reproduction-media-personal-use>.

110. Zakonodatel'stvo Rossiiskoi Federatsii ob avtorskom lravakh sostoit iz iastoishchego Zakona [Legislation of the Russian Federation on Copyright and Related Rights that Consist of this Law] July 9, 1993, No. 5351-I (Russ.), available at http://www.systema.ru/search.phtml?d1=&d2=09.07.1993&dp=0&ctx_v=&ctx_u=0&sort=0&sp=1&pg=0&Alldoc=.

111. Postanovlenie Pravitel'stva Rossiiskoi Federatsii O voznagrazhdenii za svobodnoe vosloizvedenie fogramm I audiovizual'n'ikh lroizvedenii v lichn'ikh cheliakh [Resolution of the Government of the Russian Federation on the Remuneration for the Free Reproduction of Phonograms and Audiovisual Works for Private Purposes] Oct. 14, 2010, No. 829 (Russ.), available at http://www.systema.ru/search.phtml?d1=&d2=14.10.2010&dp=0&ctx_v=&ctx_u=0&sort=0&sp=1&pg=0&Alldoc=.

112. Pablo Fuchs, *Legal Report: Intellectual Property—Drug Wars*, CANADIAN LAWYER, available at <http://www.canadianlawyermag.com/Legal-Report-Intellectual-Property-Drug-wars.html>.

113. See, Press Release, Int'l Intell. Prop. Alliance, Copyright Industries Urge Greater Global Protection of American Jobs and Exports Threatened by Piracy 122 (Feb. 18, 2010), available at <http://www.iipa.com/pdf/IIPASpecial3012010SubmissionPressReleaseFinal021810.pdf>.

114. 2010 *Special 301 Report*, U.S. TRADE REPRESENTATIVE (2010), http://www.ustr.gov/webfm_send/1906.

of licensed copies of both Russian and non-Russian software products throughout the country.¹¹⁵

In the news, reports emerged that Microsoft Corporation was complicit in oppressive tactics by the Russian government aimed against non-governmental organizations under the pretext of copyright enforcement. In response, Microsoft announced that it would provide free software licenses to advocacy groups, independent media outlets, and other nonprofit organizations.¹¹⁶

IV. Intellectual Property and Traditional Knowledge*

The World Intellectual Property Organization (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore (IGC) continues to work toward establishing a future mandate on the protection of traditional cultural expressions/expressions of folklore, traditional knowledge, and genetic resources. In its Sixteenth Session, the IGC considered draft articles.¹¹⁷ Issues under consideration included scope of protection, management and registration under a *sui generis* system of protections, and the relationship between protecting traditional expressions and enforcement through international intellectual property systems.¹¹⁸

At the African Regional Intellectual Property Organization (ARIPO) conference in Swakopmund, Namibia,¹¹⁹ nine African countries signed the protocol on Protection of Traditional Knowledge and Expressions of Folklore (ARIPO Protocol).¹²⁰ According to ARIPO, "implementation of the [ARIPO] Protocol will curtail ongoing misappropriation, bio-piracy, and prevent illicit claim of traditional knowledge-based inventions and patent applications."¹²¹ The Protocol further enables ARIPO to register traditional knowledge/folklore for protection and enforcement among all ARIPO-signatory nations.

In New Zealand, the Patents Bill¹²² has been amended to establish an indigenous group committee to advise on whether patent applications may be derived from traditional knowledge or from indigenous plants and animals attributed to the Maori indigenous group.¹²³ This revision allows the Maori to determine whether commercial exploitations of patent inventions are likely to be contrary to the group's values.

115. INT'L INTELLECTUAL PROP. ALLIANCE, RUSSIAN FEDERATION 2010 SPECIAL 301 REPORT ON COPYRIGHT ENFORCEMENT AND PROTECTION 121 (2010).

116. Clifford J. Levy, *Microsoft Moves to Help Nonprofits Avoid Piracy-Linked Crackdowns*, N.Y. TIMES, Oct. 16, 2010, <http://www.nytimes.com/2010/10/17/world/17russia.html>.

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117. *Intergovernmental Committee On Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore*, WORLD INTEL. PROP. ORG., 4 (2010), http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_16/wipo_grtkf_ic_16_5.pdf.

118. *See id.* at 28.

119. *Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore*, AFRICAN REG'L INTEL. PROP. ORG., (2010), http://www.aripo.org/images/Swakopmund_Protocol.pdf.

120. *ARIPO and Its Member States Adopt a New Protocol on TK*, AFRICAN REG'L INTEL. PROP. ORG., (Sept. 13, 2010), http://www.aripo.org/index.php?option=com_content&view=article&id=108:adoptionofkprotocol&catid=1:latest-news&Itemid=18.

121. *See id.*

122. Patent's Bill 2008 (N.Z.), available at <http://www.parliament.nz/en-NZ/PB/Legislation/Bills/BillsDigests/a/3/2/49PLLawBD16741-Patents-Bill-2008-Bills-Digest-No-1674.htm>.

123. *Id.*

The Commerce Department of the United States Patent and Trademark Office (PTO) signed an access agreement with the Government of India, thereby granting the U.S. PTO access to the Traditional Knowledge Digital Library (TKDL).¹²⁴ U.S. patent access will prevent misappropriation of traditional knowledge by U.S. patent applicants. Similar access arrangements exist for the EPO and U.K. PTO.¹²⁵

The Intellectual Property Laws Amendment Bill in South Africa¹²⁶ seeks to preserve expression of traditional knowledge and folklore through amendments to the Performers Protection Act, the Copyright Act, Trademarks Act, and Designs Act. The bill establishes new forms of intellectual property that include “traditional copyright,” “traditional designs,” and “traditional performances.” In order to receive protection under the bill, the new forms of intellectual property must be recognized by the indigenous community as having an indigenous origin. Under the bill, patent applicants are required to disclose whether an application is: “directly derived from an indigenous biological resource or a genetic resource; and based on or derived from traditional knowledge or traditional use.”¹²⁷ A patent application cannot be refused on the basis of nondisclosure or wrongful disclosure, but it might not meet the criteria for patenting, i.e., be new, no prior art, no obviousness, have an inventive step, and have novelty.¹²⁸

SIPO (Patent Office) passed a government-level statute known as the Guizhou Provincial Regulation on Traditional Knowledge Protection.¹²⁹ This regulation applies intellectual property protections for custodians of traditional knowledge in the Guizhou region of China. Also, the new patent law in China includes additional provisions related to protection of traditional knowledge. Article 5(2) states that “no patent right shall be granted for any invention/creation that relies on genetic resources accessed or used in violation of the provisions of relevant laws or administrative regulations.” Article 26(5) states that “for inventions/creations that rely on genetic resources, the patent applicant shall disclose in the application the direct source and the original source of the genetic resources, and shall, where the applicant fails to disclose the original source, provide a reason for such a failure.”¹³⁰

124. Press Release, Gov't of India, India Partners with U.S. and U.K. to Protect Its Traditional Knowledge and Prevent Biopiracy (Nov. 9, 2009), available at http://www.tkdl.res.in/tkdl/PressRelease/TKDL-Press_statement.pdf.

125. See *id.*

126. Policy Framework for the Protection of Indigenous Traditional Knowledge Through the Intellectual Property System and the Intellectual Property Laws Amendment Bill, 2008, Bill 31026 (GN) (S. Afr.), available at <http://www.info.gov.za/view/DownloadFileAction?id=81111>.

127. Patents Amendment Bill, 2005, Bill No. 27529 (GN) (S. Afr.), available at <http://www.info.gov.za/view/DownloadFileAction?id=66029>.

128. *Id.*

129. See *Province Crafts New Law to Protect Traditional Arts, Medicine*, CHINA CULTURAL INDUS., Dec. 25, 2007, <http://en.cnci.gov.cn/HtmlFiles/News/2007-12-25/3579.html>.

130. *Intergovernmental Committee On Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore*, ANNEX WORLD INTELL. PROP. ORG., 2 (2010), http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_16/wipo_grtkf_ic_16_inf_27.pdf.