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Calendar of Meetings

JULY 6 TO 17 ■ GENEVA

■ *WIPO Summer School on IP*

The WIPO Academy will organize the WIPO Summer School directed towards senior students and young professionals.

Invitations: Graduate students, post-graduate students, and young professionals from any discipline.

JULY 7 TO 10 ■ GENEVA

■ *Working Group on the Legal Development of the Madrid System for the International Registration of Marks, Seventh Session*

The Working Group will consider issues relating to the legal development of the system, focusing in particular on the possible introduction of filing languages.

Invitations: As members, the States members of the Madrid Union and the European Community; as observers, other States members of the WIPO and/or Paris Union and certain organizations.

JULY 13 ■ GENEVA

■ *Meeting the Needs of the Visually Impaired Persons: What Challenges for IP?*

This meeting will provide a forum for main stakeholders to sensitize Member States, IGOs, NGOs and other interested actors to discuss how best the intellectual property system could meet the needs of the visually impaired people to access works in accessible formats.

Invitations: The meeting will be open to the public.

JULY 13 AND 14 ■ GENEVA

■ *Conference on Intellectual Property and Public Policy Issues*

The conference will address issues relating to the interface of intellectual property with other areas of public policy, in particular, health, the environment, climate change, food security and disability.

Invitations: The Conference will be open to the public.

JULY 20 TO 22 ■ GENEVA

■ *Program and Budget Committee – Informal Session*

The session of the Committee is convened as required by the mechanism for the preparation and follow-up of Program and Budget and will, in particular, consider the Draft Proposed 2010/11 Program and Budget in parallel with the Medium-Term Strategic Plan 2010 15, as well as other matters agreed on at its thirteenth session, held on December 10 and 11, 2008.

Invitations: All States members of the WIPO Program and Budget Committee are invited to be represented at this session of the Program and Budget Committee. All other States members of WIPO are invited to be represented at this meeting in an observer capacity.

SEPTEMBER 7 TO 9 ■ GENEVA

■ *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention, 1961) – Intergovernmental Committee, Twentieth Ordinary Session*

The Committee will study the application and operation of the Rome Convention. Meetings of the Committee are convened every four years, and are held successively at the headquarters of the International Labour Office (ILO), the United Nations Educational, Scientific and Cultural Organization (UNESCO) and WIPO. A separate closed meeting will take place in which a new Committee will be elected.

Invitations: As members, States members of the Intergovernmental Committee of the Rome Convention; as observers, States party to the Rome Convention not members of the Committee, State members of the United Nations, and certain organizations.

SEPTEMBER 14 TO 16 ■ GENEVA

■ *Program and Budget Committee, Fourteenth Session*

Regular session of the Program and Budget Committee.

Invitations: All States members of the WIPO Program and Budget Committee are invited to be represented at the Fourteenth Session of the Program and Budget Committee. All other States members of WIPO are invited to be represented at this meeting in an observer capacity.

SEPTEMBER 17 AND 18 ■ GENEVA

■ *Global Symposium of IP Authorities*

The Symposium will discuss issues relating to the modernization and administration of IP Offices (Patent and Trademark Offices), brainstorm the vision for the future on the global IP infrastructure including common tools and databases for facilitating international collaboration, study the value of IP statistics for managing IP Office operation, and exchange experiences on different financial models of IP Offices.

Invitations: The Symposium will be open to the public.

SEPTEMBER 22 TO OCTOBER 1 ■ GENEVA

■ *Assemblies of Member States of WIPO, Forty-Seventh Series of Meetings*

All Assemblies and other Bodies of the Member States of WIPO will meet in ordinary sessions.

Invitations: As members or observers (depending on the assembly or body), the States members of WIPO; as observers, other States; and as Permanent Observer and *ad hoc* observer organizations, certain organizations.

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MADRID SYSTEM – MARKING A MILLION

In late May, the international trademark system passed a milestone in its 118-year history with the registration of the millionth mark by Austrian eco-company Grüne Erde – pointing to the enduring relevance and value of trademarks to businesses in all fields of commerce.

For Grüne Erde the Madrid System was “an easy and fast way” to reach all those countries in which it sought to register its trademark, “in one step... and at a relatively low cost.” Users of the Madrid System for the international registration of trademarks, such as Grüne Erde, can protect a mark in a large number of countries by obtaining an international registration having effect in each jurisdiction of the System’s 84 contracting parties.

The millionth international trademark registration consists of the words “Grüne Erde” in green letters separated by an image of a tree and covers goods in a total of 26 classes.

Grüne Erde

Grüne Erde, established in 1983, was inspired, according to its owner and Managing Director Reinhard Kepplinger, by a desire to prove “it is possible to create an ecologically-aware company that is highly successful within the marketplace.” In the 1980s, the “green thinking” that is progressively gaining currency within today’s business circles, was quite unusual. Mr. Kepplinger says, “We injected ecological thinking into our business operations long before other enterprises. At the beginning, establishing Grüne Erde seemed a ‘mad’ idea.” The company’s foresight, however, is clearly paying off. In 2008, Grüne Erde chalked up sales worth €33 million. It employs over 300 people – who enjoy forward-looking working arrangements and conditions – and prides itself on maintaining the highest ecological standards.

Austrian Patent Office

Commenting on the millionth trademark registration, Dr. Friedrich Rödler, President of the Austrian Patent Office, said, “We are delighted that the millionth international trademark registration was made by an Austrian company and especially by ‘Grüne Erde’ which is a pioneer in environmentally-friendly and sustainable production and products. The Madrid System is clearly a valuable business solution for Austrian applicants that are seeking to protect and effectively manage their international trademark portfolios in a cost-effective way. We welcome WIPO’s commitment to the continued evolution of the Madrid System and fully support efforts to make it ever more efficient and user friendly.”

Austria is the 10th largest user of the Madrid System. Some 1,245 Austrian applicants registered their trademarks under the Madrid System in 2008, representing a 9.8 percent rate of growth over the previous year.

Madrid System Timeline

April 14, 1891
Conclusion of Madrid Agreement Concerning the International Registration of Marks



1893
This Russ-Suchard & Cie trademark is no longer in effect, but was the first international trademark registered under the Madrid System and the 86th in the Swiss registry, where it was first registered in 1880.



1893
Originally registered in Switzerland in 1889 then internationally in 1893, this Longines trademark is the oldest international trademark registration still in effect.



1949
First 3D mark (143704), registered by Cointreau, France.



1989
First color mark (533870), registered by Société d'exploitation des Aliments Royal Canin, France.

The company offers over 5,000 organic products, including home furnishings, organic foods and natural cosmetics. Seventy percent of all products sold are produced by Grüne Erde's wood furniture operation in southern Austria and its textile plant in upper Austria, where work is underway to build a facility to produce natural cosmetics, the fastest growing branch of the company's business. The remaining 30 percent of its products are sourced from within the European Union. According to Mr. Kepplinger, "We always take great care to ensure that our products have short transport routes because we don't want to waste energy and harm the environment." He further notes, "We do not import ready-made goods from outside the European Union if they don't have a 'fair trade' label. It is extremely important to us that our suppliers share our ecological principles." The company refrains from using petrochemical-based or metal materials in its products. All wooden products are treated with natural oils and textiles made from natural fibers, including pure wool, organic cotton, linen and coconut fibers.

The bulk of the company's product offering is designed in-house and sold under the Grüne Erde name which, thanks to the company's sustained commitment to ecological principles, has become a trusted brand in Austria and neighboring Germany – synonymous with "the highest eco-friendly standards."

Trademark registration: a strategic decision

For Grüne Erde, registering its trademark was a strategically important commercial decision. Registration enables the company to better protect its reputation as a reliable purveyor of ecologically-sound products, to defend itself against unscrupulous competitors and to secure its future financial viability.

At present, the company has a network of large stores, six in Austria (Scharnstein, Vienna, Linz, Innsbruck and Graz) and seven in Germany (Stuttgart, Berlin, Düsseldorf, Munich, Nürnberg, Frankfurt and Hamburg) with a clutch of smaller shops specializing in natural cosmetics and wellness products of which four are in Austria (Linz, St. Pölten, Graz and Villach) and three in Germany (Berlin, Wiesbaden and Hannover). Armed with its trademark, the company can confidently move forward with its plans to enlarge this network in Austria and Germany and move into Switzerland. It also plans to set up a range of natural cosmetic stores in other countries through franchising agreements – though not before a thorough vetting of the ecological credentials of potential business partners and detailed analyses of operating conditions.

Eco marks

Trademark registrations often mirror evolving consumer tastes. It is not surprising, then, that the millionth international trademark should have been registered by an eco-friendly company such as Grüne Erde. A growing environmental awareness among the general public is fuelling a drive to actively seek out ecologically-sound products. Research suggests environmental claims wield a powerful influence on consumers' buying decisions. Eco trademarks enable consumers to make informed choices about the products they choose.

Unsurprisingly, companies are seeking to capitalize on this by profiling the ecological aspects of their products. Through the use of trademarks and service marks, companies can safeguard their ecological reputation and prevent confusingly similar brands from entering the marketplace. As a consequence, the number of eco or green-related trademark applications is on the rise and this looks likely to continue.

June 27, 1989
Conclusion of the Madrid Protocol

TAKUMI



MAPFRE

Grüne Erde

1996
First trademark published in English (654019, now expired), registered by Fielmann AG, Germany.

1996
First sound mark (659177), registered by Bausparkasse Schwäbisch Hall Aktiengesellschaft – Bausparkasse der Volksbanken und Raiffeisenbanken, Germany.

2004
First trademark published in Spanish (822048), registered by Mapfre Mutualidad de Seguros y Reaseguros a Prima Fija, Spain.

May 1, 2009
1 millionth registration – Grüne Erde, Austria.

TRADEMARKS: VALUABLE ASSETS IN A CHANGING WORLD

From the shopping mall to the local hardware store, we are exposed every day to a stunning array of trademarks – distinctive signs that transmit a myriad of subliminal messages relating to authenticity, origin, quality, reliability, prestige, advantage – that scramble for consumers' attention, whispering "buy me, I am better than the competition. I am what you need!" Trademarks and the legal protection they afford play a pivotal role in commerce. On the one hand, they contribute to market order by defining various important rules of business and on the other, they help consumers in their buying decisions.

Extremely valuable assets, even in tough economic times, trademarks strongly influence purchasing behavior as consumers make more careful decisions, often reverting to "tried and trusted" brands. So in good times and bad, investing in trademarks and brand development makes sound business sense. Trademarks and the legal rights associated with them underpin the complex network of licensing and franchise agreements that can be the source of highly lucrative revenue streams.

As an increasing number of companies enter the international arena, and the electronic marketplace expands, recognition of the importance of securing trademark rights has risen. In this context, companies must be able to register marks and manage trademark portfolios in a timely and cost-effective way.

Advantages of the Madrid System

WIPO's international trademark registration System is an affordable, user-friendly and attractive option for companies seeking trademark protection in a large number of countries. The System has

several advantages for trademark owners. By simply filing one application with WIPO (through one's national or regional trademark office), in one language (English, French or Spanish) and on payment of one set of fees, it is possible to obtain an international trademark registration. The System is a cost-saving alternative to filing multiple national applications in each of the countries in which protection is sought – a complex process involving several different languages, different national procedural rules and regulations as well as different (and often higher) fees and currencies. While the System is not a substitute for securing trademark rights in the country of origin,

it facilitates the process of protecting national trademarks abroad, acting as a legal bridge between national and global marketplaces.

The Madrid System also supports judicious management of company trademark portfolios by offering the possibility to renew a registration every 10 years through a straightforward, streamlined procedure. Additionally, if a given international trademark registration changes hands, is assigned to a third party, or if there are other changes in the holder's details (such as a change in name and/or address), this is recorded centrally through a single procedure and has effect in all designated contracting parties.

Throughout the Madrid System's 118-year history, WIPO and its stakeholders have fostered its development to ensure it keeps pace with evolving user needs and continues to offer value for money. The geographical expansion and sustained growth of the System – with 84 contracting parties (83 countries and the European Community), and a robust 5.3 percent growth rate in 2008 – point to both the commercial importance of trademarks and the continued relevance of the System.



Enhancing Madrid services

Recognizing the need to further enhance the scope and quality of Madrid services, WIPO is rolling out a comprehensive modernization program that will ensure users are able to benefit from a highly efficient, modernized information technology (IT) infrastructure. The IT modernization program, costing some CHF15.3 million, was launched in 2008 and is due for completion in 2011.

According to WIPO Assistant Director General Ernesto Rubio, in charge of trademark operations, "WIPO is committed to the progressive development of the Madrid System." He adds, "Our aim is to continue to deliver value-added services that meet the evolving needs of the business community." In addition to ongoing discussions on the feasibility of expanding the linguistic range of the System – which currently operates in English, French and Spanish – various other initiatives are in the pipeline.

These include a change to the Common Regulations whereby, as from September 1, 2009, designated offices will provide holders of a registration with a statement of grant of protection. According to Mr. Rubio, "This is a major improvement as, instead of having to wait for the end of the refusal period to be sure where they stand, holders will have, earlier on in the process, a clear picture of the status of their international trademark applications. This will provide early legal certainty and thereby help boost business confidence."

Mr. Rubio also referred to a number of other new services currently under development. In particular, he pointed to an electronic trademark classification tool designed to serve as a failsafe mechanism to avoid delays in processing applications where erroneous classification of goods and services are indicated. The first edition of this e-classification validation tool – expected to be available shortly in English, French and Spanish – will consist of approximately 27,000 descriptions of goods

and services. The new service will enable users to browse and select from a list of "accepted" terms that conform to international trademark classification standards, thereby assuring users that no irregularity notice will be issued by WIPO. The tool further offers applicants the possibility of verifying their own descriptions and categorization of goods and services against accepted terms and selecting the most appropriate ones for their purposes. The service also includes an automatic translation facility in all filing languages (English, French and Spanish). This new product promises to iron out a large number of the glitches that can arise in the application process, making registration smoother and speedier.

Mr. Rubio also pointed to the development of a new "hands-on" secure electronic trademark portfolio management system that will allow trademark holders or their representatives to split infinitive track progress of their application and the status of their mark more closely.

These new options are due to come online progressively after a trial run with a limited number of trademark attorneys over the coming months. It is expected that elements of the service will be made available to the broader trademark community during the fourth quarter of 2009. According to Mr. Rubio, they "promise to generate important practical benefits for trademark owners by facilitating the registration process and the management of their trademark portfolios. They further promise to generate efficiencies in the delivery of trademark services."

In challenging economic times, astute and strategic management of trademark rights is more important than ever. The Madrid System for the International Registration of Marks is a smart business solution for any company seeking an efficient and cost-effective way to develop and manage its trademark portfolio.



DEFENDING ITS TURF: FIFA COMBATS AMBUSH MARKETING

This article by **OWEN DEAN**, trademark attorney, Spoor & Fisher, South Africa, provides a glimpse at the amount of legal preparation that goes into protecting a big international event like the World Cup from trademark infringers who seek to free-ride on such events. Spoor & Fisher represent FIFA in South Africa.

The first match in the 2010 FIFA* World Cup South Africa™ is scheduled to kick off on June 11 next year but football fans are already caught up in World Cup fever. As are those planning to make a profit from the event. That is fine with FIFA, as

long as they agree to play by the rules and pay licensing and sponsorship rights. FIFA is well prepared for ambush marketers who think they can take advantage of the sporting event without paying their dues.

The whistle has blown in the battle against these trademark infringers, and the game has begun. And FIFA is pleased to announce that the score is 1-0 in its favor. The first court case in South Africa has been successfully conducted – the result of meticulous planning and a well-formulated strategy.

Pre-game preparations

FIFA's efforts to counteract the activities of ambush marketers began in 2004, when the awarding of the right to host the tournament in 2010 was first announced. FIFA set to work assessing its ability to thwart its opponents, in particular within the framework of South African law. It found the playing field favorable: South Africa's experience with previous world cup tournaments had led it to establish effective legislation to deal with ambush marketing. This meant that, provided an appropriate strategy and legal structure were put in place – and available legal resources properly harnessed – there was a good chance the FIFA team would carry the day.

FIFA's first step was to make the most of these advantageous conditions. It embarked on an extensive trademark registration program covering trademarks such as South Africa 2010™, World Cup 2010™ and the like. Once the official emblem had been created, it too was widely registered as a trademark as well as a design. To supplement

these measures application was made to the South African Minister for Trade and Industry to declare the principal trademarks associated with the event prohibited from unauthorized use under Section 15 of the Merchandise Marks Act.

But those measures were only secondary to the main thrust of FIFA's plan of attack: to apply the provisions of Section 15A of the Merchandise Marks Act, which empowers the Minister for Trade and Industry to designate major sporting events as so-called "protected events." This prevents ambush marketers from, for example, attempting to obtain special promotional benefit from the 2010 World Cup, or be associated with it, without becoming sponsors. In May 2006, the Minister for Trade and Industry declared the event to be a protected one.

FIFA's next step was to harmonize and synchronize the implementation of its game plan. This entailed preparing a template for legal action against ambush marketers. Causes of action and arguments were formulated, in particular, to devise a means for FIFA to pursue a civil claim against ambush marketers based on the provisions of Section 15A of the Merchandise Marks Act, which makes it a criminal offense to use event trademarks with the intent, and effect, of obtaining special promotional benefit from the publicity attached to the tournament without the authority of the event organizer. An unlawful competition argument was crafted based on the principle that, in breaching the provisions of the Act and entering into direct competition with FIFA's official sponsors, ambush marketers were guilty of unlawful conduct, tantamount to a criminal offense, causing damage to FIFA by prejudicing its relations with its sponsors.

In view of the large sponsorship fees paid by the tournament's official sponsors, it is vital that FIFA guarantee to them – and deliver – exclusivity of advertising exposure in their respective areas of



Logo © FIFA

* Fédération Internationale de Football Association

Sports-related cybersquatting complaints at WIPO

The WIPO Arbitration and Mediation Center (the Center), a provider of out-of-court dispute resolution services, received some 2,329 Uniform Domain Name Dispute Resolution Policy (UDRP) cybersquatting complaints in 2008 relating to various areas, including sports. Those sports-related complaints involved the Olympics, cricket, the Super Bowl and football (soccer), for example, from clubs such as Real Madrid, Arsenal, Bayern and Manchester. Sports cases typically involve a single athlete, club or event; however, five English Premier League clubs recently filed a joint UDRP complaint for domain names such as *official-manchester-tickets.com*.

FIFA's efforts to protect its IP for the upcoming World Cup commenced as early as 2000 when it won a UDRP case filed with WIPO for domain names including *worldcup2010.org*. Most recently, FIFA successfully settled another case filed with WIPO involving *southafrica2010.org*.

With a view to the planned major expansion of the Domain Name System with the addition of many more top-level domains, the Center has made a series of policy proposals for further dispute resolution options for trademark owners that would offer additional out-of-court dispute resolution options. The WIPO Center's proposals are available at www.wipo.int/amc/en/domains/resources/icann/index.html.

For more information on WIPO UDRP cases visit www.wipo.int/amc/en/domains/.

business. Any damage to the relationship between FIFA and its sponsors by ambush marketers could seriously harm FIFA and jeopardize the staging of future football World Cup tournaments.

Goal

So, all was set for FIFA's legal strategy to be kicked into action. Eastwood Tavern, a restaurant located near Loftus Stadium in Pretoria, one of the match venues for the 2010 World Cup, provided the opportunity for a test case. Without FIFA's authorization, the restaurant added the words "World Cup 2010" to the main sign displaying its name. It also erected banners featuring the flags of a number of prominent football-playing countries accompanied by "2010" and the words "Twenty Ten South Africa." FIFA seized the opportunity to take a first stand.

The tavern ignored requests that they remove the infringing sign and banners, so FIFA launched an application in the Pretoria High Court claiming interdicts against Eastwood Tavern for trademark infringement of World Cup 2010™, South Africa

2010™ and Twenty Ten South Africa™, passing off and unlawful competition. FIFA won this first round against ambush marketing when on April 7, 2009, the High Court of South Africa (North Gauteng) granted the relief sought on all charges.

The legal strategy developed and implemented over a period of five years proved successful a mere two months before the Confederations Cup Tournament, the dress rehearsal for the 2010 World Cup, and just over a year before the main tournament itself.

The implications of this first success and the benefits realized are significant. FIFA demonstrated the effectiveness of its strategy, that it has the will, the legal resources and the wherewithal to defend and enforce its rights and fulfill its commitment to tournament sponsors. Would-be ambush marketers would do well to take note.

GOOGLE AND BOOK PUBLISHERS SETTLE

The Google Print court case has been the subject of much discussion and controversy. Stakeholders have been waiting with anticipation for the court's decision, but instead the case has settled out of court. Professor **ANDRÉS GUADAMUZ GONZÁLEZ**, E-Commerce Law, University of Edinburgh, and Co-Director of the SCRIPT, Centre for Studies in IP and Technology Law, highlights some of the legal implications and technical details of the settlement. While Professor **WILSON RAFAEL RÍOS RUIZ**, IP Law and Information and Communication Technologies (ICTs) Specialist, Universidad de Los Andes, outlines some concerns right holders have expressed about it.

Legal and Technical Implications

Andrés Guadamuz González

Content industries face monumental challenges in the digital domain. Traditional methods of distribution have become obsolete, replaced by digital delivery of copyright content – the route of an apparent conflict between content owners and the new intermediaries: search engines, streaming services, content aggregators and value-added providers. The copyright industry has had to seriously reconsider the role of these emergent services and to explore licensing models that do not easily fit in existing revenue models. The new generation of consumers has also grown suspicious of traditional distribution channels, and expects – be it warranted or not – to find almost any sort of content online at a competitive price.

This conflict has been more evident in the case of Google™. Because of its size, global reach and deep pockets, Google has become the lightning rod for criticism by content owners, and the subject of litigation.

Google Print goes to court

In 2004 Google announced a service called Google Print (later renamed Google Book Search). Google entered into an agreement with several libraries in the U.S. and the U.K. such that it would digitize out-of-print books and make them available to anyone searching for that title. The books were to be offered either in their entirety, or in “preview” mode, meaning that only some pages would be accessible. Google's goal was to digitize 15 million books within a decade, a goal that seemed well underway by October 2008 when there were 7 million volumes in its database.¹

Needless to say, some authors responded negatively to Google's plans and, in 2005, two separate lawsuits were brought against the search engine giant by the Association of American Publishers and the Authors Guild. Both complaints were similar in scope, and alleged that Google was engaging in copyright infringement by digitally reproducing the plaintiff's works for commercial gain, and then publicly distributing and displaying copies of those works. Google argued their actions fell under the *fair use* doctrine. Given the importance of the legal issues at stake, the litigation was met with considerable interest from scholars, practitioners, publishers and anyone interested in digital copyright matters. However, formal legal resolution was cut short when in October 2008 the parties announced they had reached an agreement, and the dispute was settled out of court.

The out-of-court agreement

The agreement is surprisingly detailed and far-reaching – the definitions section alone spans 18 pages.² Under the terms of the agreement, Google will pay US\$125 million to the claimants, which will be distributed according to several schemes created by the settlement. Google must create a portal website where authors can opt-out of the settlement agreement, the deadline for opting out being September 2009.

Authors can also apply for a cash payment scheme that will compensate those whose works were digitized before the opt-out deadline; the deadline for making a claim is January 2010. Google has deposited US\$45 million in a Settlement Fund to cover payments under the scheme.

¹ “New chapter for Google Book Search,” Google Blog (28 October 2008), <http://googleblog.blogspot.com/2008/10/new-chapter-for-google-book-search.html>

² The entire text can be found here: www.googlebooksettlement.com/r/view_settlement_agreement

Google will help to create and administer an Institutional Subscription Database that will sell access to books. Google will also fund a Book Rights Registry that will act as a collective rights agency, collecting and distributing earnings from the Google Book Search scheme; it has already paid US\$34.5 million into the Registry, and will pay a net 63 percent of all future earnings from the Google Book Search project, minus operating expenses. The Registry will be administered by authors, right holders and publishers.

In exchange for those concessions, Google has been authorized to sell subscriptions to the Institutional Subscription Database, sell individual books, place advertisements on Google Book Search pages and make other commercial uses of the digitized works.³ Once the opt-out deadline has passed, Google has also been granted permission to display snippets and previews of authorized participating books as well as other non-protected bibliographical information, such as abstracts and reviews.

Interestingly, all libraries participating in the Google Search Project, namely the libraries where the digitized books originated, will be allowed to keep digital copies of the works for their institutional repositories and digital archives. Google has a non-exclusive right to make digital copies of out-of-print works from any source.

The settlement enumerates several business strategies for monetizing digital copies, particularly through the Institutional Subscription Database, through direct sales via the search results page or by including links to sites where potential customers may purchase print copies or electronic books. The agreement allows for limited non-commercial use by participating libraries. Interestingly, the settlement also identifies several future business models, including print-on-demand services, customized publishing (e.g., printing collections of several books), PDF downloads, individualized subscription models and aggregate services, such as the creation of compilations.

U.S. but worldwide

There are two important legal and technical aspects to the settlement that bear closer scrutiny. First, the agreement affects only works published in the U.S., or that have a U.S. "copyright interest." While the agreement is sketchy in this regard, the Authors Guild portal further expands on this by including books published in countries outside of the U.S. that have copyright relationships with the

U.S., such as signatory states of the Berne Convention.⁴ This makes the seemingly national nature of the agreement remarkable for its international reach, as it potentially affects authors and publishers around the world.

Second, although the agreement can concern international publishers, the benefits primarily touch the U.S. For example, Google can only sell books, subscriptions and digitized copies to customers within the U.S., which opens up the question of technical filtering by Internet Protocol address. The agreement is silent in this regard as well as on enforcing jurisdictional filtering. Similarly, all digitized copies that form part of the settlement must be stored in the U.S., and there is a technical annex outlining security measures to be implemented by institutions acting as digital repositories.

Validity

At the time of writing, questions were being raised as to the validity of the agreement in light of American antitrust law, and the settlement has not yet been ratified by the court.⁵ This could prove to be a significant stumbling block in implementing the settlement. Because of Google's dominant position in the search engine market, there is a concern the agreement could stifle competition in the electronic books market, because its wording gives Google an advantage were U.S. copyright law to be amended in order to allow the use of orphan works.

A blueprint for content industries

Nonetheless, regardless of how one feels about Google's market dominance, and pending a final outcome of the regulatory investigation, the Google Books settlement could be seen as a blueprint for other content industries. Like it or not, Google is the leading search engine by far, and content owners would be well advised to take this into consideration when thinking about their digital strategies. Content providers should carefully consider their options before deciding to make back catalogues available through aggregator services like Google.

It is not a matter of "if," but "when" and "how." The Google Book Search settlement will undoubtedly set in motion new revenue streams for out-of-print works, serving perhaps as living evidence of Chris Anderson's *Long Tail*.⁶ Aside from the many challenges, digital markets could open up new markets for works that no longer occupy shelf

³ For a thorough explanation of the settlement, see: Bill Rosenblatt, *Google's Settlement with the Publishing Industry: Opportunities and Strategies for Publishers*, GiantSteps Media Technology Strategies White Paper, www.giantstepsmts.com/GoogleSettlementWhitePaper.pdf

⁴ www.googlebooksettlement.com/help/bin/answer.py?answer=118704&hl=en#q3

⁵ Elizabeth Williamson, Jeffrey Trachtenberg and Jessica Vascellaro, "Probe of Google Book Deal Heats Up" *The Wall Street Journal* (9 June 2009)

⁶ Chris Anderson, *The Long Tail: The Revolution Changing Small Markets into Big Business*, New York: Hyperion (2006).



space in traditional retail outlets. Challenges need not be seen as negative.

Settlement Agreement: Concerns of Copyright Holders - A perspective from Colombia

Wilson Rafael Ríos Ruiz

It is alarming that many Colombian authors and right holders, as well as those in other parts of the world, were not aware their works were being digitized – let alone that a settlement agreement is being proposed by Google. However, Colombian authors and right holders who believe their works are concerned, will be able to register to participate in the settlement agreement and receive compensation, regardless of whether their works are registered in the U.S. or Colombia, thanks to automatic protection principles and national treatment principles on copyright established in the Berne Convention.

Alternatively, they will be able to file an objection or opt out of the settlement agreement. It will also be possible to request that a work not be digitized or, if it already has been, to request its withdrawal from the Google project database. The deadlines mentioned in the article above are the same for non-U.S. right holders.

However, it is worth taking a closer look at the main bone of contention in the Google Print court case, which is whether conversion from print to electronic format (space shifting) is permissible, or if it actually constitutes infringement.

From print to electronic format

From a copyright point of view, it is clear that the different forms in which a work is made available are independent of each other, and authorizing one form does not expressly include other forms. Therefore, authorizing use of a print version does not, in itself, mean the authorization extends to an electronic version.

An important element in the Google case relates to the independence and autonomy of different forms of use of works. This is a principle covered in the Law on Copyright of Colombia and the Andean Community Decision 351 of 1993, which provides that “the different forms of use of the work shall be independent of each other; authorization by the author of one form of use shall not extend to other forms.”

The point concerning the transfer or conversion of printed or written texts from traditional hard copies to electronic, optical or similar copies is also clear in the rulings handed down in the following court cases: [U.S.] *Tasini v The New York Times*; [Canada] *Robertson v Thomson Corp.*; [U.S.] *Random House v Rosetta*; [U.S.] *Greenberg v National Geographic*. Each respective court ruled that the authorization given by an author, columnist, photographer or content creator to use their work in printed form does not imply broader authorization to use the work in electronic form, and ordered that additional payment be made for each separate use.

In September 2006, Google was also hit hard by a Belgian Court of First Instance judge who ordered content removed from Google News – articles, photographs and images taken from the newspapers *Le Soir* and *Grenz Echo*.

Further right holder concerns

The settlement agreement has been at the heart of much questioning by Colombian authors and right holders as it seeks to “legalize” an illegal situation instigated by Google itself: Google used content without previously and expressly obtaining authorization from the authors or right holders of the works. Furthermore, the compensation offered by Google does not cover damages caused by their actions, but rather tries – it is worth repeating – to legalize a situation which is, in itself, illegal. In other words, the proposed settlement agreement cannot be backdated, so tries instead to wipe the slate clean without taking into account actual events.

Another cause for reflection in the agreement relates to what is known as “orphan works,” works whose authors or right holders are unknown and impossible to identify or locate. According to Google, the settlement agreement has been widely disclosed and distributed, so that any works whose authors or right holders remain unidentified fall into the category of orphan works. It is this author’s opinion that this is an attempt to obtain a blanket license without expending much effort, without violating copyright and without paying compensation to would-be right holders. Therefore, according to the terms of the agreement, if authors cannot be found, Google will be able to use such works without restriction.

ARE TWEETS COPYRIGHT-PROTECTED?

Copyright and tweeting – the debate was bound to happen. Can repeating a message on *Twitter* – a free social networking and micro-blogging service that enables users to send and read other users' updates (known as tweets) – actually be construed as copyright infringement? This article, by **CONSUELO REINBERG**, content editor, BP Council, was first published in the BP Council Notes, June 18, 2009.

A copyright debate that was already brewing positively boiled over when Dallas Mavericks owner, Mark Cuban, was recently slapped with a US\$25,000 fine by the National Basketball Association (NBA) for tweeting during a game about allegedly lousy officiating. What launched a thousand blogs about tweeting and copyright, though, was that ESPN republished his *Twitter* feed – without his permission – further ticking him off and spurring him to add his two cents' worth to the debate. Were his tweets entitled to copyright protection? Can one copyright a tweet? The legal experts' answer to the first question: not a chance. And to the second: don't bother.

As new communication technologies emerge, so do new copyright infringement questions. But copyrighting a tweet would be a difficult-to-make and hard-to-enforce legal claim – for many reasons. Most tweets cannot be copyrighted because of size, content and *scènes à faire* issues.

Size – According to an Internet posting on *blogherald.com* by Jonathan Bailey, every time a new communication technology emerges, it shifts the copyright landscape, and new copyright issues that do not fit existing intellectual property (IP) standards arise. With *Twitter*, for example, while its terms of service clearly state that tweeters own anything they post on the service, the 140-character limit to a *Twitter* post makes it almost impossible for the work to reach the level of creativity required for copyright protection. In the same vein, titles or short phrases usually cannot be protected since their length contributes to their lack of originality, as defined by copyright law.

Content – Lawyer Brock Shinen's article "*Twitter-logical, The Misunderstanding of Ownership*" (*canyoucopyrightatweet.com*) focuses on a salient point: facts are not copyrightable. And facts are what tweets are mostly about – from talking about the weather, to communicating what one had for

dinner the night before, to complaining about the morning traffic. Whether one expresses them in a funny or unique way does not make a difference. Yes, one can potentially protect a particular expression of a fact, but one cannot then prevent other people from writing about the same fact.



Scènes à faire – The French moniker, according to Clint Fabiosa and Ana Liza Villamor of IPROTECT, describes a work or part of one that is not copyright-protected, because the elements used to describe a particular "scene" are indispensable, standard or naturally occurring – and that scene cannot be expressed in any way other than through those elements. For example, two writers can both use "brilliant" or "sunny" to describe a sunrise. *Scènes à faire* are used to weed out unprotectable similarities between two works in terms of character, setting or theme. When it comes to tweeting, says Shinen, 100 tweeters are bound to describe a commonly occurring situation with the same or similar expressions.

Copyright is granted to true, original authorship not to tweeters saying basically the same thing.

Can a tweet ever be copyrightable?

Most experts agree the response should not be an all-or-nothing answer, but rather "it depends." While most tweets would not pass the "copyrightability" test, some might meet the minimum amount of originality demanded by copyright law. For example, in an Internet posting by



What are you doing?

Twitter - What are you doing?

Twitter is a free social networking service that allows users to send and receive messages known as tweets via the *Twitter* site or a cell phone short message service (SMS). Tweets, limited in size to 140 characters, display on the author's *Twitter* profile page, and are forwarded to "followers" – those who subscribe to receive messages from that person. The *Twitter* default is to allow open access to all for all messages, but authors can limit delivery to their circle of friends. Tweeters do not have bios; the only thing they can do is answer the question: "What are you doing?"

Twitter went live in 2006, and exploded in popularity in 2007 – becoming so trendy it frequently crashed due to traffic overload. It is the third largest, fastest growing, social networking service on the Internet. In February 2009, it grew 1,382 percent – compared to 228 percent for *Facebook*. *Compete.com* estimated the number of monthly visits to *Twitter* in February at 55 million. But with soaring phone bills and messages coming in at all hours, users may be feeling a bit too connected. *Nielsen Online* claims that *Twitter* only retains 40 percent of its users, who often drop the service after a month.

Twitter was used as a publicity mechanism in the 2008 U.S. presidential campaign. Celebrity users include Stephen Fry, Ashton Kutcher, Ellen DeGeneres and Britney Spears.



Michael F. Martin for the *broken symmetry* blog, the author states that a tweet reflecting a selection or arrangement of facts, rather than a rote report, might make the subject matter

copyright-eligible. Other experts claim a collection of tweets – taken as a whole – may meet the criteria to be copyrighted. But Shinen asks a key question: Even if one did own a tweet, what would one do with it?

Copyright in the age of social networking

The success of social networking sites like *MySpace* and *Facebook* has brought new IP issues to the fore. The ability to post – possibly copyrighted – video and audio clips or incorporate downloads makes these sites fertile environments for copyright infringement claims. In *Twitter's* case, according to Jonathan Bailey's article "Tweetbacks, Copyright and Scraping"

(*blogherald.com*), plug-ins that search *Twitter* for tweets that link back to posts on a blog and display those tweets on the site under their respective entries, have begged the question: is it legal to copy and publish others' tweets without permission just because they link back to your site?

Another issue, applicable to blogs in general, is scraping – the process of scanning through a large number of blogs, searching for and copying content through automated software. Scraping is copying a blog not owned by the initiator of the process and is considered copyright infringement if the material is copyrighted, unless there exists a license relaxing the copyright.

The bottom line: as communication technology evolves, so must copyright law if creators are to be protected while, at the same time, freedom of expression is upheld.

THE MODERN TALE OF NIGERIAN WAX- RESIST TEXTILES

What do you think African art is? Masks or sculptures? The idea would be laughable to most Africans, who consider textile design the African art *par excellence*. But many forms of African textile design have disappeared. Now one more – wax-resist textile design – is under threat. Slowly, the last mills are closing their doors, one after the other: wax-resist textile design might soon be a lost art.

“African designs and designers like me are an endangered species,” says Patricia Akarume who worked in a textile mill until it closed down in 2004. “Today, there are hundreds like me who have skills which have become redundant due to unfair global trade practices such as copying designs, counterfeiting trademarks and falsifying place of origin descriptions. African prints depict the heritage of our tribes and each motif and pattern tells a story.” Before we tell Ms Akarume’s story, the story of modern Nigerian wax-resist textiles, let us go back to where it all started.

Batik wax-resist textiles were first imported from Indonesia in the 19th century. The African relish for colorful fabrics made them an instant success. The method of fabrication was soon customized and designs adapted to reflect local traditional culture.

The customization that produces the cloth beloved in the continent began by accident. Dutch textile manufacturers, in adapting the Indonesian wax-resist method to a dual-roller system, experienced a few technical problems: their method could not remove all the wax from the textiles, which left spots that resisted color and, to make matters worse, when a new color was added it would bleed onto the adjacent color. The dual-roller fabric was intended for the Indonesian market, but the Indonesians viewed the fabric with its spots and bleeding colors as spoiled and had no use for it. But, somehow, the “spoiled” fab-

ric made its way to the African marketplace – and clients fell in love with it.

As African countries gained independence in the 20th century, they built their own textile mills and started creating designs that reflect traditional African culture, where each ethnic group has its own preferences for colors and designs. To the

knowing eye, the design on a textile reveals a story, often meaningful to the wearer. The colors may also provide information about the wearer’s tribal origin, social standing, age and marital status. Dress plays an important role in African society and has even been used as a form of protest. Designs and the way they were worn often made quiet but effective commentary on the colonial establishment. Today Dutch manufacturers still retain the high end of the African wax-resist fabric market, but the rest of the market belongs to local manufacturers.



From riches to rags...

The Multi-Fibre Arrangement (MFA), a quota system established in 1974 to protect the domestic textile industries of Canada, the U.S. and certain countries in Europe from emerging Asian producers, gave advantages to small textile-exporting countries that were not bound by quota constraints or that enjoyed preferential access to European and U.S. markets. Under the MFA, which created conditions benefiting it, the nascent African textile industry thrived, reaching a peak of over 200 mills in 1985.

The industry was sent reeling when new World Trade Organization (WTO) regulations came into effect in January 2005, bursting the textile bubble that had arisen from the MFA quota system. According to the International Textile, Garment and Leather Workers Federation the phasing-out of the quota system cost the African textile industry over 250,000 jobs in a few short years. The dust has



just started to settle and fewer than 40 mills remain, providing employment to fewer than 40,000 people. The survivors, giving up on the European and American markets, turned their focus to building and safeguarding their home markets.

The Nigerian story

Nigeria now holds 63 percent of the remaining West African textile manufacturing capacity. Nigerian wax-resist textiles are found in almost every marketplace in sub-Saharan Africa. But Nigerian manufacturers face another challenge in the African market: cheap Asian imports. The Nigerian government applied trade tariffs on imported textiles to protect what was left of the industry and give it time to mature.

But that move may not have been enough. What floods market stalls in Nairobi, *échoppes* in Dakar and the streets of Lagos are counterfeit Nigerian wax-resist textiles. In West

Africa, it is estimated that smuggled textiles that counterfeit West African textile trademarks have taken over 85 percent of the market. The situation is out of control and is a serious threat to the beleaguered textile industry.

Ms. Akarume tells the story firsthand: "Afprint took the threat from imports seriously and started re-tooling its mill. To meet the changing tastes and preferences, we installed the latest CAD/CAM [computer assisted design and manufacture] equipment. We moved from 30 designs a month to 100 with several collections. But the smugglers outwitted the local mills. They started picking our popular designs which they would send to their factories electronically for reproduction. But many consumers still preferred the original cloth made in Nigeria. It did not take long for the unscrupulous traders to discover this and soon the markets were flooded with copied designs, stamped 'Made in Nigeria' and counterfeit popular trademarks selling at 30 percent lower price."

The smuggled textiles are not wax-resist dyed, but rather high-velocity textile prints produced in half the time for a fraction of the price. The printed textiles "fake" the bleeding effect of the color and the

dye-resistant spots of the authentic product. They use chemical rather than natural dyes. The goods are usually smuggled into the country to avoid paying duties and taxes due to the government.

The textiles, found to originate mostly in China, specifically target and infringe well-known Nigerian trademarks, carry "Made in Nigeria" or "Made as Nigeria" on the selvages (margins or edges of a woven fabric) and blatantly fake statutory quality standard markings to deliberately mislead consumers. Some of the companies involved even display Nigerian trademarks on their websites.

If this trade continues at its current rate, it is not just the wax textile mills that may disappear, but also sub-Saharan cotton cultivation, natural dye-making and all the support industries around them.

The role of trademarks in the industry

A recent book by Stéphanie Ngo Mbem (see *WIPO Magazine* 1/2009) discusses the protection of industrial designs as key to development in Africa. The low volume of design registration in Africa's highly creative society is generally attributed to a lack of knowledge that such protection exists and lack of funds to pay for registration. But many African textile designers have also expressed the view that it is pointless to register their designs: If counterfeiters can copy trademarks and stamps of origin with impunity, how would registering a design change anything?

The more "traditional" designs may not, in any case, be protected under the conventional IP system. Companies like the Nigerian textile firm Nichem that create over 200 new designs a year note that these creations – many of them modern and eclectic – can benefit from copyright protection. However, there is no denying that West African textile companies, in the same manner as the fashion houses and textile creators of Europe, rely heavily on their trademarks to protect their goods from counterfeiting.

So far, however, trademark registration has failed them. The IP system, and more specifically trademarks, cannot play its role as a driver for economic development without the participation of right holders, proper infrastructure, collaboration among government agencies and international cooperation with neighboring countries and exporting countries. Local markets too need a functioning IP system and a global network to survive.



The first step in encouraging stakeholders and users of the IP system, as well as in supporting the textile industry, is to enforce IP rights. Coordinated efforts are required from stakeholders and government agencies such as IP offices, police, customs, the judiciary and the revenue and taxation offices.



This fabric counterfeits the Nichem trademark and falsely indicates Nigeria as country of origin.

Raids and media: Textiles with counterfeit trademarks are sold openly in marketplaces and without any fear of reprisals. Vendors do not seem to be aware that it is illegal to sell these goods. Raids may only be a temporary setback for counterfeiters but they attract media attention, quickly spreading the word among vendors that the illegal sale of goods

will no longer be tolerated.

The challenges

West African textile companies need to be as vigilant in protecting their trademarks as European fashion houses that actively defend their rights by sending cease and desist notices to vendors and challenging trademark infringers in court. The creation of a collective trademark for African wax-resist textiles mills could bring those concerned together and would create a single entity with which authorities could work to tackle the problem.

A high-visibility leader in this area would be helpful, of the same ilk as Dr. Dora Nkem Akunyili, to take up the fight against the counterfeiters of textile trademarks. Dr. Akunyili – named “One of the eighteen heroes of our time” by Time Magazine in 2006 – spearheaded the fight against counterfeit drugs when she became Director General of Nigeria’s National Agency for Food and Drug Administration and Control (NAFDAC) in 2001. Before she took over her post, a staggering 80 percent of the medicines sold in Nigeria were deficient in one way or another. She restricted the points of entry for drugs into Nigeria, had officials trained to work in the selected ports, conducted hundreds of raids, attracted media attention and gathered the support she needed within her government as well as internationally (see *Joining Forces to Combat Counterfeiting*, *WIPO Magazine* 1/2006).

The main components of the NAFDAC campaign against counterfeiting are training, raids, attracting media attention and cooperation with stakeholders, neighboring countries and exporting countries. These same tactics can be applied in the fight against counterfeit textiles.

Training: Ports are the point of entry of many counterfeit goods – from fake medicines to textiles. The trademark owners need to work hand in hand with customs controls and port authorities who will need training to recognize and identify trademarks, so that they can seize and destroy textiles carrying false markings.

Cooperation – neighboring countries: Counterfeit textiles are being sold across Africa. The border patrols required to curb smuggling and seize counterfeits would, therefore, demand more than coordinated efforts between Nigeria and its neighbors, Benin, Chad, Cameroon and Niger. But it would certainly be a start.

Cooperation – exporting countries: International cooperation with exporting countries could well play a pivotal role in enforcing trademarks. Dr. Akunyili gained the cooperation of the Chinese and Indian governments in her fight against counterfeit drugs; both countries had a number of companies that had been indicted for manufacturing fake drugs. China has invested much in Africa, becoming one of Africa’s primary partners for development. Would there be a possibility for cooperation between Nigeria and China on customs and port controls, modeled, for example, on the China and European initiative which aims to tighten enforcement and crackdown on counterfeiting by sharing information among ports (see *Ports in China and EU Share Information to Fight Counterfeiting*, *WIPO Magazine* 1/2008)?

The experience of other countries

The Nigerian case is by no means unique. For example, Panamanian *molas* – traditional wool textiles – were threatened by imports from China (see *Panama: Empowering Indigenous Women through a Better Protection and Marketing of Handicrafts*, *WIPO Magazine* 6/2005). The Omani *khanjars* (daggers) were also threatened by imports from Pakistan. What steps did the two countries take?



African Prints - The stories in the designs and colors

In pre-colonial times, standardized widths of cloth were used as a form of money in many regions of Africa. A regular number of the standard lengths were required to make a woman's wrap, and served as a unit of value. May this be the origin of Africa's love of breadths of bright beautiful fabrics?

Colors in African prints have an intimate association with tribes and regions. Sepia-ochre is generally accepted across Africa as the color used to represent earth; however, yellow is the color of initiation in Nigeria, while the combination of yellow/red belongs to the Igbo tribe of south-eastern Nigeria.

African print designs fall into four main categories:

- women's lives (family, love, housework);
- town life and what it brings, good or bad (alphabet, television, money, power);
- nature (animals, flowers); and
- rhythms (music, drums).

Motifs in traditional African print designs often convey a metaphor and the design spins a tale. Beads in designs represent the African saying "Precious beads make no noise," meaning that a good person does not need to blow his own horn. In the fabric below (right), the design depicts town life and uses the bottle-opener (cork screw) motif to connote the power it has brought.

The Nigerian *Aso Ebi* dress tradition encourages members of a particular social group or those attending a wedding, naming ceremony or burial to adhere to a design or color code. On weekends, it is common to see groups of people in such "uniforms" at bus stops and churches. The classic dice design below (left) symbolizes nobility and is often the "uniform" of senior women.

Variety is the hall mark of African print designs. There is an eclectic mix of old classics like the dice and bottle opener, and more contemporary designs with abstract motifs. ABC Wax in Ghana and Nichem in Nigeria, both part of the Cha Group, have libraries of over 35,000 designs with 200 new designs being created every year.

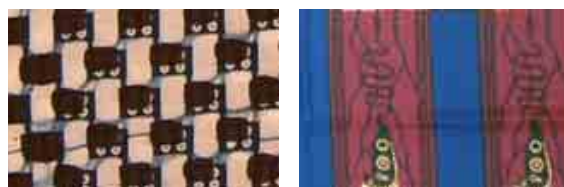


Photo: ABC Wax (Cha Group)



Photo: WIPO/S. Castonguay

is still in the process of doing this.

The option to issue a legal statute declaring wax-resist textiles a matter of Nigerian IP and to prohibit imports is open to Nigeria. The country would then also need to develop a mechanism

First, they prohibited the imports of those goods on the grounds that they infringed national IP rights or special rights established in traditional cultural expressions. Second, Panama established a national regime of protection and registration of handicrafts, including textiles. Oman

for registration and protection of handicrafts. One of the elements of that protection could be certification marks. Based on these marks, Nigeria would be able to prevent exports of fake wax-resist textiles to other countries as well. IP rights in traditional knowledge are not internationally recognized, but certification marks are.

Textile design – African art

The problem of counterfeit textiles is not such a heart-wrenching story as that of counterfeit drugs. Still, it is a human story – mills closing, jobs lost, an art form disappearing. Further cooperation between the government and all stakeholders will help turnaround this trend which threatens one of Africa's best known products.

ART AND CULTURAL HERITAGE DISPUTE RESOLUTION

The pursuit of the arts and the preservation of cultural heritage are noble causes, but that does not make them immune to dispute. Quite the contrary – conflicts in this area are as abundant and multifaceted as the wealth of works they concern. From fine or applied arts to sculpture or musical creations, from historical or contemporary works to traditional cultural expressions (TCEs, or “expressions of folklore”) or commercial blockbuster films – no area is untouched by discord.

Because these disputes often have distinct features, stakeholders tend to look for creative approaches, such as alternative dispute resolution (ADR).

Stakeholders and subject matter

A variety of players are concerned – anthropologists, archivists, art and antique dealers, artists, collective rights societies, auction houses, collectors, cultural institutions, distributors, art experts, galleries, indigenous communities, individuals, industries, libraries, museums, publishers, states, universities – the list is endless. Opportunities for dispute are also endless, and on a multitude of subjects.

Contractual disputes, for example, may arise over artist representation agreements, copyright licenses and assignments, donation, loan and sale agreements. Non-contractual disputes may pertain to access to and benefit-sharing of TCEs and/or traditional knowledge (TK), authenticity, control over a work or cultural object, digitization, documentation, resale rights, restitution, unauthorized representation, reproduction or use.

For example, disputes may arise between:

- a museum and a researcher over the reproduction of a work from the museum’s collection;
- an auction house and the seller of a work of art over its authenticity; or
- an indigenous community and a museum over the digital reproduction of confidential traditional ceremonial songs.

Nature of issues

A single dispute may combine issues both tangible and intangible in nature. An indigenous community, for example, may be in conflict with a museum regarding the return of an object (tangible) they believe was originally created by their community but which is now in the museum’s collection. Copyright questions (intangible) may arise if the museum has reproduced the cultural object in publications.

Art and cultural heritage disputes are often multidimensional, involving not only complex legal issues, but also sensitive, not necessarily legal elements, of an emotional, ethical, historical, moral, political, religious, or spiritual nature.

For example, sensitive issues arose in the Australian “carpet case”,¹ where industrial carpet manufacturers were reproducing works of indigenous artists without their authorization. The artists’ works incorporated images and TK belonging to their community. This was a very delicate case, because according to customary law, the artists could be held responsible by their community if a third party makes inappropriate use of the traditional images, resulting in communal sanctions of the artists. In addition, a moral issue arose, as the carpets did not reproduce the artists’ works in their integrity.

While this case was decided in court, which applied copyright law, ADR could also have been an appropriate avenue to settle this dispute, allowing in particular consideration of all the cultural and non-legal issues involved.

The potential of ADR

There are instances in which litigation in a national court may be entirely appropriate in art and cultural heritage disputes; for example, when a recalcitrant party is involved (as no consent is needed to start litigation), or when a legal precedent is sought which may have a deterrent effect.

However, in view of the specific needs in art and cultural heritage disputes, litigation may not always be the optimal solution.

¹ Australian Federal Court case *M*, Payunka, Marika & Others v Indofurn Pty Ltd*, as described by Terri Janke in “Minding Culture: Studies on Intellectual Property and Traditional Cultural Expressions,” WIPO, Geneva 2003, available at: www.wipo.int/tk/en/studies/cultural/minding-culture/studies/finalstudy.pdf



Parties to the dispute may have different legitimate interests, and long-term professional relationships may be involved. If they go to court there is normally an overall winner and loser, and the procedure and result are public, which may adversely affect relationships. Further, as legislation in the art and cultural heritage field is not fully harmonized internationally, there is a risk of contradictory outcomes in the courts.

That is why ADR options such as negotiation, mediation, arbitration and expert determination, may, in some circumstances, be more advantageous in this sector. Provided each party agrees to use ADR (e.g., in an ADR contract clause or submission agreement), these private, out-of-court dispute resolution mechanisms allow them to solve their disputes in a timely, cost-efficient, sustainable and responsible manner with the assistance of one or several qualified independent mediators, arbitrators or experts. A mediator can assist parties in settling their dispute through facilitating dialogue and helping identifying their interests but without imposing any decision. An arbitrator renders a final, binding and internationally enforceable decision on the parties' dispute. An expert makes a determination on a specific matter submitted by the parties, for example on the authenticity of a work.

The potential of ADR for resolving disputes relating to TCEs and TK is being addressed within the context of WIPO's program on intellectual property (IP) and genetic resources, TK and TCEs. For example, this program, working with the WIPO Arbitration and Mediation Center and other actors such as the United Nations Educational Scientific and Cultural Organization (UNESCO), the International Council of Museums (ICOM), the Food and Agriculture Organization (FAO), and the Convention on Biological Diversity (CBD), is exploring the role of ADR in IP disputes relating to access to and benefit-sharing in genetic resources and the alleged misappropriation of TK and TCEs. Moreover, WIPO is developing a compendium of issues and options for the management of IP in cultural institutions, and ADR is highlighted as a key feature of IP management policies.

The utility of considering ADR has also been raised by Member States participating in the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC).

Benefits of ADR

Some of the benefits of ADR in the art and cultural heritage sector include:

A single, international and neutral procedure – Art and cultural heritage disputes are often international, involving parties based in different countries. Instead of bringing cases to court in different jurisdictions, ADR mechanisms allow parties to solve their dispute in a single procedure, saving time and money.

ADR provides an international and neutral forum in which parties are free to choose a neutral mediator, arbitrator or expert from a third country, the applicable law and language, thereby preventing the possible perception of bias that could arise in national court litigation. Parties therefore have complete control over the dispute resolution process.

Expertise – In an ADR procedure, parties can choose one or several mediators, arbitrators or experts with expertise in the specific legal area and subject matter of art or cultural heritage at issue, as well as knowledge of the cultural and linguistic background(s) of the parties. This would be important in, for example, a dispute involving a museum and an indigenous community from different cultural backgrounds.

Consideration of sensitive issues – ADR provides a flexible forum, allowing consideration of legal as well as sensitive non-legal issues that may arise in art and cultural heritage disputes as described above, and which may be difficult to consider in court.

In mediation, the mediator can identify and address particularly delicate issues with the parties, which can help them to find a mutually agreeable solution that preserves their long-term relationship.

A possible option in arbitration is for parties to ask the arbitrator to decide *ex aequo et bono*, that is on the basis of principles of fairness.

Possibility of considering and applying customary laws and protocols – Where indigenous communities are involved, ADR can be a forum in which their customary laws, protocols and codes can be considered and applied. This is one of the issues addressed in a consultation process on customary law and IP² currently conducted by WIPO's Traditional Knowledge Division. According to this study, customary law could be incorporated into ADR proceedings at different levels, such as for:

- providing guidance on substantive issues in a dispute, for example in cases involving custodianship of TCEs;
- establishing adapted procedures, for example providing for a community consultation process; and
- determining certain remedies, for example acknowledging certain cultural and spiritual concerns.

² The Study on Customary Law and IP is available at www.wipo.int/tk/en/consultations/customary_law/index.html

WIPO arbitration in an artist promotion dispute

The following is a recent example of a WIPO arbitration in an artist promotion dispute, and illustrates how an art-related dispute can be creatively resolved in a manner satisfactory to all parties.

A European art gallery concluded an exclusive cooperation agreement with a European artist in order to promote the artist on the international market. The agreement contained a WIPO arbitration clause providing for a three-member tribunal. Three years after the agreement was signed, the parties' relationship began to deteriorate and the artist sent a notice terminating the agreement. At that point, the art gallery initiated arbitration proceedings at WIPO. Following consultations between the parties and the Center, three arbitrators experienced in art law issues were appointed.

After studying the parties' pleadings, the tribunal considered there was potential for settlement. With the agreement of the parties, the tribunal issued a preliminary case assessment encouraging the parties to resume the settlement negotiations they had attempted at an earlier stage. The parties reached a settlement and asked the tribunal to render a consent award incorporating the settlement agreement. The terms of the settlement included the termination of the cooperation agreement and the provision of a number of works by the artist to the gallery in final settlement.

This and other case summaries are available on the Center's website at: www.wipo.int/amc/en/arbitration/case-example.html

Creative solutions and preservation of long-term relationships – ADR allows parties to adopt mutually satisfactory solutions and remedies that can preserve their relationships and provide a basis for future collaboration. In art and cultural heritage disputes, such solutions have included the provision of works of art in lieu of monetary damages, the conclusion of long-term loans, shared ownership or custodianship, the formal recognition of ownership, or capacity-building programs in exchange for the lending of an object.

Confidentiality – Except where otherwise required by law, ADR mechanisms allow parties, to a large extent, to keep the proceedings and results confidential. The different actors involved in the international art market usually know each other, and reputation is key. Hence, confidential dispute resolution may help them to settle disputes in a more discreet manner. Also, where sacred traditional material is involved, confidentiality may be crucial. Depending on the circumstances, parties can also agree to balance confidentiality provisions with public interest requirements.

Issues for consideration

Certain issues in art and cultural heritage ADR, which cannot be developed in detail here, require consideration on a case-by-case basis.

While "arbitrability" in general does not present issues in art and cultural heritage disputes, certain issues of a public policy nature, or inalienable rights, may be difficult to submit to arbitration in certain jurisdictions.

While not unique to ADR, consideration may need to be given to how public cultural institutions are represented in ADR proceedings and whether they are capable of disposing of the cultural object at stake.

Also, where indigenous communities are involved, due consideration needs to be given to their identification and representation.

WIPO Arbitration and Mediation Center

The Center provides WIPO mediation, (expedited) arbitration and expert determination rules, as well as model ADR clauses and submission agreements, which can be, and have been, used in art and cultural heritage disputes.³ The Center maintains a special list of "neutrals," including mediators, arbitrators and experts who combine expertise in art and cultural heritage law with dispute resolution experience.

In addition to its standard procedures, the Center develops adapted ADR procedures. For example, it recently developed an expedited arbitration procedure at the request of the Association of International Collective Management of Audio-visual Works for disputes between their right holders (see, www.wipo.int/amc/en/arbitration/agicoa/).

Mindful of the specific needs in art and cultural heritage disputes, the Center, in collaboration with the divisions within WIPO that deal with TK and copyright, is exploring the development of specifically adapted ADR services for this sector.

³ For more information, see: www.wipo.int/amc/en/

TAKING THE HEAT OUT OF BUSHFIRES WITH INNOVATIVE TECHNOLOGY

Patent attorney **NICK HUNTER**, who wrote this article for the *WIPO Magazine*, is part of the *Griffith Hack Bushfire IP Group*, led by Robert Wulff. The Group comprises attorneys in Griffith Hack's Melbourne, Sydney, Perth and Brisbane offices with experience in protecting and commercializing bushfire technologies.

February 7, 2009, will long be remembered by Australians as "Black Saturday" – the day on which almost 200 people perished and thousands were

left homeless as a result of bushfires that raged out of control on the outskirts of Melbourne. The Black Saturday tragedy is generally thought to have resulted from record high temperatures (around 46°C) on the day, significantly

below-average rainfall over the five previous years and a "stay and defend" stance taken by many rural residents.

Hotter summers and a drier year-round climate suggest that conditions likely to increase the frequency and intensity of bushfires will persist in Australia for some time. And Australians are now looking to technology to help reduce bushfire impact in rural communities.

By their very nature, bushfires are difficult to predict and control – above and beyond the effects of other variables such as terrain and winds. Extinguishing them is a daunting task. So, in a world of video-playing iPods, mass-printable thin-film polymer solar cells and nanoparticles for targeted cancer treatment, what technologies are being developed for bushfire protection?

Elvis to the rescue

Generally, very few ideas conceived in the aftermath of bushfires have been converted into bushfire protection technologies. Even where patent

applications are filed, they are often not followed through on. Some ideas, however, are translated into tangible solutions. One such tool – currently the subject of patent protection in Australia and other countries – is a water-bombing helicopter, colloquially known as "Elvis." At the frontline of bushfire fighting, the helicopter, produced by the U.S. company Erickson Air-Crane Incorporated, is hired each summer by Australian state governments to assist in their protection efforts.

The Bushfire Co-operative Research Centre

In Australia, the Bushfire Co-operative Research Centre (Bushfire CRC) is at the heart of research aimed at generating bushfire protection solutions. The Bushfire CRC receives input from more than 30 fire and land management agencies in Australia and New Zealand, as well as the Australian government-funded Commonwealth Scientific and Industrial Research Organisation (CSIRO).

The Bushfire CRC's research focuses on three main areas: (1) fire behavior; (2) human behavior and safety issues; and (3) building (infrastructure) and planning issues. It is anticipated that this research, particularly in the third area, will lead to bushfire protection technology that can be applied to building design and materials and, as a result, will give rise to a new generation of safer homes.

The mist bomb

Research and development work is not, however, limited to collaborative groups and government-funded bodies. Many individuals and companies are now seeking bushfire fighting solutions. Sydney-based inventors Marc Hartmann and Derrick Yap have taken up the challenge and de-



Photos.com

Fire Fighting Technologies: Early Detection and Management

In North America, California wildfires make the headlines every summer. In Europe, the dire news of the countryside in flames often comes from France and Portugal. In South Africa, bushfires are the scourge of Zululand. In these and other regions, new technologies are being used to fight the fires that, each year, destroy millions of hectares of land and take many lives.

The first defense against fires is early detection and firemen are getting much-needed assistance in this area from Firehawk™, a computerized camera system that detects smoke by day and heat by night. The system was developed, patented and trademarked in South Africa by Digital Imaging Systems in 2000. Firehawk cameras rotate 360 degrees every four minutes and can detect a fire up to 20km away on a clear day. Installed and tested in Zululand, Firehawk provides early first alerts that allow fire fighters to arrive on site before fires are out of control. The system is being extended to other areas of South Africa and has been in use in California since 2006.

Getting a roaring forest fire under control is a daunting task. A change of winds can modify the course of a fire in seconds. The Spatial Fire Management System (SFMS) was developed in Canada, which has 10 percent of the world's forests, more than 3 million hectares of which is devastated annually by an average of 9,500 wildfires. The System monitors and predicts the behavior of forest fires based on data collected from 50 years of fire research by the Canadian Forest Service and input information, such as weather forecasts, vegetation, topography, temperature, relative humidity, wind speed, wind direction and precipitation, etc. This information is sourced from inter-connected databases and is used in weather prediction models to determine fire risk and behavior. It provides qualitative predictions, information firemen can use in deciding on fire prevention measures or on strategy and tactics to suppress a fire. It is currently in use in Indonesia, Malaysia, Mexico and New Zealand. No licensing fee is charged for the System, but license keys are provided to users for upgrades and support.

veloped a water-dispersing "bomb" that extinguishes fires by extracting heat from them.

The device is a football-sized, water-filled vessel that can be dropped from a helicopter or airplane. It is fitted with a detonator that triggers on, or slightly before, impact with the ground. This transforms the water into a fine mist that rapidly disperses in the vicinity of the "explosion." The mist droplets have a considerably larger surface area than the water droplets associated with conventional water-bombing techniques. This enhances their ability to remove vast amounts of energy from the fire front, making the mist bomb an extremely effective fire extinguisher.

Bearing in mind that bushfires generally occur in remote forest areas, Hartmann and Yap designed the bomb from biodegradable materials so that bombing campaigns do not pollute the environment. The combination of mist-generation and eco-friendly materials makes this a unique tool for fighting bushfires.

With the assistance of Griffith Hack, the inventors filed a PCT international patent application (WO 2008/12884). They also established Wildfire Suppression P/L to commercialize their invention and export their technology. Technical development is still continuing on certain aspects of the mist bomb, but Hartmann and Yap expect to con-



A test detonation of a mist-dispersing bomb.

duct extinguishment trials later this year. They hope that the trials will involve the Bushfire CRC and CSIRO because their approval of the technology would go a long way to bolstering commercialization efforts.

In the meantime, the inventors are pursuing discussions with a provider of aerial fire suppression services to adopt the mist bomb technology. They have a strong view that the technology is well suited to fighting fires in remote or mountainous areas, and therefore applicable to the terrain of Australia, North America and Europe.

It is to be hoped that successes such as that of Hartmann and Yap and the cutting-edge research being undertaken at the Bushfire CRC as well as the memory of the recent Black Saturday tragedy, will motivate individuals, companies and research organizations to follow through on their ideas for innovative bushfire protection technologies. Communities in bushfire-prone areas in Australia and elsewhere will live to thank them.



Courtesy: Marc Hartmann and Derrick Yap

An illustration of inventors Marc Hartmann and Derrick Yap's football-sized water-filled bomb that can be dropped from a helicopter or plane.

For further information on Wildfire Suppression P/L, please see

www.wildfiresuppression.com.au

COMMITTEE MEETINGS

Member States Endorse Senior Appointments

The WIPO Coordination Committee, meeting on June 15 and 16, endorsed proposals by Director General Francis Gurry for a new senior management team, consisting of four Deputy Directors General (DDGs) and three Assistant Directors General (ADGs). The appointments of the DDGs and ADGs are effective from December 1, 2009, to November 30, 2014, following the expiry of the mandates of the current incumbents. The Coordination Committee expressed consensus support for the new team, which comprises the following appointments:

- Mr. Geoffrey Onyeama (Nigeria), DDG for Development;
- Mr. James Pooley (United States of America), DDG for Patents;
- Ms. Binying Wang (China), DDG for Trademarks, Industrial Designs and Geographical Indications;
- Mr. Johannes Christian Wichard (Germany), DDG for Global Issues;
- Mr. Trevor C. Clarke (Barbados), ADG for Copyright and Related Rights;
- Mr. Ramanathan Ambi Sundaram (Sri Lanka), ADG for Administration and Management;
- Mr. Yoshiyuki Takagi (Japan), ADG for Global IP Infrastructure.

The Director General and the Coordination Committee also paid warm tribute to the outgoing DDGs and ADGs.

SCCR to Expedite Work in Favor of Reading Impaired

WIPO's top copyright negotiating forum has agreed "to continue without delay" its work on facilitating the access of the blind, visually impaired (VIP) and other reading-disabled persons to copyright-protected works. This subject – as well as broader questions of limitations and exceptions to copyright law as they relate to libraries, archives and educational activities – is at the heart of current work of the Standing Committee on Copyright and Related Rights (SCCR).

Discussions at the SCCR meeting from May 25 to 29 centered on a series of practical measures to facilitate access to copyright-protected materials by reading-impaired persons, including a stakeholders' platform, a key aim of which is to develop solutions to make published works available in accessible formats in a reasonable time frame. All participants supported moving forward with this work.

A proposal was also submitted by Brazil, Ecuador and Paraguay regarding a draft treaty prepared by the World Blind Union (WBU). The SCCR decided to continue these discussions at its next session later this year to give Member States time to reflect on the best way forward.

The SCCR noted progress in the work on the stakeholders' platform and encouraged the Organization

to continue to advance this initiative. This platform is designed to help secure access for disabled persons to copyright-protected works. Two meetings convened under the auspices of WIPO in January and April 2009 brought together major stakeholders, including representatives of copyright holders and reading-impaired persons, to explore the specific needs, concerns and possible approaches to facilitating access to works in formats suitable for people with reading impairment.

The SCCR also addressed the issue of the protection of broadcasting organizations and requested WIPO to organize a series of national and regional meetings. These meetings are to focus on the objectives, specific scope and object of protection of a possible new international instrument that would update the international protection of broadcasting organizations on a signal-based approach. The Secretariat will also commission a study on the socio-economic dimension of the unauthorized use of signals.

Moreover, the SCCR called for consultations to break the deadlock relating to negotiations on the international protection of performances in audio-visual media. The Secretariat will also organize a series of national and regional seminars as well as background documentation on the issue.

EVENTS GALLERY

MADRID, June 18

The *Artistas Intérpretes Sociedad de Gestión* (AISGE) welcomed WIPO Director General Francis Gurry to Madrid for the first visit of a WIPO Director General to their headquarters. The collective management society represents Spanish audiovisual performers – actresses, actors, dancers, theater directors. AISGE, a long-time partner of WIPO, has

participated in many initiatives with the Organization in Africa, Asia, Europe and Latin America in countries such as Argentina, Brazil, Chile and Colombia. Many of the world's leading performers are from the Ibero-American cultural bloc (Spain, Portugal and Latin America), and strongly rely on intellectual property to protect their rights. ■



Ambassador Javier Garrigues, Permanent Representative of Spain in Geneva, AISGE General Manager Abel Martín, AISGE Chairwoman Pilar Bardem, WIPO Director General Francis Gurry, WIPO Senior Adviser Marcelo Di Pietro Peralta

SOFIA, June 10 to 12



WIPO Director General Francis Gurry, Bulgarian Patent Office President Kostadin Manev, Professor Borislav Borisov, WIPO Acting Director Marcus Höpferger

Legal, economic and trade issues were at the center of discussion at the WIPO Worldwide Symposium on Geographical Indications (GIs), jointly organized by the Bulgarian Patent Office and WIPO. The Symposium brought together speakers from 16 countries and 5 continents, and some 250 participants from over 40 countries and six organizations, including the World Trade Organization and the European Union. At the event, WIPO Director General Francis Gurry highlighted the importance of wider policy objectives in the area of geographical indications, such as the role GIs can play in rural development and in the preservation of traditional knowledge. The program included presentations that shed light on the administrative and procedural details that are inherent in GI protection.

It also looked into the economic dimension of GIs and brought together a representative panel of prominent experts to discuss perspectives for GIs from various viewpoints. ■

PRETORIA, May 26 and 27

A gathering of senior policymakers and IP administrators from 36 African countries marked the launch of a program to promote the use of IP in Africa and Least Developed Countries (LDCs). The event, organized by WIPO in cooperation with the governments of South Africa and Japan, is part of the WIPO-administered Japanese Funds-in-Trust (FIT) Program for Africa and LDCs. The two-day meeting provided an opportunity for participants to reflect on the range of policy options available

to create an enabling environment for the effective use and management of IP assets. IP experts from Japan, Malaysia, Kenya, Ethiopia, South Africa and the African Regional Intellectual Property Office (ARIPO), WIPO and the World Bank addressed a range of themes. Participants also discussed concrete proposals for future activities to be implemented within the framework of the FIT Program.

LETTERS AND COMMENT

EBay not liable for counterfeiting



Franck Soutoul and
Jean-Philippe Bresson
Inlex IP Expertise
www.inlex.com

Your readers may be interested to learn that the long awaited decision of the Court of First Instance of Paris on the eBay vs L'Oréal case finally came through on May 13 after several postponements. The case was mentioned in the conclusion of the *WIPO Magazine* 3/2009 article: "Legal Pioneering at the Online Auction Frontier." Contrary to the main case discussed in that article and others it mentioned, the Court ruled that the liability of eBay – an Internet host – could only be enforced in cases of evidenced knowledge of the infringing content and failure to remedy thereto.

France The L'Oréal suit, launched in 2007, alleged trademark infringement and breach of selected distribution networks by eBay companies. L'Oréal argued that eBay qualified as a website editor with brokerage activities, which under French practice makes eBay fully responsible for the content of its website. The auction site was said to actively intervene in the promotion of cosmetic and perfume products, and to earn money on their sales. L'Oréal claimed 3.5 million euros in damages.

EBay opposed the plaintiff's position, claiming it was an intermediary, offering solely hosting services and lacking

control over users and the contents of their ads. "Power seller" programs, eBay shops or Paypal protection were presented as only aiming at enhancing sellers' auctions. As a hosting company, eBay is not bound by a general obligation to monitor the content of their website.

The Court agreed with eBay's arguments and ruled that eBay acted in good faith by establishing strong means to fight counterfeiting. With this difference in positions between Courts of First Instance, a Court of Appeal decision would now be welcome.

But this new decision is in line with the decision of the U.S. District Court (Southern District of New York, July 14, 2008) regarding eBay's generalized knowledge that some auctions are counterfeiting as insufficient to rule eBay as liable for trademark infringement. In August 2008, a Belgian Court decision also favored the auction site over L'Oréal, ruling that eBay had no obligation to systematically watch which products were being offered up for sale. A court in the U.K. took the same position on May 22, 2009 (pending a referral to the ECJ). L'Oréal's only win has been in the German Courts. A decision is yet to come from Spain.

BOOK REVIEW

Economics of Intellectual Property

Suggestions for Further Research in Developing Countries and Countries with Economies in Transition



Available from WIPO's
E-Bookshop
ISBN:
978-92-805-1791-0
Price: 30 Swiss francs

Empirical economic research on intellectual property (IP) in developing countries and countries in transition is limited, making it difficult for policymakers to rely on such evidence when taking decisions on IP. This is the main conclusion of a recent WIPO publication entitled: "The Economics of Intellectual Property: Suggestions for Further Research in Developing Countries and Countries with Economies in Transition" (WIPO publication No. 1012).

The publication, which includes papers from renowned international economists, focuses on six selected themes: (1) Innovation and Appropriability Strategies; (2) Intellectual Property and International Technology Transfer; (3) the Economics of Copyright; (4) the Economics of Geographical Indications (5) Intellectual Property Rights and Pharmaceuticals; and (6) IP Rights and Knowledge Transfer from Universities and Public Research Organizations.

The papers provide an overview of the empirical literature on each theme, highlight the key gaps in the literature and provide some suggestions for future research. The first draft of the papers was discussed at the International Roundtable on the Economics of IP held at WIPO in November 2007. The publication includes revised versions of these papers as well as comments made at the Roundtable in order to provide a range of different views on ways in which the themes could be further studied in developing countries and countries in transition.

The papers may be downloaded free of charge at www.wipo.int/ip-development/en/economics/index.html.

NEW PRODUCTS



Singapore Treaty on the Law of Trademarks, Regulations Under the Singapore Treaty on the Law of Trademarks and Resolution by the Diplomatic Conference Supplementary to the Singapore Treaty on the Law of Trademarks and the Regulations Thereunder done at Singapore on March 27, 2006

Russian No. 259R
20 Swiss francs (plus shipping and handling)



Patent Cooperation Treaty (PCT) and Regulations under the PCT (as in force from July 1, 2009)

German No. 274G, Portuguese No. 274P, Spanish No. 274S
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Summaries of Conventions, Treaties and Agreements administered by WIPO - 2009

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