

WIPO | MAGAZINE

N° 5 - OCTOBER - 2014

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Acknowledgements:

- p.10 **Michele Woods**, Copyright Law Division, WIPO
- p.14 **Geidy Lung**, Copyright Law Division, WIPO
- p.18 **Jean-François Arrou-Vignod** and **Samar Shamoon**,
Communications Division, WIPO
- p.24 **Victor Guizar**, Regional Bureau for Latin America
and the Caribbean, WIPO
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and **Marcus Hopperger**, Law and Legislative Advice Division, WIPO

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Front cover:
Curtis Jampijinpa Fry, a Warlukurlangu
artist from Yuendumu, a remote indigenous
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proudly displays his Emu dreaming.
He and his fellow artists are generating
income by licensing their colorful works
to trusted partners.
Photo: IP Australia

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MAKING INTERNATIONAL IP LAW:

an interview with Francis Gurry



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As the global forum for intellectual property (IP) policy, WIPO plays a pivotal role in shaping the IP laws and systems which harness the benefits of innovation and creativity. But achieving consensus among 187 countries is ever more challenging. As he begins his second term at the helm of the Organization, WIPO Director General Francis Gurry describes how IP is becoming a “key geopolitical issue of the 21st Century,” and the implications he sees for international IP law-making.

How do you see the IP landscape evolving?

IP has been on a journey from the periphery to the center of the economic system. Many countries, including the world’s four largest economies – the USA, China, Japan and Germany – have explicitly recognized the central role of IP in their economic future. This means that competition will increasingly focus on innovation and on IP, raising the stakes in the field of IP. In this context, the continuing absolute neutrality of the WIPO secretariat is vital in our handling of what promise to be ever-more challenging negotiations.

Why do you think it is becoming more difficult to reach international agreements on many issues?

This, I believe, stems from the profound changes resulting from the geopolitical shift in the world’s economic center of gravity over the last 20 years. This is altering the interests and positions of actors in international negotiations and making it increasingly difficult for member states to agree on proposed normative measures. We have to accept this reality and try to identify opportunities where interests are sufficiently aligned to permit agreement – as the member states were able to do in the negotiations to conclude the Beijing and Marrakesh Treaties. I hope it will be possible to reach such fruitful outcomes for the other items on our agenda. I would say, however, that the nature of the current operating context favors the specific and measurable over the general and political.

What are your priorities in the current copyright law agenda at WIPO?

First, encouraging speedy ratification by member states of the Beijing Treaty on Audiovisual Performances and of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, which were concluded in 2012 and 2013, respectively.

The treaties WIPO administers fall into different categories. Some set standards for national laws, like the Beijing Treaty, which sets minimum standards of protection for

Delegates applaud the adoption of the Marrakesh VIP Treaty in Morocco on June 27, 2013.

Amid the changing interests and positions of member states, “we have to try to identify opportunities where interests are sufficiently aligned to permit agreement – as we were able to do in the negotiations to conclude the Beijing and Marrakesh Treaties,” Mr. Gurry says.



Photos: Emmanuel Berrrod/WIPO

“At the broadest level... the most important question is the need to adjust territorial IP legal systems to serve the reality of a global digital content marketplace.”

performers. Others seek to facilitate action. The Marrakesh VIP Treaty will make it easier to exchange accessible format works across borders, helping to ensure that people with print disabilities can get hold of the books they need. The Accessible Books Consortium, that we launched in June 2014, (see *Accessible Books Consortium: Breaking Down Barriers to Accessibility* - www.wipo.int/wipo_magazine/en/2014/04/article_0005.html) will help give practical effect to that Treaty.

Second, taking forward the negotiations on broadcasting rights. WIPO needs to demonstrate that it can deal with the IP implications of all levels of technology, including the most highly developed. Recent discussions in the WIPO Standing Committee on Copyright and Related Rights (SCCR) have given us a better technical understanding of contemporary broadcasting and the need for reform. But this has not yet translated into a consensus on when to go forward with the proposed new treaty. It is important that member states reach a consensus on this, not least because broadcasting organizations generate enormous economic value. Just recently, the International Olympic Committee reported that it had agreed to sell to NBC Universal in the USA the broadcasting rights for the Olympic Games between 2021 and 2032 across all platforms for US\$7.75 billion. That's just for the sale of rights in one country, and for one major event. Imagine the sums involved for broadcasting in all countries across all events!

What will be the next copyright issues to be addressed at WIPO?

There is no consensus among member states yet as to the way forward with new issues for the SCCR agenda. Some feel that WIPO's activity in this area should slow while the new treaties gain international acceptance. Others feel that there are specific issues that could be tackled.

At the broadest level, I believe the most important question is the need to adjust territorial IP legal systems to serve the reality of a global digital content marketplace. But this is not primarily a legislative or normative matter. It is a complex question which needs a worldwide dialogue between governments and all the different actors in the digital marketplace.

Can you say more about your call for international dialogue on copyright in the "global digital content marketplace?"

The global digital content marketplace already exists for illegal services. Our challenge is to make it as easy to get content legally as it is to get it illegally. This is very difficult because no one actor or group of actors, whether public or private, can

assume the task. It is an enormous undertaking covering all forms of cultural expression and entertainment worldwide.

We can only edge towards the goal of establishing a seamless and legal global digital content marketplace by identifying specific, actionable issues that can be resolved along the way.

It is critically important that we create a dialogue around these issues to ensure that copyright can continue in the digital age to serve its basic function of financing cultural production. WIPO stands ready to facilitate a global dialogue on these important issues.

What is the status of other current IP treaty negotiations, such as the draft Design Law Treaty?

The studies carried out for the WIPO Standing Committee on Trademarks, Designs and Geographical Indications (SCT) show enormous diversity in the procedural rules for applying for design protection in different countries. For design protection to be effective, it must be accessible and to be accessible, the procedures involved need to be simple and relatively uniform. The draft Design Law Treaty should help us attain this objective. It also seeks to introduce at the international level a novelty grace period (under certain circumstances) for the disclosure of a design. This will particularly benefit small, independent designers, many of whom are unaware that the disclosure of a design can result in their not being able to protect it subsequently by means of a registration.

Design is an increasingly important part of innovation as a means of product differentiation and competitiveness. Consider, for example, the disputes between Apple and Samsung where the role of design is as important as that of patents.

What can you tell us about the negotiations on genetic resources, traditional knowledge and folklore?

The negotiations taking place in the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) are of fundamental importance to WIPO. They express the aspirations of developing countries, in particular, to ensure the IP system addresses all knowledge systems and recognizes the contribution that has been made – and continues to be made – to humanity by traditional knowledge (TK) systems. In fact, all countries have an interest in the inclusiveness and widest possible acceptance of the international IP system. A balanced and satisfactory outcome to the IGC's negotiations will contribute to this.



Photo: Stockphoto © Britta Kaschni-Tengye

WIPO is working directly with indigenous communities to ensure they have the practical tools and expertise they need to use IP to their advantage.

“All countries have an interest in the inclusiveness and widest possible acceptance of the international IP system.”

The challenge is to identify the precise areas in which IP can protect – in a clear and certain manner – the specific value that these knowledge systems add. Since TK systems are highly diverse, covering both oral and written traditions, that task is extremely complex. In general, it helps to deal with concrete elements, rather than broad general propositions which may lead to uncertainty. For example, if it were decided that sacred names should be protected, it might be helpful to propose a register, which would enable countries to accept or refuse the effects of protection, rather than simply stating that sacred names should be protected.

Why has reform of the Lisbon System for the Protection of Appellations of Origin moved up the international IP agenda?

Globalization has opened markets and created opportunities for commercializing agricultural produce. Geographical indications and appellations of origin allow producers to distinguish the quality of their products by reference to their geographical origin. In a world characterized by increasing levels of standardization, distinctiveness has acquired important value as consumers increasingly seek high quality, authentic products.

Although it has been in existence for over 50 years, the Lisbon System has attracted a membership of just 28 countries. The current negotiations aim to make the System more flexible, and better adapted to the different national and regional legal systems for the protection of geographical indications, as well as to allow competent intergovernmental organizations to participate in it. The big challenge for member states is to find an appropriate balance between depth of protection, on the one hand, and breadth of participation, on the other hand. This is a common balance in IP treaties: as a general rule, the deeper the protection, the narrower the participation.

How do you see WIPO's other global IP protection systems evolving?

The Patent Cooperation Treaty (PCT), the Madrid System for the International Registration of Marks, and the Hague System for the International Registration of Industrial Designs all continue to experience strong growth. These systems provide cost-effective options to secure international protection of IP and are an indispensable part of the global innovation ecosystem. Growth in their use in 2013, in fact, outstripped national and global economic growth rates.

In 2013, the PCT grew by 5.1 percent, and for the first time in its history the number of international patent applications filed in a single year passed 200,000. Similarly, a record number of international applications were filed under the Madrid System, which grew by 6.5 percent. I believe the volume of applications filed through the Madrid System will double over the next five to ten years as the globalization of markets reinforces the importance of branding.





Despite 15 percent growth in 2013, and the recent accession by the Republic of Korea, the Hague System remains much smaller but has tremendous growth potential. Its expansion – China, Japan, and the USA are all expected to join in the coming months – means that its geographical scope will soon cover an area responsible for around 95 percent of design registrations worldwide. This will lead to a profound transformation of the System. WIPO will have to balance the needs of these new members, many of which provide for novelty examination of designs, with the users' demand for a system that remains effective and easy to use.

What other opportunities and challenges do you see for WIPO in the coming years?

Without diminishing the importance of treaties, there are rich opportunities for international collaboration that do not involve law-making or norm-setting. We can achieve a lot through practical projects that help IP offices manage the rising global demand for IP titles. Take for example the Digital Access Service (DAS), which offers a rapid, secure, and inexpensive means of exchanging priority and similar documents between IP offices; or the Centralized Access to Search and Examination (CASE) platform, which facilitates the sharing of search and examination information between IP offices. These are important elements of shared technical infrastructure which improve the quality and efficiency of global IP operations.

Public-private partnerships such as WIPO Re: Search and the Accessible Books Consortium also provide opportunities for practical and fruitful international cooperation.

Over the last two decades, the trend has been towards greater involvement by the enterprise sector in public policy. We need to capture the advantages of such increased engagement without altering the character of WIPO as an intergovernmental organization. That means listening to the enterprise sector, although not negotiating with it. It also means seeking opportunities to mobilize the enterprise sector's considerable resources to support the implementation of policy decided by member states.

At a more abstract level, our challenge is to ensure that WIPO remains a relevant and trusted forum for IP. Maintaining relevance, and keeping pace with change, is increasingly difficult for intergovernmental organizations such as ours, operating in a multi-tiered and multi-speed world. But while it is not always easy to achieve consensus within the multilateral framework, I firmly believe that multilateralism offers the unique and indispensable values of legitimacy and universality, which are so important for developing successful solutions to global challenges. ♦

CARDIOPAD: Reaching the hearts of rural communities in Africa

By *Edward Harris,*
Communications Division,
WIPO

In a remote clinic in Mbankomo, down a crimson-earthed road in Cameroon, a doctor attaches electrodes to the chest of a patient lying on an examining table. Murmuring reassurances, the generalist records the patient's heart data on an African-designed touch screen medical tablet. The readings are then transferred wirelessly, over the mobile-phone network to specialists in distant urban centers for interpretation, diagnosis and prescribed treatment.

By making it possible to perform tests, such as an electrocardiogram (ECG) in far-flung villages, the tablet is bringing high quality cardiac care to remote and often poorly equipped countryside clinics where many Cameroonians go for their health care. It connects rural patients suffering from heart disease, many of whom do not have the means, the time, the contacts or the strength to travel to the big city, with Cameroon's few, primarily urban-based cardiologists.

The potentially life-saving Cardiopad – designed in Cameroon to address a Cameroonian problem, but which is also widespread across Africa – is the brainchild of 26-year-old engineer Arthur Zang. For now, the heart reading and interpretation are just a simulation – but that will change soon if Mr. Zang gets his way.

The winner of numerous overseas awards and grants, Mr. Zang hopes that his invention – imagine an iPad with home-built software built for deployment in the African bush – will revolutionize cardiac care in Cameroon. And for him, his business is also personal. “There are a lot of people in my family who suffer from cardiac illness,” he says referring to the recent heart-related death of his uncle. “So personally, this has affected me but above all I would say it has impassioned me, because I know personally the daily existence of people living in the village ... I lived myself in a village and I know how difficult it is to get specialist care.”

According to Mr. Zang, Cameroon has only a few dozen cardiologists in a country of around 22 million people and these are clustered in urban centers like the capital, Yaounde, or the main seaport town of Douala. Roughly half of Cameroon's population lives in rural areas, according to the World Bank, while many others live in urban areas that do not have access to heart specialists.

LIFE-SAVING POTENTIAL

The young engineer saw a problem and set out to try to fix it. In 2009, while still a student, Mr. Zang began developing a software product that could help doctors monitor the health of their patients' hearts. He made contact with a Yaounde-based cardiologist, Professor Samuel Kingué, who helped him better understand the type of technical solutions required. With these insights, the young engineer finally wrote a program that he loaded onto an off-the-shelf device. But he soon realized he needed the flexibility of his own platform, and so turned to developing his own hardware – the Cardiopad – the first medical tablet in Africa, says Mr. Zang.



The Cardiopad has a simple-to-use, touchscreen interface that is adapted to the needs of remote health workers who may lack familiarity with the latest computing devices and the know-how required to use them. In tests by the Cameroonian scientific community, the Cardiopad has proven 97.7 percent reliable. It is solidly built to withstand the humid climate and the shocks incurred while being carried over rutted, often unpaved dirt roads like the one leading to the clinic at Mbankomo. The device is also built to withstand the frequent power cuts experienced in Cameroon and across Africa. Equipped with a battery, it can run independently for around six hours at full power.

With some 30,000 euros funding from the Cameroonian government, Mr. Zang was able to create a prototype and eventually travel to China, where he found a factory that could produce a limited run of Cardiopads while he searched around for partners to help fund his venture. Obtaining investments has been difficult. Finding the right contact in overseas companies is a challenge and the pitch is no easier. The device is designed to help Africans in rural, impoverished communities; something that not all companies see as a promising prospect, Mr. Zang says. That's why he intends to tap into a very modern financing model – crowd-funding on platforms such as Kickstarter, where users can donate funds to, or purchase shares in, fledgling firms.

For now, he is searching for more funding, hoping to build upon the CHF50,000 grant he received as a Rolex Award Young Laureate 2014. While funding issues have been a constraint, the pilot tablets he has been able to produce are now being tested in hospitals in Cameroon.

Mr. Zang's aim is to produce and sell his device for around 2,200 euros which is significantly cheaper than other commercially available, less portable devices. The hope is that hospitals purchasing the low-cost Cardiopad will be able to lower the price of medical examinations and speed-up medical diagnoses.

PATENTING THE CARDIOPAD

He also turned to the intellectual property (IP) system to help advance his work. In December 2011, he applied for a patent via the *Organisation Africaine de la Propriété Intellectuelle* (OAPI) in Yaounde [see box]. OAPI later granted him a patent (No. 16213) on his technology, covering some aspects of both the software and the hardware.

Obtaining a patent was an important step for Mr. Zang. "I did it to reassure myself," he said, "also to protect the product, and to have a lot more credibility in the eyes of, for example, partners with whom I wanted to sign contracts in order to be able to produce and then sell the product."

When funds permit, he also has plans to register the Cardiopad, and his company, Himore Medical, which currently produces the tablet, as trademarks.

About OAPI

OAPI (*Organisation Africaine de la Propriété Intellectuelle*) ensures the protection of IP rights in most French-speaking African countries.

It was created in 1977 by the Bangui Agreement to introduce a uniform IP law and to create a common industrial property office in Yaoundé, Cameroon. OAPI is composed of 17 member states: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Gabon, Guinea, Equatorial Guinea, Mali, Mauritania, Niger, Guinea Bissau, Senegal and Togo.

In each member state, OAPI serves as both the national IP office and the central agency for IP documentation and information. It also provides training and participates in IP policy development.

“The intellectual property system can help us in Africa – it can add credibility to African products. And credibility has repercussions on the business plan because if you aren’t credible, it’s difficult to sell your product,” says Mr. Zang.

DRIVING NEW DEVELOPMENTS

The budding entrepreneur is already in collaboration with other young Cameroonian engineers to develop a range of additional medical devices and technologies for rural areas. He points to what he views as a disconnect in the innovation environment in Cameroon: in the medical space, in particular, many of the creators and inventors are young like him – roughly half of Cameroon’s population is under the age of 18 – so they rarely suffer from the diseases that products like the Cardiopad are designed to address.

Further, with a rapidly urbanizing population, urban dwellers may all too easily overlook the specific needs of those living in remote rural areas. For Mr. Zang, innovation requires a flexible mindset, a deep understanding of an entire economic ecosystem and an ability to commercialize ideas.

“You can’t only have engineering ideas,” he says. “We have to go further, into researching the problems confronting Africans and then pursue research into solutions, subsidize the creation of companies, create business incubators that can help nurture projects, researchers, engineers and really help them move from the laboratory to the factory.”

PURSUING A DREAM

Ultimately, Mr. Zang’s dream is to continue working to “improve life conditions” by branching out into other areas of medical technology, envisioning specially adapted devices for echography and radiology.

In the Mbankomo clinic, the lack of these higher-end materials is evident. Surrounded by a tidy plot of well-brushed soil dotted with shade trees, the one-story clinic is austere. Patient consulting rooms are cooled by open windows, but little advanced machinery is on display. Mr. Zang says doctors at the facility are overwhelmed by the health needs of patients, which range from the mundane to the mortal. Connecting these clinics to better-resourced hospitals elsewhere via the mobile phone system is establishing a lifeline.

Mr. Zang hopes ultimately to manufacture the Cardiopad in Cameroon, and to help the country develop as a manufacturing center for lower-cost devices specifically tailored to low-resource environments and markets, like those in West Africa.

“This will help lower the cost of medical exams and the cost of good health across the regions, in the villages,” he says. “That’s it, that’s the dream that is smoldering in me.” ♦



Photo: © Edward Harris/WIPO



Photo: Mimore Medical

The Cardiopad, developed by 26-year-old Cameroonian engineer, Arthur Zang, promises to bring high quality cardiac care to remote rural communities. It is built to withstand the humid climate and rough terrain of outlying villages. Equipped with a battery, it can run independently for around six hours at full power.

THE AEREO DECISION: Exploring the implications

By **Lois F. Wasoff**,
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This article is based on the webinar *Copyright and the Aereo Decision* presented as part of the *Beyond the Book* series of the Copyright Clearance Center (CCC) on July 10, 2014, with Christopher Kenneally of CCC and Lois F. Wasoff. A podcast of the webinar is available at <http://beyondthebookcast.com/>.

Lois Wasoff's consulting and legal practice specializes in copyright, publishing and licensing issues.

The main antagonists in the case of *American Broadcasting Companies, Inc. v. Aereo, Inc.* (134 Sup.Ct. 2498 (June 25, 2014)) were, on one side, leading US television broadcasters and, on the other, a startup company delivering broadcast content to subscribers over the Internet. But interest in the outcome was not limited to the named parties. Many saw the dispute over whether Aereo had infringed the broadcasters' rights when it offered its service without permission or payment as the latest example of conflict between innovation and copyright. The US Supreme Court decision, announced in June, resolved the legal issue by finding that Aereo's activities were infringing. Whether that decision has broader implications for technology and innovation is a matter of discussion and debate.

AEREO'S BUSINESS MODEL

Aereo's service allowed subscribers paying a modest monthly fee to watch broadcast television programs virtually live on any Internet-connected device. The broadcast signal was captured and retransmitted using one of thousands of tiny antennae maintained by Aereo. When a subscriber signed on to watch a program, it was assigned a specific antenna for the duration of that session, and a separate copy of the program was made for that user.

This structure was not arbitrary. Nor was it a coincidence that Aereo's service was first offered in New York, which falls within the jurisdiction of the US appeals court for the Second Circuit. In 2008, the Second Circuit had decided the case of *Cartoon Network LP, LLLP v. CSC Holdings, Inc.* ("*Cablevision*") (536 F. 3d 121 (2008)) which involved a remote digital video recording (R-DVR) service offered by cable television provider *Cablevision*. After the Supreme Court's seminal 1984 decision in *Sony Corp. of America v. Universal City Studios, Inc.*, (464 US 417 (1984)), it was clear that *Cablevision*'s customers could have recorded television programs with set-top equipment in their homes without infringing copyright. The question was whether they could do essentially the same thing using remote equipment provided by *Cablevision*. The Second Circuit said they could, reasoning that the user was initiating the copying, there was a separate copy for each user, and the user's playback was not a public performance. Under US copyright law, the right



Photo: iStockphoto © meganarmy

to control public performance is a key exclusive right of the copyright holder (17 USC §106(4)). The private performance of a copyrighted work (e.g. a viewer watching a program in his or her own home) is not an infringement. Aereo wanted to put itself within the ambit of *Cablevision* and in the shoes of its subscribers to avoid making public performances that would implicate copyright. Hence the architecture of the system: one antenna, one copy, one user.

The reasoning of *Cablevision*, and in particular the court's reliance on the fact that the R-DVR service maintained separate, user-specific copies, helped remove some of the legal uncertainty around cloud-based Internet offerings like storage services for music, media, and documents. That is one of the reasons the *Aereo* case has attracted so much attention. The possibility that the US Supreme Court, in deciding the *Aereo* case, might overrule *Cablevision* or render a decision that undercut its reasoning was a matter of great concern to many parties.

AEREO RELIES ON LEGAL PRECEDENT

Aereo's reliance on *Cablevision* was, initially, well placed. Both the District Court in New York and the Second Circuit sided with *Aereo*, citing *Cablevision*. When the broadcasters appealed to the Supreme Court, *Aereo* joined in their request. *Aereo* had built its business around the legal theory that its retransmission of broadcast signals over the Internet did not implicate copyright, and it was willing to bet the company that the Supreme Court would agree with its position.

The Supreme Court held that *Aereo's* business model: one antenna, one copy, one user, was a gimmick to avoid paying royalties for delivering content.

THE SUPREME COURT DOES NOT AGREE

The majority of the Supreme Court did *not* agree with Aereo. Justice Stephen Breyer, writing for the six justices who voted to reverse the Second Circuit, put it this way: “We must decide whether respondent Aereo, Inc., infringes this exclusive [public performance] right by selling its subscribers a technologically complex service that allows them to watch television programs over the Internet at about the same time as the programs are broadcast over the air. We conclude that it does.” Justice Breyer parsed the questions presented, asking: is there a performance? If there’s a performance, is it a public performance? Does the fact that the users are watching separate copies matter? He concluded that Aereo was performing the protected works. Looking at the public performance issue, and reviewing the history of the “Transmit Clause” in US copyright law, he concluded that the fact that each user watched a user-specific copy of the work did not mean that the performances were private. He found that the “one user, one copy” model was essentially irrelevant and focused on the result, which is that thousands of individuals could potentially watch the same work at the same time. Importantly – and this has been a source of controversy since the case was decided – he found that Aereo’s activities were “highly similar” to the activities of cable television companies, which are covered by copyright and are the subject of a statutory compulsory license (17 USC §111).

Justice Antonin Scalia wrote for the three dissenting justices. Because the choices about what to watch and what to record were made entirely by the user, he saw Aereo as an automated service provider that was not itself performing the work. He was troubled by the majority opinion’s use of what he called a “looks-like-cable-TV” standard for imposing liability, and warned that this approach, at least in his view, could result in confusion about what rules would apply to future services.

But there was little support for Aereo or its business model in Justice Scalia’s dissent. He clearly shared the majority view that what Aereo was doing or enabling to be done “ought not to be allowed.” His disagreement was with the reasoning of the majority opinion, and he expressed frustration that the Supreme Court could only, as the case was presented, consider whether Aereo was directly (rather than secondarily) liable for infringement.

A GIMMICK TO AVOID PAYING ROYALTIES?

Another aspect common to the majority and dissenting opinions (and to the dissenting opinion written by Judge Denny Chin in the Second Circuit) was the view that the one antenna, one user, one copy structure was a gimmick designed to avoid paying

royalties for delivering content – in other words, to exploit a perceived “loophole” in the law. The difference between Justice Scalia’s approach and those of Justice Breyer and Judge Chin was that Justice Scalia felt that if Aereo had found a loophole in the copyright law, it was up to Congress, not the courts, to close it.

The Supreme Court was well aware that the *Aereo* case was being closely watched. The majority opinion explicitly stated that the Court intended to make a limited holding based on *Aereo*’s particular facts, and that it wasn’t opining on cloud storage services or R-DVR services. But Justice Scalia was skeptical, saying that he did not believe the court could deliver on that promise, given what he called the “imprecision of its result-driven rule.”

AN IMPORTANT SOURCE OF BROADCAST REVENUE IS PRESERVED

It is too early to say whether Justice Scalia’s concerns are well founded. In the short term, an important source of revenue for broadcasters (retransmission fees from cable companies) has been preserved. If the *Aereo* model were upheld, the cable companies that now pay retransmission fees would have had the option of changing, or threatening to change, their technology to emulate *Aereo*’s. Also, other “*Aereo*-like” services would undoubtedly have sprung up, which brings up longer-term implications. Online streaming is rapidly becoming an important means of distributing content. It is critical for owners and developers of broadcast content to establish and preserve their right to be compensated for the delivery of their works over the Internet.

Cablevision is barely mentioned in the majority opinion and it certainly is not expressly overruled. An argument could be, and is being, made that its reasoning has been undercut, but that view may fail to take into account some important differences in the facts underlying the two cases. Justice Breyer referred in the majority decision to the “prior relationship” or lack thereof between the user and the work. He emphasized that *Aereo*’s users had no such “prior relationship.” Unlike a cable subscriber using an R-DVR service or an Internet user storing copies of music and videos already on his or her hard drive in a cloud locker, the *Aereo* subscriber was not already, in Justice Breyer’s words, “an owner or a possessor” of a copy of the work. Note that Justice Breyer did not say the user had to be a licensee of the copyrighted work. Given his choice of words (“owner or possessor” instead of “owner or licensee”) it would be difficult to read the decision as intending to impose liability on cloud storage services for pirated works that are uploaded by users.

The “Transmit Clause” in US copyright law says that performing or displaying a work “publicly” includes transmission of the work “by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.” (17 USC §101).

Also, a key benefit Aereo offered to its subscribers was delivery of copyrighted content owned by others for which it was not paying. US courts have not generally been sympathetic to that business model. The value delivered by cloud storage services is additional storage space, unrelated to the nature of the content. The Aereo decision restates an underlying principle of copyright: copyright owners are entitled to be paid when their works are distributed within the exclusive rights that the law reserves to them. The fact that Aereo was not paying content providers, when others offering analogous services were, clearly bothered the majority and underlay the decision.

WILL THE DECISION HAVE AN IMPACT ON INNOVATION?

There has been concern expressed that the Aereo decision may interfere with innovation by creating legal uncertainty that will limit investment. Although Aereo’s investors may sustain significant losses, whether the decision may have an impact on innovation generally will not be clear until courts begin to consider its application in subsequent cases. And it is worth noting that Aereo’s “innovation” was apparently driven not by a desire to produce the most efficient and effective service, but by an attempt to design a system around a court opinion for the purpose of avoiding paying royalties. It may be reasonable to ask whether that is truly innovative, and whether there might be other places that society could invest its financial and intellectual capital.

Immediately after the decision, Aereo “paused” its service and began a public relations effort, encouraging its subscribers and supporters to contact Congress and seek changes in copyright law. More recently, Aereo has argued, to both the US Copyright Office and New York District Court that it is a cable television company and should be entitled to statutory licenses for cable retransmission of broadcast content. So far, neither of those efforts appears to be accomplishing Aereo’s goals, and its future remains uncertain.

Whatever ultimately happens to Aereo and the service that the Supreme Court has now declared infringing, the dispute between Aereo and the broadcasters does have larger implications. Copyright seemed simpler when the concept that separate legal regimes applied to the work itself and to the pages on which it was printed was theoretical. Now, works travel completely independently of tangible objects and can be received, viewed, used and copied in myriad ways. That creates an inherent tension, which in this case arose between those who would like to “cut the cord” connecting them to the content they want to watch and those who create and own that content. But if content that is of value to users requires investment to create, there has to be a mechanism for compensating creators and the entities that fund their work. Not all works require investment, and not everyone who is distributing copyrighted work cares about getting a financial return. Ideally, the law should accommodate all of those different circumstances. Hopefully the Aereo decision, which may now be frustrating for some and comforting for others, will turn out to be a step on the road toward achieving an appropriate balance. ♦

COPYRIGHT:

No time to monkey around

Adapted from *Ape selfies and the law of copyright* first published at *ft.com*, August 7, 2014

By **David Allen Green**,
Solicitor, Preiskel & Co LLP,
and legal commentator for *ft.com*,
London, United Kingdom

Sometimes a news story emerges which goes to the very basics of the law of copyright. And, in an amusing context, the following question has been raised in the media: who owns the copyright in a photograph taken by an ape? This somewhat odd question came about following a recent decision by Wikimedia in relation to the following scenario. Wikimedia explained:

"A photographer left his camera unattended in a national park in North Sulawesi, Indonesia.

A female crested black macaque monkey got hold of the camera and took a series of pictures, including some self-portraits.

The pictures were featured in an online newspaper article and eventually posted to Commons.

We received a takedown request from the photographer, claiming that he owned the copyright to the photographs.

We didn't agree, so we denied the request."

The "photographer" was reportedly upset at this decision: "It makes me very angry, I'm a professional photographer – it cost me over £2,000 to do the trip. It's my livelihood."

So why would a photographer not own the copyright in such a picture? And who, if anyone, would own the photograph? Under UK law the position is complicated, and is revealing about the importance of human creativity in the field of copyright.

First, we have to assume that the picture has not been cropped or modified before it is published. If it had been, which according to the photographer is the case in this instance, the person who did the cropping or modification could rightly claim some intellectual property rights in the work.

The next point to make is that, in the UK, copyright is a property right. But apes and other non-human animals cannot own property under the law. This may be unfair to the poor primate, but only natural persons (or "legal" persons such as corporations) can own property. This means the copyright owner is never going to be the ape.

Under UK legislation, the copyright in a photograph first belongs to "the person who creates the work". The key is the act of "creation" – a person creates something which would not have existed but for that act of creation. With photographs, this is fairly easy to work out: it is the person with the camera taking the photograph (even if that camera belongs to someone else).

However, the photographer does not have to be physically present: a wildlife photographer may set up a trip-wire or other sensor so that animals may be photographed whilst the photographer is far away. This would still involve the "creativity" of the photographer, who would be showing as much "sweat of the brow" as if actually taking the picture.

But when the picture is not part of some human's creative endeavor then there may not be any meaningful "creation" of a work. There may not even be any "work" at all, for the purpose of copyright law. As I noted in a recent article in the *Financial Times* (<http://blogs.ft.com/david-allen-green/2014/08/07/ape-selfies-and-the-law-of-copyright/>):

"It would perhaps be as if a stray cat had rubbed paint on a canvas or a wild dog had chewed loudly at the strings of a Stradivarius: the result may be something which, if it were created by a human, could qualify to be a work under the law of copyright; but because it was done by a beast, it may not even be a "work". The incidental use of a human tool is legally irrelevant."

On this basis, a photograph taken by an ape would not be an artistic work for the purpose of copyright law, just as the sound of that very same camera being smashed repeatedly by the ape on a rock would not be a musical work.

And so, the ape may well create a beautiful photograph; but however talented the ape, it is never going to create a work protected by the law of copyright under UK law. ♦



This image, is at the heart of a copyright row between UK photographer David Slater and Wikimedia Commons. It raises some basic issues relating to the law of copyright.



International copyright law: The Berne Convention

Copyright, like other intellectual property rights, is territorial in nature meaning that there are differences in the copyright laws of individual countries. However, various international agreements, including the Berne Convention for the Protection of Literary and Artistic Works, concluded in 1883 and last revised in 1971, mean that there is a certain coherence in copyright law from one country to another.

The Berne Convention sets minimum standards of international protection in relation to, for example, the types of works protected, the duration of protection and the scope of limitations and exceptions. It establishes the principle of “national treatment” whereby works emerging from one signatory country are protected in the same way as the works of nationals in other signatory countries. It also upholds the principle of “automatic protection” whereby copyright exists as soon as a work is fixed in some tangible way (e.g. written or recorded) without any formal requirement to register it, although some national laws allow for the voluntary registration of works.

The original creators of works protected by copyright, and their heirs, have certain basic rights. They hold the exclusive right to use or authorize others to use the work on agreed terms. The creator of a work can prohibit or authorize:

- its reproduction in various forms, such as printed publication or sound recording;
- its public performance, as in a play or musical work;
- its recording;
- its broadcast (by radio, cable or satellite);
- its translation into other languages or its adaptation.

Under the Berne Convention, these economic rights are limited to a minimum of 50 years after the creator’s death. National laws may establish longer time-limits. Copyright protection also includes moral rights which involve the right to claim authorship of a work and the right to oppose changes to it that could harm the creator’s reputation.

The Berne Convention does not define the term “author” or the choice of law to determine the initial owner of rights. However, references to “the author” in the Convention relate to a physical person who is the intellectual creator of a work.

Some national copyright laws also recognize the authorship of legal entities – such as employers, producers, etc. – who take the initiative to create and the responsibility for creating a work and who, (in general, by determining the objectives and features of the work to be created) also have an impact (direct or indirect) on its nature, style and comments.



Photo: © David J. Slater, 2014

UK wildlife photographer David Slater
on location in Sulawesi, Indonesia.



JEAN MICHEL JARRE on culture, creators and the tech industry

*By Catherine Jewell,
Communications Division, WIPO*



Jean Michel Jarre, in concert in Santiago de Compostela in Spain during his "2010" Tour.

“We need to send a clear message to the street that intellectual property is not just important for artists, it affects every single family with a son, a daughter, a brother or a sister dreaming of becoming a writer, a photographer, a musician, a film maker.”

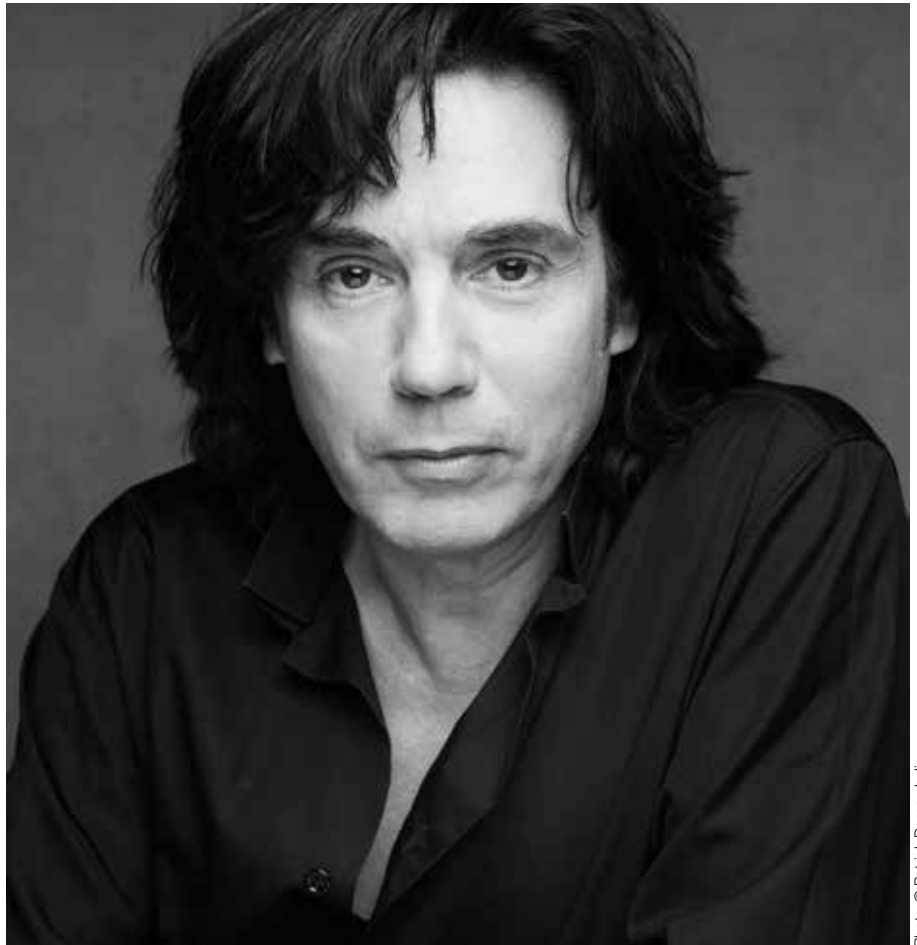


Photo: © Patrick Demarchelier

The digital revolution has radically transformed the creative industries, offering many new ways to tap into the cultural scene and reach global audiences. As consumers, we enjoy access to an ever-expanding choice of music, we can engage directly with our favorite artist through social media sites, and as music streaming and subscription services become mainstream, and the number of online recommendation services grows, we enjoy unprecedented opportunities for discovering new music. While this is good news for industry and consumers, what does it all mean for creators? According to a recent report by the International Confederation of Authors and Composers Societies (CISAC), worldwide royalty collections rose to a record high of 7.8 billion euros in 2012, but digital revenues, which amounted to 301 million euros that year, still only represent 4 percent of overall global collections. This suggests that creators are not getting a fair share of the digital market. Electronic music pioneer and champion of creators' rights, Jean Michel Jarre, President of CISAC, believes artists need a new deal; one in which creators are on a more equal footing with the tech giants – the hardware manufacturers and the content carriers – whose ingenuity is fuelling the expansion of the online world. The musician shares his views about the importance of intellectual property (IP) and the need for the tech industry and creators to work together for mutual benefit to foster sustainable cultural development.

Despite the positive dynamics currently witnessed in the music industry, the threat of online piracy is ever present; something Jean Michel Jarre believes calls for a redoubling of efforts to improve the public's understanding and awareness of IP. "We need to send a clear message to the street that intellectual property is not just important for artists, it affects every single family with a son, a daughter, a brother or a sister dreaming of becoming a writer, a photographer, a musician, a film maker."

CREATORS ARE IMPORTANT FOR OUR FUTURE

"If we don't respect the rights of creators and give appropriate value to their work" he said "books will not be written and films and music will not be made". "We will miss opportunities for future masterpieces... we need the next Fellini, the next Beethoven and the next Garcia Marquez."

"It's far beyond a few artists sitting on their pot of gold trying to keep their advantages," he continued, noting the broader social and economic benefits that can flow from robust IP rights. "We have to recognize that creators are a very important part of our future. Creation and all art forms make up the soul and the identity of a country, there is no sustainable development if there is no sustainable economy for creation."

Underlining the vital economic contribution of creators, he said, "millions of jobs are created by artists all over the world. We forget they create lots of employment." Stressing that creators play an integral part in a nation's social, economic and cultural development, he noted, "we need to stop considering that music is like wallpaper" and "have to work together to define a sustainable economy for our culture."

COPYRIGHT'S FUNDAMENTAL IMPORTANCE

While, in some circles, the whole idea of copyright and the need to finance creation is being questioned, the artist observed that many emerging countries, including China, are recognizing copyright "not only as a stimulant for economic growth but also as the best way to export their culture and to reinforce their identity."

Despite the huge opportunities created by the Internet in terms of accessing content, and the increasing appetite for free content, Mr. Jarre underlined the importance of finding ways for creators to be able to earn a living from their work. "Free access is one thing, but the economy of that free access is something else," he explained. Drawing a parallel with existing arrangements with radio broadcasters, he noted, "when you listen to the radio, you listen to music for free, it's not illegal, and artists get paid because the rights have been paid on top by the radio station, by the network. We should recognize now that everybody – and especially those commercial entities whose business it is to carry creative content – should pay."

Underlining the fundamental importance of copyright, he countered the argument that copyright and authors' rights are

“Protect, invent, transmit – the future of culture depends on authors’ rights.”

Antón Patiño – painter – Spain.

“Authors’ rights are the salary of the creator”

Monné Bou – visual artist – Ivory Coast

“Authors’ rights are really about respect.”

Baz Luhrmann – film director – Australia

Jean Michel Jarre's high-tech, futuristic, open-air concert in Monaco in 2011 was broadcast internationally attracting a huge following.

barriers to education. "It's exactly the reverse," he said. "You can have access to education only if you have books. To have books you need a system that rewards authors and encourages them to write these books. It's totally naïve to think that free access will solve education challenges. It's the exact opposite. Free access would discourage the creation of education materials. This idea that we are all brothers and sisters and should exchange everything for free is a fallacy. Nothing is ever free and if it is, it will always favor the richest."

A NEW DEAL FOR CREATORS

Mr. Jarre believes creators and artists need to engage with content carriers to carve out a new deal for themselves in the ever-expanding digital economy. This, he claims is the only way to safeguard their long-term interests and to secure sustainable cultural development.

He believes the time is now ripe to sit down with telecoms companies, hardware manufacturers and digital content distributors to work out a balanced and reasonable business model that works for creators. "They need us as much as we need them," he noted, highlighting the fact that artists are, in fact, in a much stronger negotiating position than they think. It is their work that is contributing to the economic success and power of high-tech giants who themselves face challenges arising from the shifting sands of the market and public opinion.

"The people making the most money from what we create are not consumers but the people carrying our content. They are not paying what they should pay. Our content makes their fortunes and gives them their power. It's like a company not paying its shareholders." Artists, he said, should be treated as equal partners and remunerated as such. "We are not talking about a tax or a contribution – we are not beggars – we are business partners with Google, Facebook, with all these other businesses that make fortunes from providing access to our content. At the end of the day, it's quite simple, the money is somewhere and there are people deserving this money, so we have to sit around a table and find a solution, and we'll find it."

"We have to create a new business model for the new media and the new distribution networks," he said. "We need to stop considering the big actors of the Internet as our enemies. These guys didn't exist 20 years ago, they were kids who created great

concepts that became so big, so fast, they didn't have time to realize the potential collateral damage they were creating. They are friends of creators much more than we think."

As President of CISAC, Mr. Jarre is committed to promoting authors' rights around the world. Although musicians regularly take up political and social causes, they have been noticeably silent in fighting their own corner. "This is why our sector is so vulnerable. Creators are full of doubts and uncertainty. The most difficult thing for an artist is to evaluate his or her work. When it comes to finance or business, it's very difficult for creators to defend themselves and to speak out."

Despite the challenges relating to changing public perceptions about the importance of IP and creating a 21st century business model that works for creators, Mr. Jarre is upbeat about the future. "The creative sector is far stronger than artists themselves think. Artists and creators existed before electricity and they will exist long after the Internet."

"My goal is to make both creators and citizens, ambassadors of intellectual property." While at first sight this seems a daunting task, Jean Michel Jarre is optimistic about his chances of success. "How many people say they would have loved to be a musician, a film maker or a writer but some social or economic reason prevented them from doing so? We have to improve this, we have to encourage people to create and we have to establish the conditions that promise creative people a reward for their creativity in the digital world. We are in the 21st century and need to get this right," he said. "As musicians we know how to make a noise, so let's do it!" ♦

Rendez-Vous Houston: A City in Concert, a live performance in 2012, by Jean Michel Jarre entered the *Guinness Book of Records* as the largest outdoor rock concert in history.



Photo: © Jarre Management - Aero Productions

START-UP CHILE

By *Maximiliano Santa Cruz S.*,
National Director, National Institute of
Industrial Property, *Eduardo Bitrán C.*,
Executive Vice-President, and
Inti Núñez U., Entrepreneurship Manager,
CORFO, Chile



Photo: iStockphoto © Hans Laubel

In a bid to transform Chile into a hub for innovation in Latin America, the Chilean government launched the Start-Up Chile program in 2010. This ambitious initiative, a first in global innovation policy, has attracted considerable global attention. The initial aim of the program – its focus has since broadened – was to attract young entrepreneurial talent from around the world to Chile to catalyze the development of home-grown, high-growth start-ups; this with a view to strengthening Chile's long-term economic growth prospects. Rolled out under the direction of CORFO, Chile's development agency, this novel business accelerator program, now in its fourth year, is being restructured to increase its economic impact on the national economy and to strengthen the country's entrepreneurship culture and its innovation ecosystem.

Under the pilot scheme, successful applicants were offered US\$40,000 in seed capital, a work visa and office space to launch their companies. The only requirement: spend 6 months working in Chile to establish their companies (there was no requirement for the start-up to begin activities in Chile) and engage in innovation

and entrepreneurship outreach efforts with students and local businesses. The response was overwhelming. Competitions to select suitable candidates were held three times a year, attracting over 5,000 applications from which over 240 projects were selected each year.

To qualify, applicants could submit either early-stage ideas without prototypes or projects that were less than two years old. A key criterion for selection, however, was the scalability of the proposed business models.

In a move to boost the development of Chilean start-ups, the program, which initially targeted foreign applicants, is now open to Chilean entrepreneurs. In the last round of applications, 35 percent of applicants were Chilean, 30 percent of which were admitted to the program. The program's emphasis has also shifted away from spawning high-growth, billion dollar companies, towards the broader goal of fostering a country-wide pro-innovation entrepreneurial culture. In just four years, Start-Up Chile has emerged as one of the most respected publicly-run business incubators in Latin America.

INITIAL ACHIEVEMENTS

In addition to attracting high-caliber foreign entrepreneurial talent to Chile, the program has established a credible, transparent and efficient process for connecting the country's start-ups with world-class innovation and entrepreneurship ecosystems.

Chile has also acquired international recognition as a country willing to develop a forward-looking policy approach to innovation and entrepreneurship. The program has put Chile on the map as a favorable place for business, inspiring similar programs in many other countries.

A 2013 survey of Start-Up Chile grantees during the period 2010 to 2012 showed that around 83 percent of Chilean entrepreneurs started their activities in Chile. Just 10 percent of Chilean grantees started their businesses outside Chile. The majority of projects run by foreigners (59 percent of the total), however, were operating outside Chile (only 24 percent of foreign grantees started their businesses in Chile), suggesting that many foreign grantees saw the program as a means of securing seed capital without having to give up any equity to third parties. It also suggests that these projects found networks, markets and opportunities for raising a second round of equity funding more accessible outside Chile.

Origin of the participants selected to participate in Start-Up Chile

Entrepreneur's region of origin	Started activities in Chile	Started activities outside Chile	No response	Total	Percentage of companies starting activities in Chile
Chile	71	9	6	86	83%
Other countries	78	190	53	321	24%
South America	20	38	8	66	30%
North America	28	66	26	120	23%
Europe	18	48	12	78	23%
Other (Oceania, Asia, Africa)	10	34	4	48	21%
No indication of origin	2	4	3	9	22%
Total	149	199	59	407	37%

EQUITY FUNDING, EMPLOYMENT AND SALES

Weaknesses in Chile's venture capital sector became all too clear in rolling out the project. Projects initiated in Chile attracted just US\$26 million in equity funding, whereas those starting operations abroad raised, US\$72 million – more than twice as much. However, in terms of the average amount of capital raised by individual companies, the survey showed that many more Chile-based start-ups raised capital than those with operations outside the country. Of the 149 companies in Chile, 96 raised on average US\$270,000 each; while of the 199 based outside Chile, just 86 raised additional funding (on average US\$840,000 each). Many of the start-ups raising equity outside Chile had access to early-stage risk capital, while those in Chile relied on State or other funding. Only exceptionally were Chile-based start-ups able to obtain venture capital.

In terms of employment creation, a significant number of Chile-based start-ups hired an average of 6 workers. Many of the start-ups operating outside Chile, however, also retained staff (2.9 workers on average) in Chile for programming and support activities, taking advantage of wage cost differentials.

Of the 149 Chile-based start-ups 96 (65 percent) had average annual sales of US\$119,000 although only 49 percent of them had clients outside Chile. The pace of business development as a function of where start-ups are established will make for interesting future analysis.

ICTs STAND OUT

Although Start-Up Chile favored no one business sector, over 80 percent of funded projects related to information and communications technologies (ICTs). This, however, may well have resulted from the online application process, the resources available under the program and the way in which it was promoted.

PROGRAM'S SUSTAINABILITY QUESTIONED

Despite its significant achievements, some have questioned the long-term sustainability of the program. Measured against similar, earlier initiatives, Start-Up Chile may appear to fall short in terms of its benefits to the Chilean economy. For example, only 37 percent of Start-Up Chile participants between 2010 and 2012 began activities in Chile, compared to CORFO's Seed Capital Program (which provides up to US\$120,000 in seed capital to selected ventures) where around 94 percent of funded companies began activities in Chile (according to a survey covering 2008 to 2012). Data, although incomplete, also suggest that business survival rates under the Seed Capital Program are more than twice those of the Start-Up Chile program. However, after factoring in the differences in the programs (and the bigger grants and higher administration costs of the Seed Capital Program), it is not at all clear that the impact of the Seed Capital Program (in terms of employment, investment and company formation) is so much greater than that of Start-Up Chile.

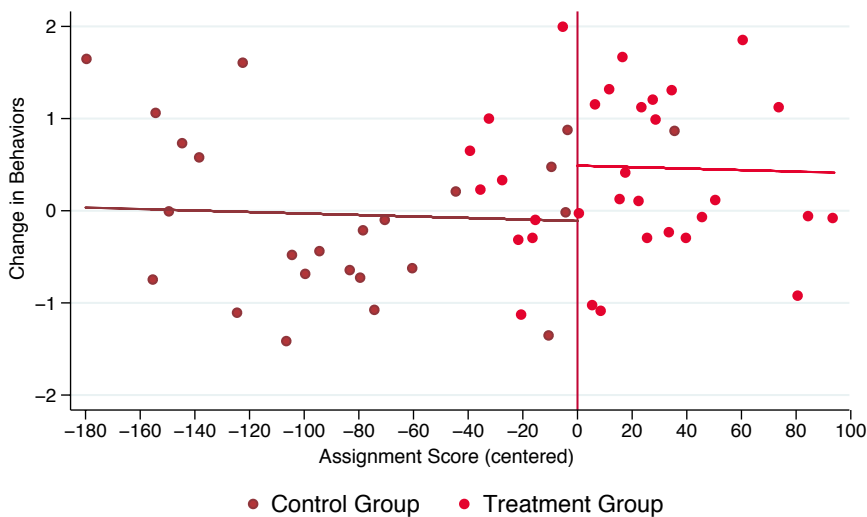
Interestingly, under the Seed Capital Program, only 16 percent of grant beneficiaries operated in the ICT sector, compared to around 54 percent under the Start-Up Chile program. In the digital economy, traditional economic metrics do not fully capture the positive impact of Start-Up Chile, in particular, its ability to foster global relationships in the area of innovation and entrepreneurship. Participants in Start-Up Chile effectively join a global network of forward-looking entrepreneurs and benefit from rapid and easy access to valuable resources, including mentors and investors, creating significant opportunities for entrepreneurial and innovative talent to grow.

CATALYZING INNOVATION IN CHILE

The introduction of high-caliber, well-connected foreign entrepreneurs is also catalyzing innovation and entrepreneurship within Chile. When foreign entrepreneurs interact with their local counterparts, albeit for short periods, business practices and skills and understanding of product development and commercialization are strengthened.

Effect on entrepreneurial skills of Chilean participants in Start-Up Chile

Treatment Effect of Start-Up Chile Over Opportunity Discovery Behaviors



Reference: Leatherbee & Easley, 2014. Boulevard of Broken Behaviors: Socio-Psychological Mechanisms of Entrepreneurship Policies.

A recent change in Government, however, has prompted a re-think of the program's place in the country's economic growth agenda. Now that the program is well established and has acquired international reknown, how can it be improved to support national development goals?

START-UP CHILE MARK II

In restructuring the program, the aim is to translate the investment, prestige and quality of the talent cultivated by Start-Up Chile into tangible national economic growth by encouraging more rapid rates of company formation and expansion to boost sales, income and job creation in Chile. Particular attention will be paid to improving access to business finance and to strengthening intellectual property (IP) awareness so start-ups can more easily scale up their operations in Chile.

Previously, after the required six-month stay in Chile, many foreign-run start-ups moved back to their home countries. Under new arrangements, funding will be more rigorously structured and geared towards encouraging start-ups to continue their activities in Chile. In addition to seed capital of US\$40,000, which will now be disbursed in two phases to ensure the commitment of participants, projects that demonstrate high growth potential can also apply for a non-refundable grant of US\$120,000. Thereafter, innovation and technology projects which raise funds in Chile will be eligible for up to 50 percent of their equity funding under a specialized Early Investment Fund to be set up in late 2014.

Another priority will be to link participants into more sophisticated and complex industrial networks so they gain first-hand experience of tackling industry challenges.

A NEW IP FOCUS

Corfo and INAPI are working together to ensure that Start-Up Chile applicants and grantees are familiar with how IP can create business value. IP training programs covering all aspects of the IP system – from trademarks, patents and utility models to trade secrets and copyright – will be available. Practical workshops on, for example, the advantages of using public databases, such as WIPO’s Patentscope, to enhance product development and quality; patent drafting and IP licensing; and various IP evaluation tools (such as those available under *INAPI-Proyecta*) to support effective IP management will also be offered. The aim is to ensure that all participants know how to use the IP system to protect their valuable IP and can develop an effective business strategy that will enable them to generate, protect and transfer their IP within Chile and abroad. Other areas of focus include creating opportunities for Chilean entrepreneurs to enter into joint ventures with counterparts in Latin American and beyond; identifying global challenges to attract talent to

different regions of the country to foster links between start-ups and industry; and encouraging the repatriation of Chilean talent educated abroad.

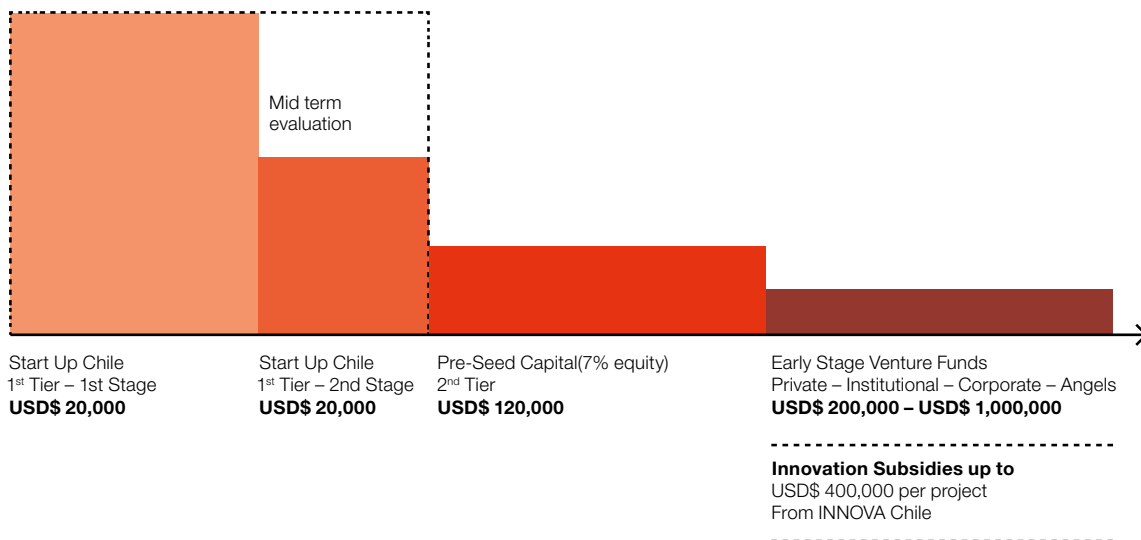
With these measures, we anticipate that within three years, Chile will have at least three innovation hubs operating. While global in scope, these hubs will address local problems, provide high-quality employment and further catalyze a culture of innovation. Since its inception, Start-Up Chile has disrupted the national innovation and business landscape, introducing fresh, new ideas and enabling local entrepreneurs to gain access to global innovation and business networks. While some business circles have questioned its future, Start-Up Chile is thriving and now lies at the heart of the country’s innovation strategy. As such, it will continue to shape the future evolution of entrepreneurship and innovation in Chile and enhance the economic prospects of a country that remains overly dependent on its natural resources. ♦

Restructuring the Start-Up Chile Program, 2014.

START UP CHILE
Growth Plan / 2014 – 2018

- + Impact in Chile (income, jobs)
- + Supporting improvements in local ecosystem
- + Bridge for new technologies

Start Up Chile Program



Dream Shield: COMMUNICATING IP to indigenous business

By *Patricia Kelly*,
Director General, IP Australia



Photo: © IP Australia

Creating intellectual property (IP) from traditional knowledge involves a number of complex legal and cultural issues. To show how effective management of IP can help protect the brands, designs and inventions of the businesses run by Aboriginal and Torres Strait Islander people, IP Australia has developed a suite of culturally-relevant materials known as *Nanga Mai Arung*, which roughly translates to “Dream Shield”. Chosen with the help of Allan Madden, elder of the Gadical People, Dream Shield is a metaphor for the way in which IP rights can act as a shield.

Indigenous Australians operate in many fields that generate valuable IP, from conventional fields such as construction, retail, tourism, graphic design and professional services to cultural businesses like eco-tourism, bush foods and creative arts. Dream Shield seeks to encourage indigenous entrepreneurs to consider what makes their business special, and to make informed decisions about protecting it.

ESTABLISHING DREAM SHIELD

In 2009, IP Australia established an Indigenous Expert Panel to improve understanding of how indigenous business owners viewed and understood the IP system.

We learnt that while existing IP messages are generally applicable to the indigenous business community, we could do more to adapt them to this audience. Census data tells us there are between 3,300 and 6,000 indigenous businesses across Australia with a large proportion of them located in remote regions.

IP Australia began working with an indigenous design company to create a series of video materials on patents, trademarks, designs and aspects of traditional knowledge.

Alison Page, a well-known indigenous spokesperson and designer, narrated each case study and became the public face of Dream Shield, enabling us to reach out and engage with our target audience.

ADAPTING IP MESSAGES TO THE INDIGENOUS BUSINESS COMMUNITY

Understanding how to use the IP system can help indigenous businesses protect unique features of their work and gain a commercial advantage. IP exists in most indigenous businesses, particularly those operating in creative industries. For many, it might be their brand, or perhaps a unique way of producing something, or an innovative jewelry design.

“Dream Shield has been a rewarding initiative allowing us to partner with indigenous communities and communicate the value of IP to their businesses,” explains Patricia Kelly, Director General of IP Australia (above).





Photo: © IP Australia

Examples of the luxury, ready-to-wear clothing line developed by Melbourne-based fashion designer Roopa Pemmajaru in collaboration with Warkurlanga artists.

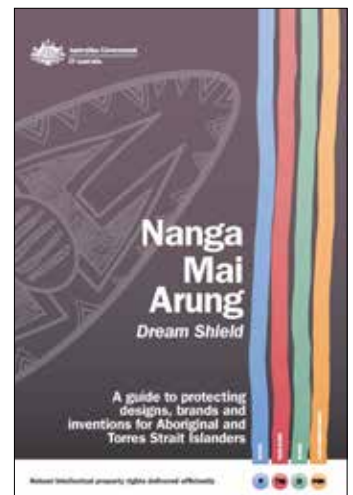
Without formally protecting or registering their IP, indigenous businesses, like other enterprises, are vulnerable to infringement and can have a hard time defending their interests and enforcing their rights. In addition, potential investors are less likely to support commercialization without ownership of formal IP rights. We know from our customer data that as IP applicants, Aboriginal and Torres Strait Islander people are under-represented. That's why Dream Shield is so important.

IP Australia has partnered with government and indigenous organizations to help communicate its messages about the relevance of IP to indigenous business. The indigenous business association Indigenous Business Australia (IBA), for example, includes Dream Shield in its nationwide "Into Business" workshops for aspiring entrepreneurs. This helps ensure that important IP information reaches indigenous businesses in remote parts of Australia.

Since the launch of Dream Shield, there has been increasing interest in including information about copyright and moral rights in the information campaign. As IP Australia is not responsible for copyright, we worked closely with the Australian Attorney General's Department to include a copyright case study within the Dream Shield materials.

WARLUKURLANGU ARTISTS

In 2014, as part of NAIDOC week (National Aborigines and Islanders Day Observance Committee), IP Australia released a new case study featuring the Warlukurlangu artists from Yuendumu, a remote indigenous settlement in the Northern Territory about 300 kilometers from Alice Springs. NAIDOC Week is a time to celebrate Aboriginal and Torres Strait Islander cultures and an opportunity to recognise the contributions that indigenous Australians make to our country and our society.



IP Australia's culturally-relevant Dream Shield materials are designed to show how effective management of IP can help protect brands, designs and inventions of businesses run by Aboriginal and Torres Strait Islander people.



Curtis Jampijinpa Fry (below), a Warlukurlangu artist from Yuendumu, a remote indigenous settlement in Australia's Northern Territory, proudly displays his Emu dreaming. He and his fellow artists are generating income by licensing their colorful works to trusted partners.

Photo: © IP Australia



Photo: © IP Australia



The Warlukurlangu artists have a fascinating story. Doing business in such a remote location is no easy task, but thanks to an effective use of their IP, local Aboriginal artists associated with the local Arts Centre are making a living from their creativity. The artists, with the help of Cecilia Alfonso who manages the Centre, are leveraging their IP through licensing agreements with manufacturers and designers of goods including clothing, iPhone covers, crockery, bags, cushion covers, rugs, jewelry, ties and many other items. The community's vibrant artwork speaks to people across the globe.

Roopa Pemmaraju, a Melbourne-based fashion designer, is one of several official licensees. Her luxury ready-to-wear clothing line is sold in department stores in Sydney, Brisbane and Melbourne.

Roopa's designs are developed in collaboration with the artists. Each piece celebrates both the vibrant colors of Australia's landscape and the stories they inspire. "Royalties from the sale of each garment make a positive contribution to the lives and wellbeing of artists, communities and the environment," Roopa notes.

The Warlukurlangu Artists have built a successful business by taking their IP seriously. Copyright is rarely sold. In general, licensing arrangements with trusted partners generate a better return for the artists, both in terms of income and opportunities for marketing and distribution. Licensing also supports the moral rights of artists, including the right to attribution. Each artist is acknowledged on labels of authenticity, which also adds to the consumer experience.

Consumers of these goods want authentic and sustainable products that support artists and their communities. It's great to see our IP system helping to make this a reality.

As part of this evolution of Dream Shield, IP Australia has partnered with the National Museum of Australia to incorporate a series of Indigenous IP master-classes in a travelling exhibition, designed to support Indigenous businesses within the creative industries sector.

Warakurna is an exhibition of contemporary paintings and sculptures that documents a new art movement emerging from the Western Desert community of Warakurna. The exhibition was on show at the National Museum of Australia in Canberra from 2013 and is travelling to seven regional sites and capital cities in the Northern Territory, South Australia and Western Australia throughout 2014 and 2015.

Dream Shield has been a rewarding initiative allowing us to partner with indigenous communities and communicate the value of IP to protect their businesses and ideas.

Further information about Dream Shield materials is available on the IP Australia website (www.ipaustralia.gov.au/). ♦

BRANDED HASHTAGS: The next big thing?



Photo: © Birds Eye

Merriam-Webster announced on May 19, 2014, in a press release that it was adding the word “hashtag” to the dictionary. “Hashtag” is defined as:

“a word or phrase preceded by the symbol # that classifies or categorizes the accompanying text (such as a tweet).”

Conveniently, the press release provides an example of proper hashtag usage: “Join the New Words conversation on Twitter using hashtag #MW2014NewWords.”

The hashtag phenomenon has created new branding opportunities. It is now common for TV shows to promote themselves through branded hashtags. Singing shows like NBC’s *The Voice* and Fox’s *American Idol* are known for their extensive use of hashtags. Consumer product companies are also getting in on the act. Frozen food maker Birds Eye recently launched a pop-up restaurant that allows customers to pay for their meals by posting photos of their meals on Instagram with the hashtag #BirdsEyeInspirations. Thanks to Birds Eye, you can also literally eat hashtags with its Mashtags fried potato snacks.

The increased usage of hashtags has led to a number of new trademark application filings. #RISETOTHRIIVE, and #HELMETSARECOOL are recent examples. One particularly enterprising applicant even tried to obtain trademark protection in the US for the word “hashtag” in connection with TV advertising; various electronic transmission and broadcasting services; and entertainment services such as development, distribution and production of programs, contest and incentive award programs for people who contribute to shows and other interactive entertainment programs. The United States Patent and Trademark Office (USPTO) rejected the application on the grounds that it was merely descriptive of the applicant’s services “because it immediately tells consumers that the interactive nature of these services involves the use of hashtags, as that term is widely used by others in the industry.” In hashtag parlance, the application was a #fail.

The popularity of hashtags shows no signs of letting up. Therefore, it is important for brand owners to consider the use of hashtags in their branding strategies. If the decision is made to use branded hashtags, then it would be wise to seek trademark protection to effectively protect your reputation and prevent consumer confusion. Otherwise, you might find yourself #notwinning. ♦

By **Randy Michels**, Partner,
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and co-founder of the Trademarkology blog



The hashtag phenomenon is creating new branding opportunities. Thanks to Birds Eye, you can also literally eat hashtags with its Mashtags fried potato snacks.

CHINA'S NEW TRADEMARK LAW

By **Mr. ZHANG Mao**, Minister, State Administration for Industry and Commerce (SAIC), People's Republic of China



Photo: SAIC

Minister Zhang Mao (above). China's new trademark law which took effect in May 2014 seeks to protect the rights of brand owners and consumers and to maintain competitive and fair market conditions.

Establishing the conditions for innovation and creativity to thrive and improving China's intellectual property (IP) system are top priorities for the Chinese Government in its process of *reform and opening up*. The newly amended *Trademark Law of the People's Republic of China*, which took effect on May 1, 2014, is the latest major step in enhancing the country's IP system. The new trademark law streamlines trademark registration procedures and strengthens the legal protection of trademarks in China in line with international standards. It also promises to generate significant economic and social benefits for the country and to support the growth of the global economy and trade.

Since the adoption of its policy of reform and opening up, the Chinese Government has been paying increasing attention to the importance and role that IP plays in socioeconomic development and consistently working to improve the country's IP system. IP is a strategic national resource for the development of innovation and a core element in determining a country's ability to compete in international markets.

Since its promulgation in 1982, there have been two amendments to the trademark law – in 1993 and 2001 – in line with the evolution of China's market economy and the internationalization of economic growth. This ongoing strengthening of the legal framework for protecting trademarks in China is aimed at protecting the legitimate rights and interests of trademark owners and consumers and to maintaining competitive and fair market conditions.

The promulgation and implementation in 2008 of China's national IP strategy provided a good policy and legal basis for the further development of the country's trademark system.

A TRADEMARK POWERHOUSE

Over the years, China has seen marked improvement in the registration, use, protection, and management of trademarks, which are now playing an increasingly important role in promoting business growth and economic development. But in recent years, China has emerged as a true trademark power. The country's trademark office processes the largest number of trademark applications in the world. By the end of 2013, China had recorded a cumulative total of 13.24 million trademark applications and 8.65 million registrations, of which 7.24 million remain in force.



Photo: SAIC

China's trademark office processes the largest number of trademark applications in the world. By the end of 2013, China had recorded a cumulative total of 13.24 million trademark applications and 8.65 million registrations.

In 2013, China was the seventh largest user of the Madrid System for the International Registration of Marks with a record 2,359 applications (one mark covering multiple classes) filed by Chinese applicants. This represented an increase of 8.3 percent over the previous year, bringing the cumulative total number of registrations to 17,000. In the same year, 20,275 international trademark applications (covering multiple classes) designating China were received by the Chinese Trademark Office bringing the cumulative total number of applications designating China to 196,000. For the eighth year running, China was the most designated country member of the Madrid System.

Against a backdrop of increasing economic globalization and the internationalization of China's market economy, it became clear that the trademark law as amended in 2001 required updating to keep pace with the country's on-going comprehensive process of reform and opening up. The new third amendment of the trademark law adopted in May 2014, introduces significant improvements to China's trademark system. Its overriding objectives are to:

- streamline procedures associated with acquiring trademark rights;
- ensure a fair market for trademark holders; and
- clamp down on trademark infringements with a view to protecting the interests of consumers, producers and other business operators.

In order to improve the management and administration of China's trademark system, the amendments to the new law include, but are not limited to, measures that simplify trademark application and examination procedures, providing applicants with more user-friendly and efficient trademark registration services. Other amendments seek to improve the trademark opposition system, set time limits for the review and adjudication of trademarks; allow for sound marks to be registered; enable electronic filing of applications, and establish procedures for the efficient processing of "multi-class applications" and the communication of review opinions.

In terms of the registration, use and representation of trademarks to ensure fair competition and market order, the law clarifies the system for protecting well-known marks, and adds provisions on the principles of honesty and integrity. It explicitly prohibits trademark hijacking, reinforces guidance and protection of trademark use, and tightens the regulation of trademark agents.

With a view to strengthening the legitimate rights and interests of trademark holders, the law identifies additional types of legally liable trademark infringement, provides for heavier and more stringent penalties and punitive damages where infringement occurs and reduces the burden of proof on trademark holders.

By providing more user-friendly and efficient government services for trademark applicants, and by establishing a fairer and more just legal environment, the Government is seeking to encourage and support independent innovation, help make China's business community more competitive and make China,





Photos: SAIC

the world's largest market, a more attractive place for foreign companies to do business.

The new law also sets higher standards for the State Administration for Industry and Commerce (SAIC), requiring us to provide higher quality public services in the interests of safeguarding social equity and justice. As such, it supports the Government's drive to encourage innovation-driven development and accelerate the transformation of China's economic growth pattern.

Since China joined WIPO in 1980, and in particular, since 2009 when SAIC signed a cooperation agreement with WIPO, we have placed great emphasis on raising public awareness and providing training on the advantages of acquiring and protecting trademark rights both at home and abroad. A particular focus has been to highlight the benefits of using the Madrid System to register trademarks internationally. Thanks to these efforts, trademark awareness among the business community has been greatly enhanced. The expanding trademark portfolios of Chinese firms and the rising number of international applications filed under the Madrid System, in particular, demonstrate broad recognition among Chinese entrepreneurs of the advantages of protecting their trademarks internationally. The success of companies such as Huawei and Gree Electric Appliances Inc. demonstrate what can be achieved when an effective branding strategy, underpinned by a robust portfolio of national and international trademark rights, is implemented. Both of these companies are users of the Madrid System and each has been able to build its international business and become more competitive in the global marketplace through strategic use of their IP, including their brands.

In implementing the new trademark law, SAIC, the government agency responsible for administering China's trademark system, is working to ensure the timely, efficient and effective delivery of high-quality trademark services for both foreign and domestic businesses. To this end, efforts are being made to:

- publicize and implement the new trademark law effectively and to accelerate the revision and promulgation of supplementary rules and regulations;
- strengthen trademark regulation and law enforcement to ensure fair competition and market order;
- improve the implementation of the national trademark strategy to facilitate the effective use and protection of trademarks for socioeconomic development; and
- constantly improve the Administration's competence in trademark examination.

As the Chinese market becomes more open and dynamic, the strategic use of trademarks by businesses operating in China and beyond will become ever more important. We trust that as the legal framework for trademarks continues to evolve and improve, increasing numbers of foreign enterprises will start and develop their business in China. This will enable them to participate in China's economic development, share in the fruits of the country's economic growth and the on-going and deepening process of reform. ♦

GCC

TRADE MARK LAW

coming soon

By **Saba Al Sultani**, Associate,
and **Rob Deans**, Partner,
Clyde & Co LLP, Dubai, United Arab Emirates.

The reality of a regional trademark law in the Middle East came a step closer with the approval in May 2014, by the Cabinet of Ministers in Saudi Arabia of the revised draft of the Trade Mark Law of the Gulf Cooperation Council States (the GCC Trade Mark Law).

Initially scheduled for enactment in 2006, the draft law was put on hold while a number of its provisions were renegotiated. This process is now complete and a revised draft of the law has been published.

ENACTMENT AND TIMING

The GCC Trade Mark Law has been drafted on the basis that it will apply in the six states that make up the GCC, namely, Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates.

The publication in the GCC Gazette states that the law will become effective six months after the GCC Trade Cooperation Committee (comprising the Trade Ministers of each GCC member state) issues the law's implementing regulations. However, it will also need to be enacted by the legislature of each GCC state.

To date, only Bahrain, Saudi Arabia and, more recently, Qatar, have taken steps to enact the law, but the other GCC states are expected follow suit. If they do, the law could become a reality within a few months.

A UNITARY OR A UNIFYING LAW?

The GCC Trade Mark Law is a *unifying*, not a *unitary* law in that it sets out a single set of provisions which will apply uniformly across all GCC states with respect to the registrability, registration and enforcement of trademark rights. It does not, however, provide for a single (unitary) registration or enforcement system. The Trade Mark Office of each GCC state will continue to receive applications and register trademarks on a national basis. Registering a trademark in all six GCC states will still require filing six separate national trademark applications.



The GCC Trade Mark Law does not envisage setting up a single GCC trade mark office or a single court or enforcement authority for dealing with trademark disputes.

MAINTAINING A UNIFIED APPROACH

Despite the adoption of unified provisions across the GCC states, it is inevitable that national courts will adopt different interpretations of the law unless some form of central court or other body is established in order to ensure a consistent interpretation of the law's provisions.

Article 51 of the law anticipates this problem by providing that the GCC Trade Cooperation Committee has the power to interpret the law. However, it remains to be seen how this will work in practice. Will issues of interpretation be referred to the GCC Trade Cooperation Committee in the same way that the national courts of EU member states refer issues to the Court of Justice of the European Union (CJEU)? Once issued, the law's implementing regulations may clarify the position by setting out procedures for bringing such matters before the GCC Trade Cooperation Committee.

KEY PROVISIONS

The GCC Trade Mark Law includes a number of provisions which amend the current position in some or all of the GCC states and which promise to improve the region's trademark registration and protection system. Some of the key provisions include:

The definition of a mark

Article 2 expressly includes some forms of non-traditional trademarks, (e.g. color, combinations of color, sounds and smells) in its definition of a mark. These express references suggest it will be possible to secure registrations for such marks in GCC states. However, once the law comes into force, it will be interesting to see the extent to which the trade mark offices in the GCC states are prepared to grant registrations for such marks.

Multi-class filings

At present, it is only possible to file applications covering a single class in each of the GCC member states; none allows for multi-class applications.

While the 2006 draft of the law expressly stated that a trademark application may not include more than one class, this was deleted from the 2013 draft. This development, however, only hints at the possibility of being able to file multi-class applications in the GCC states. Such a move would constitute a major shift in trademark practice in these countries but would be advantageous

for applicants in that it would offer a more cost-effective and administratively less burdensome way of seeking protection for their marks in numerous classes.

Examination and opposition

At present, most national trade mark offices in the GCC states do not consider goods and/or services in different classes either when examining a trademark application or during the course of trademark opposition proceedings.

However, Article 9 of the 2013 draft of the law states "*goods or services listed in the same class may not necessarily indicate similarity. Likewise, goods or services listed in different classes may not necessarily be dissimilar*".

It will be interesting to see what guidance the implementing regulations provide on this change and how it is applied by trademark examiners, should it come into force.

Well-known marks

The GCC law boosts the protection of well-known marks in that it prohibits the registration of marks which constitute a "*reproduction, an imitation, or a translation of a well-known mark or an essential part thereof*" in relation to identical/similar goods and/or services (Article 3). The law also prohibits the registration of such marks in relation to dissimilar goods and/or services where the use of the mark would indicate a connection between those goods and/or services and the owner of the well-known mark, and that might damage the owner's interests.

This provision goes further than the 2006 draft of the law which only mentions translations of well-known marks and does not address the possibility of registering such marks for dissimilar goods or services.

The 2013 draft of the law also sets out the criteria for determining whether a mark is well-known. Article 4 states that "*the duration and extent of any registrations or use of the mark, the number of countries where it has been registered or recognized as a well-known mark, the value associated with the mark and the extent to which such value helps promote the goods and/or services to which it applies*" shall also be considered. This will favor owners of well-known marks who will have increased scope to argue that their marks meet the required criteria.

Exclusivity

The GCC Trade Mark Law expressly provides that "*the owner of a registered trade mark shall have the exclusive right to use its mark and to prevent third parties from using its mark, or any*



The GCC Trade Mark Law sets out a single set of provisions which will apply uniformly across all GCC states with respect to the registrability, registration and enforcement of trade mark rights.

identical or similar mark” in relation to identical or similar goods or services and in a manner which is likely to mislead the public (Article 17).

Importantly, the law also provides that a likelihood of misleading the public will be presumed when a mark identical to a registered trademark is used in relation to identical goods or services. This removes the need for a trademark owner to establish confusion where an identical mark is being used in relation to identical goods. In these circumstances, the onus will be on the defendant to demonstrate that its use of the mark does not cause confusion.

This change should have a real impact in that it will enable trademark owners to enforce their rights in straightforward cases and avoid the protracted legal proceedings involved in establishing confusion.

Infringements

Rights holders will be comforted by the knowledge that with a view to deterring and, where necessary, preventing infringements from occurring, the law includes significant penalties for trademark infringement.

In line with current laws in the GCC, the law focuses on combating the counterfeiting of trademarks; both those that are registered and those that are unregistered (Article 42). It further allows action to be taken against the use of identical and similar marks in relation to the same or similar goods or services.

The law also restricts (Articles 42, 3.11 and 3.12) the use of trademarks that would indicate a connection with the goods or services of the holder of a registered mark; and which would damage the interests of the trademark holder or diminish the value of associated goods or services.

In addition, the law allows for criminal penalties to be applied in infringement cases. Specifically:

- where a person forges a registered trademark in a manner which misleads the public and affixes the mark to its products – a fine of not less than SR5,000 and not exceeding SR1,000,000 (approximately US\$ 267,000) and/or imprisonment for between one month and three years;
- where a person knowingly sells goods which bear a forged, counterfeit or unlawfully affixed trademark – a fine of not less than SR1,000 and not exceeding SR100,000 (approximately US\$26,000) and/or imprisonment for between one month and one year;
- in the event of a second infringement – the penalty may not exceed double the maximum specified penalties and the premises will be closed for fifteen days to six months.

Moreover, damages may be awarded in civil claims which may include a recovery of profits from the infringer (Article 41) who may by order of the court be required to disclose the identity of any third parties involved in any aspect of the infringement. Rights holders may also apply to the competent court when an infringement occurs or obtain appropriate provisional measures, including an injunction, “to stop or prevent the infringement from occurring”.

Parallel imports

The GCC Trade Mark Law provides (Article 39) that the powers granted to customs authorities to seize infringing goods (pursuant to Article 38) do not allow customs to seize goods which have been put onto the market in the exporting country by or with the consent of the rights holder. This provision appears to be focused on parallel imported goods, such that parallel imports cannot be seized by customs authorities under the GCC Trade Mark Law.

However, this restriction in relation to parallel imported goods is stated as applying to Article 38, without mentioning any other provisions of the GCC Trade Mark Law. Accordingly, other remedies (such as a right to claim damages under Article 41) may potentially be available to trade mark owners in relation to parallel imported goods. Given the prevalence of parallel imported goods in the GCC states, these provisions may well receive a great deal of scrutiny by brand owners seeking to combat parallel imports in the region once the GCC Trade Mark Law comes to force.

AN IMPROVED SYSTEM

The introduction of the GCC Trade Mark Law will, without doubt, significantly improve the process of registering and protecting trademarks in the GCC region. Brand owners will benefit from a more efficient and streamlined system, although much will depend on the detailed interpretation and practical application of the law.

The implementing regulations will be important, as will the procedure for ensuring that a unified position is applied throughout the GCC states, whether this is maintained by the GCC Trade Cooperation Committee or otherwise.

As we get closer to the enactment of the law (and then once the law comes into force), many of the provisions discussed in this article will come under increased scrutiny. The take-away message for those brand owners with an interest in the GCC is currently “watch this space”. ♦



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WIPO Magazine is published bimonthly and distributed free of charge by the World Intellectual Property Organization (WIPO), Geneva, Switzerland. It is intended to help broaden public understanding of intellectual property and of WIPO's work, and is not an official document of WIPO. Views expressed in articles and letters by external contributors do not necessarily reflect those of WIPO.

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