

# International Intellectual Property Law

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## I. Developments in Patent Law 2006

### A. UNITED STATES

In *Illinois Tool Works v. Independent Ink, Inc.*<sup>1</sup> the Supreme Court overturned well-settled law that a patent holder is presumed to have market power for purposes of antitrust claims.<sup>2</sup> Illinois Tool Works manufactured printing systems which included both patented and unpatented components.<sup>3</sup> Illinois Tool Works sold their printing systems to original equipment manufacturers on the condition they purchase and use exclusively a special, but unpatented, ink from Illinois Tool Works.<sup>4</sup> The Supreme Court held that “in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market

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1. Ill. Tool Works, Inc. v. Indep. Ink, Inc., 126 S. Ct. 1281 (2006).

2. *Id.* at 1284.

3. *Id.*

4. *Id.* at 1284-85.

power in the tying product.”<sup>5</sup> The Court based its decision on Congress’s amendment to the Patent Act in 1988, which eliminated the market power presumption in patent misuse cases.<sup>6</sup> By so holding, the Supreme Court brought antitrust law into line with patent law on the issue of presumption of market power for patented products.<sup>7</sup>

In *eBay Inc. v. MercExchange, L.L.C.*, the U.S. Supreme Court clarified the standard for obtaining permanent injunctive relief in patent cases, specifically rejecting the Federal Circuit’s prior holding that there was a “general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances.”<sup>8</sup> Under *eBay*, a patent plaintiff seeking injunctive relief must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.<sup>9</sup>

In *On Demand Machine v. Ingram Industries, Inc.*, the Federal Circuit endorsed, albeit in dicta, liability for the relatively novel concept of joint patent infringement.<sup>10</sup> The patent-at-issue claimed a method for: (1) providing sales information about books to customers; and (2) printing a single copy of a book from a computer that stores the contents of many books and book covers in electronic form.<sup>11</sup> The defendants argued that while Amazon.com may perform the first task, it is Ingram, Amazon.com’s supplier, that arguably performs the second.<sup>12</sup> The district court instructed the jury that: “[w]hen infringement results from the participation and combined action(s) of more than one person or entity, they are all joint infringers and jointly liable for patent infringement.”<sup>13</sup> Although the Federal Circuit reversed the trial court’s judgment of infringement, the appellate court did endorse the district court’s jury instruction as an accurate statement of the law.<sup>14</sup> Further clarification from the Federal Circuit on this concept of liability is expected in the pending matter of *Freedom Wireless, Inc. v. Boston Communications Group, Inc.*<sup>15</sup>

In *In re Echostar Communications Corp.*, the Federal Circuit explicitly delimited the scope of the work-product waiver applicable to the advice-of-counsel defense to claims of willful patent infringement: “Work-product waiver extends only so far as to inform the court of the infringer’s state of mind.”<sup>16</sup> Accordingly, that court held that attorney work product never communicated to a client remains protected.<sup>17</sup> In contrast, work product that is

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5. *Id.* at 1293.

6. *Id.* at 1284.

7. *Ill. Tool Works, Inc.*, 126 S. Ct. at 1284.

8. *eBay Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837, 1839 (2006).

9. *Id.*

10. *On Demand Mach. v. Ingram Indus., Inc.*, 442 F.3d 1331 (Fed. Cir. 2006).

11. *Id.* at 1334.

12. *Id.* at 1335.

13. *Id.* at 1344-45.

14. *Id.* at 1345.

15. See Fed. Cir. Non-Precedential Public Order of December 15, 2005, staying an injunction granted by the United States District Court for the District of Massachusetts, noting that “this court has not directly addressed the theory of joint infringement and there is relatively little precedent on that issue” and that “the question of the viability and scope of the theory of joint infringement is an issue that will benefit from fully briefing by the parties in the appeal.”

16. *In re Echostar Commc’ns Corp.*, 448 F.3d 1294, 1303 (Fed. Cir. 2006).

17. *Id.*

communicated, as well as documents that merely discuss such a communication, are both discoverable.<sup>18</sup> The decision represents an important clarification, but also raises the disconcerting specter that communications from trial counsel regarding infringement, as well as undisclosed documents, may now be discoverable.

The Supreme Court granted certiorari in *MedImmune, Inc. v. Genentech, Inc.*,<sup>19</sup> where it will determine whether a patent licensee can challenge the validity of a patent without first refusing to pay royalties and breaching its license agreement. The District Court held that because MedImmune continues to comply with the license terms and is thus under no threat of an infringement suit or license cancellation by Genentech, there is no “actual controversy” as required the Declaratory Judgment Act.<sup>20</sup> The Federal Circuit affirmed.<sup>21</sup>

## B. EUROPE

On December 13, 2005, the fifteenth ratification or accession to the EPC 2000 revision<sup>22</sup> of the European Patent Convention (EPC) was received,<sup>23</sup> starting a two-year time limit within which EPC 2000 will come into force.<sup>24</sup> The threshold of fifteen ratifications probably seemed reasonable when it was set, but in the last few years the EPC has been joined by numerous central and eastern European countries, all of which had to accede to EPC 2000. Of the twenty countries that informally signed EPC 2000 when it was approved, only four (Greece, Monaco, Spain, and the UK) were among the first fifteen countries to ratify EPC 2000. When EPC 2000 comes into force, the original EPC “shall cease to apply.”<sup>25</sup> Any EPC Member Country that has not ratified EPC 2000 will effectively be expelled from the EPC on that date,<sup>26</sup> although the European Patent Office (EPO) will continue to process applications that are already pending.<sup>27</sup> By the end of 2003, ten of the present EPC Member Countries, including France and Germany, had still not ratified EPC 2000.<sup>28</sup>

On June 29, 2006, Regulation (EC) No. 816/2006 came into force, allowing compulsory licenses for the manufacture of pharmaceuticals for export to the least-developed

18. *Id.* at 1303-34.

19. *MedImmune, Inc. v. Genentech, Inc.*, 427 F.3d 958 (Fed. Cir. 2005), *cert. granted*, 126 S. Ct. 1329 (U.S. Feb. 21, 2006) (No. 05-608).

20. *Id.*

21. *Id.*

22. Act Revising the Convention on the Grant of European Patents, Nov. 29, 2000, *available at* <http://www.european-patent-office.org/epo/dipl-conf/pdf/em0003a.pdf> [hereinafter Revision Act].

23. As of August 2, 2006, eighteen of the thirty-one EPC member countries had ratified or acceded to EPC 2000. See European Patent Office, <http://patlaw-reform.european-patent-office.org/epc2000/status/index.en.php> (last visited Mar. 4, 2007).

24. Revision Act, *supra* note 22, art. 8(1).

25. *Id.* at art. 8(2).

26. European Patent Convention, art. 172(4), Oct. 5, 1973, 13 I.L.M. 268 [hereinafter EPC]. This sort of “sudden death” expulsion when a treaty is revised is very unusual. It was necessary for EPC 2000 because it would be impractical for the EPO to apply two different sets of rules to a single application, and unacceptable to postpone the coming into force of EPC 2000 until every EPC 1978 member country has ratified the revision in its own time.

27. EPC, art. 175(2).

28. European Patent Office, EPC 2000—Status of Accession and Ratification, <http://patlaw-reform.european-patent-office.org/epc2000/status/index.en.php> (last visited Mar. 23, 2007).

countries.<sup>29</sup> The intending manufacturer applies for the license to the national authorities in the country where manufacture is to take place, but the importing country must first notify the European Commission of its intent to import the products in question.<sup>30</sup> Re-import of the products into the European Union is forbidden.<sup>31</sup>

The first nonbinding opinions by the United Kingdom Patent Office on validity and infringement were issued, to favorable reviews.<sup>32</sup> The opinions are reported to be “well thought out and generally convincing” and, by strict enforcement of a timetable, are issued in a few months from the initial request.

On July 13, 2006, the European Court of Justice delivered two decisions on jurisdiction over patent cases involving more than one European Union country. In case C-4/03,<sup>33</sup> the Court held that under Article 16(4) of the Brussels Convention<sup>34</sup> any proceeding concerned with the validity of a patent is under the exclusive jurisdiction of the courts of the place where the patent is registered, even if validity is raised only as a defense in an infringement action. In case C-539/03,<sup>35</sup> the Court held that Article 6(1) of the Brussels Convention, which generally allows a number of defendants to be sued in the country of domicile of any of them, does not override Article 16(4) even where the defendants are members of the same group of companies, are acting in accordance with a common policy, and are infringing various national parts of a European patent.

The French National Assembly defeated legislation that would have allowed the London Agreement<sup>36</sup> to come into force.<sup>37</sup> The London Agreement provides a framework for EPC Member Countries to waive the requirement that European Patents take effect only when translated into a local language.<sup>38</sup> The French Constitutional Court later ruled that the London Agreement does not violate Article 2 of the French Constitution, which says, “The language of the Republic is French.”<sup>39</sup> The London Agreement will come into force if France ratifies it.

Several countries have amended their national laws to implement the Enforcement of Intellectual Property Rights Directive.<sup>40</sup> The amendments improve enforcement by requiring an infringer to provide information about those above and below him in the distri-

29. Commission Regulation 816/2006, 2006 O.J. (157) 1.

30. *Id.* at art. 3.

31. *Id.* at art. 13.

32. [2006] CIPA 82, [2006] CIPA 292. Actual opinions are published at [www.patent.gov.uk/patent/opinions/withdrawn.htm](http://www.patent.gov.uk/patent/opinions/withdrawn.htm).

33. Case C-4/03, Gesellschaft für Antriebstechnik mbH & Co. KG v Lamellen und Kupplungsbau Beteiligungs KG, 2006 O.J. (C 224/01).

34. *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, 1990 O.J. (C 189), 29 I.L.M. 1413.

35. Case C-539/03, Roche Nederland BV v. Primus, 2006 O.J. (C 224/02).

36. Agreement Dated 17 October 2000 on the Application of Article 65 EPC, Oct. 17, 2000 (London Agreement), available at [http://www.european-patent-office.org/epo/pubs/oj001/12\\_01/12\\_5491.pdf](http://www.european-patent-office.org/epo/pubs/oj001/12_01/12_5491.pdf). The London Agreement was concluded with the aim of creating a cost attractive post-grant translation regime for European patents. The parties to the London Agreement undertake to waive, entirely or largely, the requirement for translations of European patents to be filed in their national language.

37. Annie Kahn, *Paris Bloque la Simplification du Brevet Europeen*, LE MONDE, Mar. 8, 2006.

38. London Agreement, *supra* note 36, at 1.

39. Décision n° 2006-541 DC, Journal Officiel de la République Française [J.O.] [Official Gazette of France] Oct. 3, 2006, at 14635, available at <http://www.conseil-constitutionnel.fr/decision/2006/2006541/index.htm>.

40. Council Directive 2004/48, 2004 O.J. (L 157) 45.

bution chain, and to provide financial information about the extent of the infringing activities for assessment of damages.<sup>41</sup>

A panel of patent judges convened by the EPO proposed rules of procedure for the centralized Patent Court under the proposed European Patent Litigation Agreement (EPLA).<sup>42</sup> The lobbyists who defeated the Directive on Computer Implemented Inventions are raising political support in the European Parliament to defeat the EPLA.

### C. CHINA

The Year 2006 was a year of progress for patent protection in China. There were increased government crackdowns against pharmaceutical counterfeiters, including the interdiction of counterfeit Tamiflu, and courts upheld patent rights of companies such as Pfizer and General Motors.<sup>43</sup>

#### 1. *New Patent Applications and Enforcement Cases*

The number of international patent applications filed at the World Intellectual Property Office (WIPO) by Chinese inventors increased in 2006, making China the fifth-largest source.<sup>44</sup> Patent applications filed at the China State Intellectual Property Office (SIPO) also continued to increase dramatically.<sup>45</sup>

The rate of new intellectual property (IP) enforcement cases heard by Chinese courts continued to increase as well, surpassing the 1,799 IP-related criminal cases processed in 2005, which was an increase of 51.9 percent over 2004.<sup>46</sup> Successful court actions included an appeal by Pfizer resulting in a June 2006 reversal of a decision by the SIPO which had invalidated Pfizer's patent.<sup>47</sup> And in *GM v. Chery*, after suing China's Chery Automobile Co. in the Beijing Intermediate People's Court for infringing the design of the Daewoo Matiz and Chevrolet Spark minicar models, Chery voluntarily stopped selling the vehicle outside China.<sup>48</sup>

#### 2. *Validity of Chinese Patents*

Many patents issued by the SIPO are vulnerable to being invalidated because the patented products have either already been on the market or known for many years prior to

41. *Id.* at art. 8.

42. European Patent Judges, Second Venice Resolution, Nov. 2006, <http://www.eplaw.org/resolutions.asp> (follow "Downloads" hyperlink).

43. For some recent studies of developments in Chinese patent law, see Averie K. Hason & Jean E. Shimotake, *Recent Developments in Patent Rights for Pharmaceuticals in China and India*, 18 PACE INT'L L. REV. 303 (2006); Jeffrey A. Andrews, *Pfizer's Viagra Patent and the Promise of Patent Protection in China*, 28 LOY. L.A. INT'L & COMP. L. REV. 1 (2006).

44. *China Patent Applications Up 600% in 10 Years, Surpass Germany*, INTERFAX CHINA, CHINA BUSINESS NEWS, Oct. 17, 2006.

45. *Patent Applications Increase in China: WIPO*, ASIA PULSE, Oct. 18, 2006.

46. Anna-Lena Wolfe, *Enforcement Experience in China*, MANAGING INTELLECTUAL PROP., Oct. 2006, available at <http://www.managingip.com/?Page=10&PUBID=34&ISS=22567&SID=654572&TYPE=20>.

47. *Chinese Firms Appeal Ruling over Viagra*, PEOPLE'S DAILY ONLINE, June 20, 2006, available at [http://english.peopledaily.com.cn/200606/20/eng20060620\\_275514.html](http://english.peopledaily.com.cn/200606/20/eng20060620_275514.html).

48. Michael Burr, *China's IP Protections are Improving, But Enforcement Remedies Remain Weak*, INSIDE COUNSEL, Nov. 2006, at 52.

the filing of the application. Additionally, many Chinese patents are granted for the same invention. The problem exists due to a lack of substantive examination for design patent and utility model applications.

### 3. *Tactical Use of Patents by Chinese Companies*

While a Chinese patent may be subject to invalidation, it can stymie a competitor. In 2006, a growing number of foreign companies were surprised to be notified that their own products were allegedly infringing the rights of third parties based on utility model patents, even though the products in question had been sold in the Chinese market for several years prior to the priority date of the cited rights.

Other foreign companies have encountered Chinese companies who, based on mere specifications, file patent claims on technology employed by the foreign companies. For example, a U.S. IP owner enters an agreement with a Chinese manufacturer to produce a component. The Chinese company then claims a patent based on the specifications in the contract or improvements to the specifications. The U.S. company does not learn about the Chinese patent claims until it seeks to renegotiate the contract or take its business to another manufacturer. U.S. companies have found that unless the contract expressly provides otherwise, all improvements belong to the party that made the improvement.

### 4. *Utility Model Patents*

Chinese patent law provides not only for patent and design patent protection, but also for utility model patents.<sup>49</sup> Because this right is not provided in all countries, foreign companies in China sometimes overlook utility model patents in their own patent filing strategies. While the value of a utility model patent can be questioned, the cost of the application is small, the resulting protection is issued much more quickly than a patent, and protection is useful even if for temporary and tactical advantage.

### 5. *Challenges for U.S. and Foreign IP Owners*

China's first-to-file system places the burden on foreign IP owners to invalidate Chinese patents. Foreign licensees of Chinese patents are treated differently than domestic licensees of the same IP, notwithstanding the nondiscrimination principles of the WTO. Moreover, Chinese remedies for infringement are weak by U.S. and European standards. Damages awards are strictly limited, injunctions are not a presumed remedy for infringement, and compulsory licensing is common.

In general, foreign IP owners in China are advised to document product information as diligently as possible, including sales and marketing activities, to create the capability of demonstrating prior art and prior use.<sup>50</sup> Also, if a foreign IP owner does not have the resources to file patents for all its patentable technology in China, then the owner should at least create an official document establishing its right, such as the filing of utility model applications or design applications.

49. Patent Law (P.R.C.) (promulgated by the Standing Comm. Nat'l People's Cong., Mar 12, 1984, effective Apr. 1, 1985, amended Sep. 4 1992, amended Aug 25, 2000), 24 I.L.M. 295 (1985).

50. Wolfe, *supra* note 46.

## 6. Patent & IP Protection in the U.S.-China Trade Relationship

U.S. critics of China's policies blame the huge U.S. trade deficit in goods with China on Chinese unwillingness to crack down on IP pirates and counterfeiters. Several bills with bipartisan support currently pending in the U.S. Congress would punish China economically for what the legislative sponsors view as the Chinese government's manipulation of its currency for trade advantage.<sup>51</sup> Theft of U.S. intellectual property also has prompted congressional critics to call for action against China in the WTO. On November 30, 2006, the congressionally appointed U.S.-China Economics and Security Review Commission announced it would urge Congress to instruct the U.S. Trade Representative to press ahead aggressively with a WTO case against China for its "manifest failures to enforce intellectual property rights."<sup>52</sup>

### D. MULTINATIONAL AND OTHER

The authorities of the United Nations Convention on Biological Diversity<sup>53</sup> continue to promote a requirement for disclosure of the origin of genetic resources.<sup>54</sup> One version of the text<sup>55</sup> requires that intellectual property rights applications whose subject matter makes use of genetic resources should disclose the country of origin or source of such genetic resources, with sanctions for lack of compliance including revocation of the intellectual property rights in question.<sup>56</sup>

On February 28, 2006, the South African Patent Act and Regulations were amended to require<sup>57</sup> a declaration from every applicant for a patent stating whether or not the invention is based on indigenous biological or genetic resources, traditional knowledge, or traditional use.<sup>58</sup> The definitions are all derived from an indigenous species, as one that occurs or has occurred naturally in a free state in South Africa, excluding the human

51. See Elana Schor, *Pressure Gathers for and Against China Tariffs Bill*, The Hill, MAR. 22, 2006, available at [http://thehill.com/thehill/export/TheHill/Business/032206\\_china.html](http://thehill.com/thehill/export/TheHill/Business/032206_china.html).

52. Larry M. Wortzel, Chairman, U.S.-China Economics and Security Review Comm'n, Statement on Release of 2006 Annual Report to Congress of the U.S.-China Economic and Security Review Commission (Nov. 16, 2006), available at [http://www.uscc.gov/annual\\_report/2006/statement\\_release.pdf](http://www.uscc.gov/annual_report/2006/statement_release.pdf); see also U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION, 109TH CONGRESS, 2006 ANNUAL REPORT TO CONGRESS (2d Sess. 2006), available at [http://www.uscc.gov/annual\\_report/2006/annual\\_report\\_full\\_06.pdf](http://www.uscc.gov/annual_report/2006/annual_report_full_06.pdf).

53. United Nations Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818, available at <http://www.biodiv.org/convention/convention.shtml>.

54. See Decisions Adopted by the Conference of the Parties to the Convention on Biological Diversity at its Eighth Meeting, Mar. 20-31, 2006, available at <http://www.biodiv.org/doc/decisions/COP-08-dec-en.pdf>.

55. See Decision VIII/4 on Access and benefit-sharing of the Eighth Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity, Curitiba, Brazil, Mar. 20-31, 2006 [hereinafter Decision VIII/4], available at <https://www.biodiv.org/decisions/default.aspx?m=COP-08&id=11016&lg=0> (last visited February 13, 2007).

56. Convention on Biological Diversity, Fourth meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-sharing, Granada, Spain, 30 January-2 February 2006; see also Decision VIII/4, *supra* note 55.

57. GN R204/205 of 28 February 2006, at 4-7, available at <http://www.info.gov.za/gazette/regulation/2006/28579b.pdf> [hereinafter 2006 Amendment].

58. *Id.* at 4.

species and species introduced as a result of human activity.<sup>59</sup> An application cannot be accepted until the declaration is filed.<sup>60</sup> A declaration that the applicant knew or ought to have known was false is grounds for revocation of the patent.<sup>61</sup>

On March 30, 2006, the Australian government introduced a bill<sup>62</sup> to reform the Patents Act. Major changes include an exemption for seeking regulatory approval of generic pharmaceuticals before the patent expires,<sup>63</sup> enhanced exemplary damages for flagrant patent infringement,<sup>64</sup> and compulsory licenses as a remedy for anti-competitive conduct.<sup>65</sup> The governing party has a majority in both houses of Parliament, so the bill is expected to proceed smoothly.

In *Grant v. Commissioner of Patents*, the Australian Full Federal Court ruled that patent claims for business methods require a “physical effect in the sense of a concrete effect or phenomenon or manifestation or transformation,” although the Court approved earlier cases in which the physical effect was “a change in state or information in a part of a machine.”<sup>66</sup> These can all be regarded as physical effects. The rejected claims in *Grant* were to “a mere scheme, an abstract idea, mere intellectual information,” with “no physical consequence at all.”<sup>67</sup>

## II. Developments in Trademark Law 2006

### A. UNITED STATES

On Friday October 6, 2006, President Bush signed the Trademark Dilution Revision Act (the Act)<sup>68</sup> into law, thus strengthening the protection afforded famous marks and clarifying the confusion among the Federal Courts in their application of the Federal Trademark Dilution Act of 1995 (FTDA).<sup>69</sup> The Act was a response to, and overrules, the Supreme Court’s widely criticized holding in *Moseley v. V Secret Catalogue, Inc.*,<sup>70</sup> in which the Court, addressing the split among the lower courts over the more subjective “likelihood of dilution” standard, held that actual dilution was required in order for famous marks to qualify for injunctive relief under the FTDA.<sup>71</sup>

The Act expressly overrules the Court’s holding in *Moseley* by providing that the owner of a famous mark is entitled to injunctive relief “regardless of the presence or absence of

59. Patents Act of 1978, § 2, amended by Patents Amendment Act 2005, § 3, GG28319 of 9 December 2005, at 2-4, importing a definition from National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004) [hereinafter 2005 amendment].

60. See 2006 Amendment, *supra* note 57.

61. Patents Act 1978 *supra* note 59, § 61(1)(g).

62. Intellectual Property Laws Amendment Bill 2006, available at <http://parlinfoweb.aph.gov.au/PIWeb/Repository/Legis/Bills/Linked/30030608.pdf>

63. *Id.* sched. 7 (amending Patents Act, 1990 § 119).

64. *Id.* sched. 5 (amending Patents Act, 1990 § 122).

65. *Id.* sched. 8 (amending Patents Act, 1990 § 133).

66. *Grant v. Comm’r of Patents* (2006) FCAFC 120, ¶ 32, available at <http://www.austlii.edu.au/au/cases/cth/FCAFC/2006/120.html>.

67. *Id.* ¶ 32.

68. Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, 120 Stat. 1730 (2006).

69. Federal Trademark Dilution Act of 1995, 15 U.S.C.A. § 1125(c) (1996).

70. *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003).

71. *Id.*



actual or likely confusion, of competition or of actual economic injury.<sup>72</sup> The Act provides greater certainty as to when dilution has occurred by defining and distinguishing between “dilution by blurring” and “dilution by tarnishment,” both of which are actionable. “Dilution by blurring” is defined as “association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark.”<sup>73</sup>

The internet figured greatly in recent case law. In *In re America Online, Inc.*,<sup>74</sup> the Trademark Trial and Appeal Board (TTAB) reversed a ruling by the trademark examiner that “Instant Messenger” was a generic term and therefore not entitled to registration. The TTAB instead held that the trademark examiner should have permitted AOL to provide evidence to rebut the prima facie case of genericness. AOL provided substantial evidence in rebuttal before the TTAB, including numerous news articles and marketing materials distributed throughout the country, and the fact that over eighty million subscribers use the Instant Messenger services to send over one billion messages daily. On this evidence, the TTAB found that “Instant Messenger” was not generic and, although it was merely descriptive, AOL met the burden of showing that the mark had acquired distinctiveness.<sup>75</sup>

In *Australian Gold Inc. v. Hatfield*,<sup>76</sup> the Tenth Circuit held that initial interest confusion will result from the unauthorized use of trademarks to divert Internet traffic. Australian Gold manufactures and distributes indoor tanning lotions to independent distributors on the condition that the products are sold exclusively to salons for use on their premises. Australian Gold discovered that Hatfield was selling Australian Gold products online without authorization, as well as using Australian Gold’s trademarks both in the text of its website and in metatags. Hatfield had also purchased premium search engine placement using the marks. Australian Gold filed suit for trademark infringement, false advertising, and tortious interference with contracts between the manufacturers and their distributors. In finding that initial interest confusion occurs when Internet traffic is diverted through the unauthorized use of trademarks, the Tenth Circuit noted that Hatfield used Australian Gold’s trademarks to divert traffic to its own website, where it sold its own products in addition to the Australian Gold products. The court also noted that the First Sale Doctrine does not apply to resellers using the trademark of another to create the impression that they are authorized dealers.

## B. THE EUROPEAN UNION

### 1. ECJ Confirms the Doctrine of Counteraction

In *PICARO/PICASSO*<sup>77</sup> and *SIR/ZIRH*,<sup>78</sup> the European Court of Justice (ECJ) confirmed the doctrine of counteraction, as enunciated by the Court of First Instance (CFI) in

72. Trademark Dilution Revision Act of 2006 § 2(1)(c)(1).

73. *Id.* § 2(2)(b).

74. *In re Am. Online, Inc.*, (T.T.A.B. Jan. 18, 2006), available at <http://www.uspto.gov/web/offices/com/sol/foia/ttab/other/2006/75460305.pdf>.

75. *Id.* at 21.

76. *Australian Gold, Inc. v. Hatfield*, 436 F.3d 1228 (10th Cir. 2006).

77. Case C-361/04, *Picasso v. Office for Harmonization in the Internal Mkt.*, 2006 O.J. (C 60/15).

*Phillips-Van Heusen/OHIM*,<sup>79</sup> *El Corte Inglés/OHIM*,<sup>80</sup> and *Claude Ruiz-Picasso and others/OHIM*.<sup>81</sup> In its holdings, the ECJ clarified that the mere aural similarity of the marks in question will not create a danger of confusion under Paragraph 1 of Article 8 of the Council Regulation (EC) No 40/94 of 20 December 1993, except in limited circumstances. The ECJ stressed that a finding of likelihood of confusion must be based on the overall impression created by the marks in question, taking into consideration all the factors relevant to the circumstances of the case, including the distinctive and dominant components of each mark. Great visual or great aural similarities do not automatically create a danger of confusion. Instead visual or aural similarities can be counteracted by conceptual differences between the marks that negate the likelihood of confusion. The requirement for such counteraction is that at least one of the marks has, from the point of view of the relevant public, a clear and specific meaning that the public can grasp immediately.<sup>82</sup>

## 2. *Binding Force of Decisions of the European Courts in Trademark Matters*

In *REVIAN's/EVLIAN*,<sup>83</sup> the Higher Regional Court in Hamburg addressed whether a national court is bound by the decisions of the European courts in trademark disputes. According to this decision, the European courts' decisions are not binding when a national trademark is at issue in one case and a European trademark is at issue in another case. To have found that European decisions had binding force would have had considerable effects in practice. National trademark infringement proceedings could be paralyzed if the same appellant filed for a European trademark for the infringing mark, while the national proceeding was pending.

One question that remains unanswered is whether there is a binding effect between simultaneous national and European violation proceedings concerning the same European trademark. With reference to this question, Advocate General Colomer alluded in his Opinion in *SIR/ZIRH*<sup>84</sup> to a possible obligation of national courts to request an interpretative preliminary ruling in such cases, in order to comply with the Community law principle of *effet utile*.

## 3. *Trademark-Related Use Of A Three-Dimensional Trademark*

In a decision concerning Hermès handbags, the Higher Regional Court of Cologne affirmed the use of a three-dimensional trademark.<sup>85</sup> The court pointed out that, in this exceptional case, the shape of the handbag met all the requirements of a trademark-related

78. Case C-206/04 P, Muhlens GmbH & Co. KG v. Office for Harmonization in the Internal Mkt., 2006 O.J. (C 131/22).

79. Case T-292/01, Phillips-Van Heusen Corp. v. Office for Harmonization in the Internal Mkt., 2003 O.J. (C 304/44).

80. Case T-183/02, El Corte Ingles, SA v. Office for Harmonization in the Internal Mkt., 2004 O.J. (C 106/115).

81. Case T-185/02, Mely Garroni v. European Parliament 2004 O.J. (C 228/81).

82. See *Picasso*, ¶ 20.

83. Oberlandesgericht Hamburg [OLGZ] [trial court of appeals], Mar. 3, 2006, Case 5 U 1/05.

84. Opinion of Advocate General Colomer, Case C-206/04 P, Muehlens GmbH & Co. KG v. Office for Harmonisation in the Internal Mkt., 2005, available at <http://oami.europa.eu/en/mark/aspects/pdf/JC040206.pdf>.

85. Oberlandesgericht Köln [OLGZ] [trial court of appeals], Apr. 28, 2006, Case 6 U 121/05.

use. This requires either that the design of the three-dimensional trademark has become generally known as an indicator of origin of the trademark proprietor or that the consumer recognizes the shape itself as a brand. The idea that trademark protection has to be denied, if the relevant market has been flooded by similar or identical products does not prevail, when the fashion product in question has earned the reputation as a particular product of prestige.

#### 4. *Trademark-Related Use of a Domain*

In its holding in *Ecolab*,<sup>86</sup> the Higher Regional Court of Cologne noted that a domain name will qualify as a trademark even if the domain itself merely acts as a conduit to another website, as long as the first domain name is visible on the screen for just a moment. Furthermore, the Court noted that if two companies have registered the same trademark, the criterion of priority determines which owner has the rights to the corresponding domain name.

#### 5. *Responsibility of Search Engines for Trademark Infringement*

In a May 4, 2006 decision,<sup>87</sup> the Higher Regional Court of Hamburg confirmed a holding of the Regional Court of Hamburg (Landgericht Hamburg) that denied the responsibility of search engine operators for the use of trademark names in “adwords” ([www.google.de](http://www.google.de)).<sup>88</sup> In its holding, the Court noted that a search engine operator cannot be responsible for infringing marks placed in an “adwords” form unless it played an active role in their selection. Liability is solely with the advertiser or proprietor of the website.

### C. DOMAIN NAME DEVELOPMENTS

An increasing number of domain name cases in 2006 demonstrates the persistent appeal of cybersquatting.<sup>89</sup> Domain tasting, the large-scale automated and free registration of domain names within a grace period in order to assess their potential revenue, is an ongoing challenge faced by the domain name system. In its March 2006 report, Verisign noted that while most registrars delete only a small number of domain names per month, seven registrars registered and deleted over one million domain names during the month of March alone.<sup>90</sup> Mass registrations and deletions of domain names unduly burden the domain name system and prevent entities with a legitimate interest from registering certain domain names.

The provision of Whois privacy services is equally challenging given its impact on the application of Uniform Domain Name Dispute Resolution Policy (UDRP). In January 2006, Internet Corporation for Assigned Names and Numbers’ (ICANN’s) Generic

86. Oberlandesgericht Köln [OLGZ] [trial court of appeals], Jan. 20, 2006, Case 6 U 146/05.

87. Oberlandesgericht Hamburg [OLGZ] [trial court of appeals], May 4, 2006, Case 3 U 180/04.

88. Landgericht Hamburg [LG] [regional court], Sept. 21, 2004, Case 312 O 324/04.

89. Since the launch of the UDRP in 1999, the WIPO Arbitration and Mediation Center has received over 10,000 cases, and 2006 has shown a considerable increase in the filing rate as compared to previous years, see UDRP Case Filing and Decisions, WIPO (2007), <http://www.wipo.int/amc/en/domains/statistics/cumulative/results.html>.

90. REGISTRY OPERATOR’S MONTHLY REPORT (2006), <http://www.icann.org/tlds/monthly-reports/comnet/verisign-200603.pdf>.

Names Supporting Organization (GNSO) issued a recommendation for a procedure that will enable registrars to address conflicts between Whois requirements and privacy laws.<sup>91</sup> Some recent WIPO UDRP decisions have begun to address these issues from a practical UDRP perspective.<sup>92</sup>

As of today, forty-seven country code top level domain (ccTLD) registries have incorporated the UDRP or versions thereof and designated the WIPO Arbitration and Mediation Center to provide domain name dispute resolution services for their respective national ccTLD.<sup>93</sup> As of September 2006, 418 ccTLD-related cases have been received by WIPO, including the first ‘.es’ and ‘.ae’ cases.<sup>94</sup>

In a report issued in June, the GNSO anticipated the introduction of additional generic top level domains (gTLDs) while calling for objective selection criteria in line with Internet security, stability, and technical capacity.<sup>95</sup> The ‘.mobi’ domain, a sponsored top level domain (sTLD) “dedicated to delivering the Internet to mobile devices,”<sup>96</sup> was launched in May 2006 with a Limited Industry Sunrise Period, followed by a Trademark Sunrise Period.<sup>97</sup> As of November 2006, only six Trademark Sunrise challenges had been received by the WIPO Arbitration and Mediation Center, the exclusive administrator of ‘.mobi’ challenges.<sup>98</sup> On September 26, 2006, ‘.mobi’ registration was made public, subject to the application of the UDRP for those domains that are not on the List of Premium Names.<sup>99</sup>

The sTLD for the global travel community, ‘.travel,’ was launched on January 2, 2006. As of November 2006 the WIPO Arbitration and Mediation Center had received two disputes related to the ‘.travel’ domain.<sup>100</sup>

91. GNSO, Council Report to the ICANN Board (2006), available at <http://gns0.icann.org/issues/whois-privacy/council-rpt-18jan06.htm>.

92. See, e.g., *GAYLORD ENTMT’ CO. v. NEVIS DOMAINS LLC*, WIPO CASE NO. D2006-0523, available at <http://www.wipo.int/amc/en/domains/decisions/html/2006/d2006-0523.html>; *World Wide Fund for Nature v. Moniker Online Servs.*, WIPO Case No. D2006-0975, available at <http://www.wipo.int/amc/en/domains/decisions/html/2006/d2006-0975.html>.

93. The ‘.es’, signaling Spain, was added in 2006. WIPO, IP Services, Domain Name Dispute Resolution Service for Country Code Top Level Domains (ccTLDs) (2007), <http://www.wipo.int/amc/en/domains/ctld/>.

94. Relating to Spain and the United Arab Emirates respectively. Most frequent filings concern the Swiss ‘.ch’ domain (120), followed by ‘.tv’ (Tuvalu, 115 cases), ‘.fr’ (France, 54 cases), ‘.mx’ (Mexico, 43 cases) and ‘.nl’ (The Netherlands, 41 cases). *Id.*

95. LIZ WILLIAMS, ICANN, GNSO INITIAL REPORT: INTRODUCTION OF NEW GENERIC TOP-LEVEL DOMAINS (2006), <http://gns0.icann.org/issues/new-gtds/issues-report-15jun06.pdf>. In the 1980s, seven of the most popular generic top level domains were introduced: ‘.com,’ ‘.net,’ ‘.org’ (open) and ‘.edu,’ ‘.gov,’ ‘.int,’ and ‘.mil’ (restricted); seven new domains were introduced in 2000, three of which are sponsored: ‘.aero,’ ‘.coop,’ and ‘.museum,’ and four of which are unsponsored: ‘.biz,’ ‘.info,’ ‘.name,’ and ‘.pro.’

96. See What is Dotmobi Web Page, <http://pc.mtld.mobi/mobilenet/index.html> (last visited Mar. 5, 2007).

97. WIPO, IP Services, .mobi: General Information on .mobi, <http://www.wipo.int/amc/en/domains/gtld/mobi/index.html> (last visited Mar. 5, 2007).

98. See *id.* for a list of .mobi Sunrise Challenges.

99. See .mobi Premium Names website, <http://pc.mtld.mobi/switched/premium.html>.

100. *Goway Travel Ltd. v. Tourism Austrl.*, WIPO Case No. D2006-0344, available at <http://www.wipo.int/amc/en/domains/decisions/html/2006/d2006-0344.html>; see Case Details for WIPO Case No. D2006-0535, available at <http://www.wipo.int/amc/en/domains/search/> (enter Case No. D2006-0535).

The '.eu' TLD for the European region was launched on April 7, 2006, with more than 2.3 million active registrations filed by November 2006.<sup>101</sup> The alternative dispute resolution proceeding for '.eu' domain name disputes, provided by the Prague-based Arbitration Court of the Czech Republic,<sup>102</sup> is somewhat similar to the UDRP, with two key differences. While a UDRP complaint may be based only on trademark rights, an '.eu' complaint may be based on a broader range of rights such as trade names, business identifiers and family names that have been recognized in the European Community.<sup>103</sup> A complaint can be filed either against a speculative or abusive domain name registration or against a decision of the registry Eurid that conflicts with EC regulations 733/2002 or 874/2004.<sup>104</sup>

### III. Developments in Copyright Law 2006

#### A. UNITED STATES

Peer-to-peer file sharing, already weakened by the Supreme Court's *Grokster* ruling<sup>105</sup> in 2005,<sup>106</sup> faced two more major blows—in the span of two weeks—in September 2006. eDonkey agreed on September 11 to shutdown its file-sharing services and to pay a total of \$30 million to settle a lawsuit brought by the record companies. Two weeks later, summary judgment was entered on September 27 against StreamCast, effectively shuttering its file-sharing service. Some declared these two events as “total victory” by “[t]he movie and music industries,”<sup>107</sup> while others lamented that “the last of the popular P-to-P (peer-to-peer) music sharing sites [have] been defeated.”<sup>108</sup>

eDonkey's plight was followed closely, as founder Sam Yagan had emerged as an outspoken advocate for peer-to-peer file sharing networks. In September 2005, he warned the Senate Judiciary Committee that in light of the *Grokster* decision, free peer-to-peer file sharing companies in the United States would cease to exist, as such companies had to change their business models to become like iTunes and charge for downloads, or risk facing lawsuits that such companies “cannot afford to fight . . . even [if] we think we would win.”<sup>109</sup> Yagan's prophecy came true one year later, as shortly after being sued by a host

101. The first report of the '.eu' registry Eurid to the European Union has been issued, see EURID Home Page, <http://www.eurid.eu> (last visited Mar. 5, 2007).

102. The court administers ADR Proceedings according to ADR Rules and ADR Supplemental Rules, and in line with the Public Policy Rules for the '.eu' of the European Commission. See Regulation (EC) 874/2004, 2004 O.J. (I162/40) laying down public policy rules concerning the implementation and functions of the '.eu' top level domain and principles governing registration).

103. See *id.* at art. 10(1).

104. See *id.* at art. 22.

105. *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 927-929 (2005).

106. The *Grokster* ruling was discussed in detail in the 2004 Year-in-Review article, Melvyn J. Simburg et al., *International Intellectual Property*, 39 INT'L LAW. 333 (2005), available at <http://meetings.abanet.org/webupload/commupload/IC750000/newsletterpubs/intellpropYR2005.pdf>.

107. See Eric Bangeman, *StreamCast Loses File-Sharing Suit*, ARS TECHNICA, Sept. 28, 2006, <http://ars-technica.com/news.ars/post/20060928-7852.html>.

108. Nancy Gohring, *eDonkey Settles Record Industry Battle for \$30 Million*, INFO WORLD, Sept. 13, 2006, [http://www.infoworld.com/article/06/09/13/HINedonkeybattle\\_1.html](http://www.infoworld.com/article/06/09/13/HINedonkeybattle_1.html).

109. Nancy Gohring, *File-Sharing Doomed, Warns Exec*, PC WORLD, Sept. 30, 2005, <http://pcworld.com/article/id,122795/article.html>.

of record companies—including Arista, Capitol Records, and Sony BMG—in the Southern District of New York,<sup>110</sup> his company, Meta Machine, agreed on September 11 to pay \$30 million to settle the lawsuit and shut down its eDonkey service.<sup>111</sup> In perhaps a twinge of irony, in the complaint filed against Meta Machine, the precedent established by *Grokster* was cited, and eDonkey's business model was unfavorably compared to iTunes and AOL Music.<sup>112</sup>

Meanwhile, as Meta Machine was settling its litigation, across the country in the Central District of California, summary judgment was about to be entered against StreamCast. StreamCast, along with co-defendant Grokster, gained fame in 2003 by prevailing against the recording industry, winning a partial summary judgment<sup>113</sup> that the Ninth Circuit affirmed<sup>114</sup> in 2004, reasoning that because StreamCast and Grokster's programs were capable of substantial non-infringing uses—for example, reducing the cost of sharing files already in the public domain—the software makers were not liable for contributory infringement since they lacked knowledge of specific infringing uses. Following the Supreme Court's reversal and remand, Grokster settled its suit with the recording industry. StreamCast elected, however, to continue fighting and face a summary judgment motion brought by the record industry plaintiffs.

In a sixty-page opinion, Judge Stephen V. Wilson ruled in favor of the record industry.<sup>115</sup> Judge Wilson noted that “[a]n unlawful objective to promote infringement can be shown by a variety of means.”<sup>116</sup> In light of “overwhelming” evidence, and “hint[s] [from the Supreme Court *Grokster* opinion] that summary judgment should be granted for Plaintiffs,” the Court found “that no reasonable factfinder could conclude that StreamCast [operated] without the intent to induce infringement.”<sup>117</sup>

The settlement by eDonkey and summary judgment against StreamCast leaves, at the close of the third quarter, LimeWire as perhaps the last remaining file-sharing outlet. And with LimeWire, as of late 2006 facing suit from the record industry,<sup>118</sup> its fate is worth monitoring for future updates to see whether it finds an outcome different from eDonkey and StreamCast.

## B. INTELLECTUAL PROPERTY AND TRADITIONAL KNOWLEDGE

The Ninth Session of the World Intellectual Property Organization (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) met to consider the policy options and legal mechanisms that national and regional legal systems have employed to address the protection of tradi-

110. *Arista Records LLC v. Meta Machine, Inc.*, Case No. 06-cv-6991 (S.D.N.Y.).

111. CAROLINE MCCARTHY, *File-Sharing Site eDonkey Kicks It*, CNET News.Com, Sept. 13, 2006, [http://news.com.com/File-sharing+site+eDonkey+kicks+it/2100-1030\\_3-6115353.html](http://news.com.com/File-sharing+site+eDonkey+kicks+it/2100-1030_3-6115353.html).

112. See Complaint, ¶¶ 19, 21, *Arista Records LLC*, Case No. 06-cv-6991 (S.D.N.Y.).

113. *MGM Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029 (C.D. Cal. 2003).

114. *MGM Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. 2004).

115. *MGM Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966 (C.D. Cal. 2006).

116. *Id.* at 56.

117. *Id.* at 46.

118. Associated Press, *Music Publishers Sue Owner of Web File-Sharing Program*, N.Y. TIMES, Aug. 5, 2006, at C4.

tional knowledge.<sup>119</sup> The latest draft summary of policy and legal objectives considers diverse legal options for the general form of protection recognized in existing national and regional initiatives, including laws governing: unfair competition and unjust enrichment; the law of contracts; the law of civil liability, including tort law and liability for compensation; customary law; and environmental law.<sup>120</sup> The Ninth Session of the IGC is further exploring substantive options to recognize and protect traditional knowledge under *sui generis* and intellectual property right frameworks. One related example is the Secretariat of the Convention on Biodiversity's adoption of Decision VIII/5 on Article 8(j) of the CBD urging member parties to "develop, adopt and/or recognize national and local *sui generis* models for the protection of traditional knowledge . . ." <sup>121</sup> In this way, the CBD does not seek to develop new legal norms for the international protection of traditional knowledge. It remains unclear as to the form the international system of recognition and protection of traditional knowledge will take in the coming years.

With respect to the protection of traditional knowledge within bilateral and regional trade frameworks, the Trans-Pacific Strategic Economic Partnership Agreement, a regional trade agreement entered between New Zealand, Brunei, Chile, and Singapore,<sup>122</sup> recognized the right of Member Countries to adopt appropriate measures to protect traditional knowledge, consistent with international obligations, including the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).<sup>123</sup> The United States entered two bilateral treaties with Peru<sup>124</sup> and Columbia,<sup>125</sup> each addressing biodiversity and traditional knowledge protection in similar ways. According to the Office of the United States Trade Representative, under the bilateral treaty between the United States and Peru,

the two countries would seek ways to share information that may have a bearing on the patentability of inventions based on traditional knowledge or genetic resources by providing publicly accessible databases that contain relevant information; and an opportunity to cite, in writing, to the appropriate examining authority prior art that may have a bearing on patentability.<sup>126</sup>

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119. WIPO, Intergovernmental Comm. on Intellectual Prop. and Genetic Res., Traditional Knowledge and Folklore, *The Protection of Traditional Knowledge: Revised Outline of Policy Options and Legal Mechanisms*, WIPO/GRTKF/IC/9/INF/5 (Mar. 27, 2006), available at [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=70532](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=70532) (follow PDF hyperlink).

120. *Id.*

121. Secretariat of the Convention on Biological Diversity, *Decision VIII/5: Article 8(j) and Related Provisions*, UNEP/CBD/COP/8/31 (June 27, 2006), at 56, available at <http://www.biodiv.org/doc/decisions/COP-08-dec-en.pdf>.

122. Trans-Pacific Strategic Economic Partnership Agreement, art. 10.3, June 3, 2005.

123. *Id.* The Trans-Pacific Strategic Economic Partnership Agreement reaffirms each party's right to adopt appropriate measures to prevent the abuse of intellectual property rights and anti-competitive practices that might arise from such abuse, and to prevent the misleading use of country names; see also Ministry of Foreign Affairs and Trade, *Trans-Pacific Strategic Economic Partnership Agreement, National Interest Analysis*, July 2005, <http://www.mfat.govt.nz/downloads/trade-agreement/transpacific/transpacific-sepa-ia.pdf>.

124. United States-Peru Trade Promotion Agreement, U.S.-Peru, Apr. 12, 2006, available at [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Peru\\_TPA/Final\\_Texts/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html).

125. United States-Columbia Trade Promotion Agreement, U.S.-Columbia, Nov. 22, 2006, available at [http://www.ustr.gov/Trade\\_Agreements/Bilateral/Columbia\\_FTA/Final\\_Text/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Columbia_FTA/Final_Text/Section_Index.html).

126. The United States Trade Representative further notes the recognition that contracts reflecting mutually agreed terms between users and providers, rather than intellectual property systems, can serve to ade-

Additional regional free trade agreements that indirectly address the protection of traditional knowledge under intellectual property right frameworks include the Bay of Bengal Initiative for Multi-Sector Technical and Economic Cooperation<sup>127</sup> and the South Asian Free Trade Agreement.<sup>128</sup>

Additional legislation has been amended in the past year to consider how source of origin disclosures are handled within a traditional knowledge framework. In Belgium, a new law passed in the form of an amendment to Belgium's patent law requiring disclosure of the geographic origin of biological matter of plant or animal origin from which inventions have been developed.<sup>129</sup> The Swiss Federal Council submitted a draft law to the Swiss Parliament for consideration in 2006 requiring patent applications for inventions concerning genetic resources or traditional knowledge to contain a declaration of the source.<sup>130</sup> Under the Patents Amendment Bill of South Africa, patent applicants are required to disclose whether an application is: "directly derived from an indigenous biological resource or a genetic resource; and based on or derived from traditional knowledge or traditional use."<sup>131</sup>

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quately address access to genetic resources or traditional knowledge as well as the equitable sharing of benefits that may result from use of those resources or that knowledge. Indus. Trade Advisory Comm. On Intellectual Prop. Rights, *The US-Peru Trade Promotion Agreement: The Intellectual Property Provisions*, BILATERALS.ORG, Feb. 1, 2006, [http://www.bilaterals.org/article.php?id\\_article=4222](http://www.bilaterals.org/article.php?id_article=4222).

127. Bay of Bengal Initiative for Multi-Sector Technical and Economic Cooperation [BIMST-EC], Dec. 22, 1997, <http://www.mofa.gov.bd/bimstec/BIMSTEC%20FTA.pdf>.

128. The Agreement on the South Asian Free Trade Area covers India, Pakistan, Nepal, Sri Lanka, Bangladesh, Bhutan and the Maldives. Agreement on the South Asian Free Trade Area [SAFTA], Jan. 6, 2004, available at <http://www.dawn.com/2004/01/07/top6.htm>.

129. Article 5 of the new law modifies Article 15 of the country's patent law (No. 2005/11224. *Loi modifiant la loi du 28 mars 1984 sur les brevets d'invention, en ce qui concerne la brevetabilité des inventions biotechnologiques*, *Belgisch Staatsblad/Moniteur Belge* 13/05/2005, 22852). The text of this law is available online at [http://www.just.fgov.be/index\\_fr.htm](http://www.just.fgov.be/index_fr.htm).

130. *Declaration of the Source of Genetic Resources and Traditional Knowledge in Patent Applications*, Swiss Federal Institute of Intellectual Property, <http://www.ige.ch/E/jurinfo/documents/j10017e.pdf> (summarizing the draft law) (last visited Mar. 7, 2007). The draft provisions of the patent law defined the source of a genetic resource to include: (i) that to which the inventor or the applicant has had access, if the invention is directly based on this resource; in case this source is unknown to the inventor or the applicant, this must be declared accordingly; or (ii) with respect to traditional knowledge of indigenous or local communities related to genetic resources, that to which the inventor or applicant has had access, if the invention is directly based on this knowledge; in case this source is unknown to the inventor or the applicant, this must be declared accordingly." *Id.*

131. Patents Amendment Bill, Act 38 of 1997, § 33(3A), available at <http://www.info.gov.za/gazette/bills/2005/b17b-05.pdf>. Under the Act, a patent application cannot be refused on the basis of nondisclosure or wrongful disclosure. However, it could mean that the patent application will not meet the criteria for patenting, (i.e. be new, have no prior art or no obviousness, have an inventive step and have novelty).