

2010

International Intellectual Property Law

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Recommended Citation

Suong Nguyen et al., *International Intellectual Property Law*, 44 INT'L L. 245 (2010)
<https://scholar.smu.edu/til/vol44/iss1/15>

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I. Patents**

A. MULTINATIONAL

On March 2, 2009, WIPO launched a user consultation¹ on a “roadmap” for the future of the Patent Cooperation Treaty. WIPO’s vision is to reduce duplication of search and examination by different Offices handling successive stages of a PCT application.

India and Brazil intend to file with the World Trade Organization a “Request for Consultations,” the first stage of the formal dispute procedure, over the EU’s seizure of generic pharmaceuticals in transshipment at European ports.²

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1. See Patent Cooperation Treaty, *Working Group*, PCT/WG/2/3, ¶ 4 (Apr. 3, 2009), available at http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=119774.

2. Peter Ollier, *India and Brazil to File WTO Case over Generic Drugs*, ASIALAW, Oct. 2009, <http://www.asia.law.com/Article/2326713/Channel/16973/India-and-Brazil-to-file-WTO-case-over-generic-drugs.html>.

B. UNITED STATES

On November 9, 2009, the Supreme Court heard argument in *Bilski v. Doll*,³ an appeal of the Federal Circuit's holding that business methods are patentable only if "(1) [they are] tied to a particular machine or apparatus, or (2) [they] transform a particular article into a different state or thing."⁴ The issue of patentable subject matter is also raised in the petition for certiorari filed in *Prometheus Labs., Inc. v. Mayo Collaborative Servs.*,⁵ requesting review of the Federal Circuit decision that the step of administering a drug transformed the body and caused chemical and physical changes that could be measured.⁶ Moreover, the Court held that the step of determining the level of the drug in the body also involved a transformation because some form of manipulation was required, and therefore the patents did not claim merely "natural phenomena."⁷

In other cases, the Federal Circuit explored the doctrine of patent exhaustion, confirmed the anticipatory effect of compounds with no known uses, and heightened the evidence required to support damages awards. The Court also restricted liability relating to product-by-process claims and the export components used to perform a patented method abroad. Finally, the Court clarified the applicability of the patent misuse doctrine to patent pools as well as the type of conduct that may constitute inequitable conduct.

In *TransCore, LP v. Elec. Transaction Consultants Corp.*,⁸ the Federal Circuit relied on the Supreme Court's decision in *Quanta Computer, Inc. v. LG Electronics, Inc.*⁹ to find that a covenant not to sue in a settlement agreement can exhaust patent rights. The Court relied heavily on *Quanta's* holding that "[t]he longstanding doctrine of patent exhaustion provides that the initial authorized sale of a patented item terminates all patent rights to that item."¹⁰

In *In Re Gleave*, the Federal Circuit confirmed that a description of a compound with no known use is nonetheless anticipatory so long as the compound could be manufactured at the time it was described.¹¹ The Federal Circuit found that the "mere naming of a *theoretical* compound, *without more*, cannot constitute a description under § 102(b)."¹² But the naming of a compound that may be manufactured by a person of ordinary skill in the art is an enabling description.¹³

In *Lucent Techs., Inc. v. Gateway, Inc.*,¹⁴ the Federal Circuit indicated that it would require stronger evidence to support significant damages awards. In overturning the damages award, the Federal Circuit found that it was "based mainly on speculation or guesswork."¹⁵ It noted that the entire market value of a product could be helpful in deter-

3. *Bilski v. Doll*, 129 S. Ct. 2735 (2009).

4. *In re Bilski*, 545 F.3d 943, 954 (Fed. Cir. 2008) (*en banc*).

5. *Prometheus Labs., Inc. v. Mayo Collaborative Servs.*, 581 F.3d 1336 (Fed. Cir. 2009).

6. *Id.* at 1343-44.

7. *Id.* at 1349.

8. *TransCore, LP v. Elec. Transaction Consultants Corp.*, 563 F.3d 1271 (Fed. Cir. 2009).

9. *Quanta Computer, Inc. v. LG Elecs., Inc.* 128 S. Ct. 2109 (2008).

10. *TransCore, LP*, 563 F.3d at 1274.

11. *See In re Gleave*, 560 F.3d 1331, 1338 (Fed. Cir. 2009).

12. *Id.* at 1337 (emphasis in original).

13. *See id.* at 1338.

14. *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301 (Fed. Cir. 2009).

15. *Id.* at 1335.

mining a reasonable royalty, but only if the infringing feature's importance to the overall product was accurately conveyed.¹⁶

In *Abbott Labs. v. Sandoz Inc.*,¹⁷ the Federal Circuit resolved a split in its precedent and established that a product-by-process patent is only infringed if the product is actually produced through the claimed process.¹⁸

In *Cardiac Pacemakers, Inc. v. St. Jude Med., Inc.*,¹⁹ an *en banc* panel of the Federal Circuit overruled its decision in *Union Carbide Chems. & Plastics Tech. Corp. v. Shell Oil Co.*²⁰ and held that Section 271(f) does not cover method claims. Section 271(f) imposes liability for causing the "components of a patented invention" to be "supplied" from the United States to another country with the intention that they be assembled at the destination.²¹ The Federal Circuit held that the "components" of a method claim are "the steps that comprise the method," and not the physical components.²²

In *Princo Corp. v. International Trade Commission*, the Federal Circuit considered the standards for misuse in the context of patent pools, offering guidance as to which patents may be included in a pool and the impermissibility of agreements between pool members.²³ The Federal Circuit held that a purported blocking patent could be included in a pool so long as, "at the time of the license[,] an objective manufacturer would believe [that it] reasonably might be necessary to practice the technology at issue."²⁴ The Court also held that if the patentees of substitute technologies formally agreed not to develop one of them, such an agreement would constitute misuse on antitrust grounds.²⁵

Finally, the Federal Circuit continued to clarify the standard for inequitable conduct in *Rothman v. Target Corp.*²⁶ and *Larson Mfg. Co. v. Aluminart Products Ltd.*²⁷ Though the *Rothman* Court upheld findings that the patent was obvious, it overturned a jury's determination that it had been procured through inequitable conduct.²⁸ The Court was adamant that "a prosecuting attorney is free to present argument in favor of patentability without fear of committing inequitable conduct."²⁹

In contrast, the Federal Circuit took a broad interpretation of the facts "material" to patentability in *Larson*, which involved a patent on a storm door design.³⁰ Specifically, it held that adverse office actions relating to "substantially similar claims" in a continuation application were material to a reexamination of the original patent application, even

16. *Id.* at 1339.

17. *Abbot Labs. v. Sandoz, Inc.*, 566 F.3d 1282 (Fed. Cir. 2009) (*en banc* in part).

18. *See id.* at 1293.

19. *Cardiac Pacemakers, Inc. v. St. Jude Med., Inc.*, 576 F.3d 1348, 1359 (Fed. Cir. 2009).

20. *Union Carbide Chems. & Plastics Techn. Corp. v. Shell Oil Co.*, 425 F.3d 1355 (Fed. Cir. 2005).

21. 35 U.S.C. § 271(f)(1) (2003). Section 271(f)(2) also creates a cause of action for shipping a component that is only useful when used in a patented invention.

22. *Cardiac Pacemakers*, 576 F.3d at 1363.

23. *Princo Corp. v. Int'l Trade Comm'n*, 563 F.3d 1301 (Fed. Cir. 2009).

24. *Id.* at 1310.

25. *See id.* at 1315. The operative distinction between this case and the authority on which the ITC relied was that, here, the purported agreement's exclusive nature would guarantee that the disfavored of the two technologies never became commercially viable in its own right. *See id.*

26. *Rothman v. Target Corp.*, 556 F.3d 1310 (Fed. Cir. 2009).

27. *Larson Mfg. Co. v. Aluminart Prods. Ltd.*, 559 F.3d 1317 (Fed. Cir. 2009).

28. *Rothman*, 556 F.3d at 1322, 1329.

29. *Id.* at 1328-29.

30. *Larson*, 559 F.3d at 1321.

though the applicant disclosed all references on which those adverse decisions were based, and the Reexamination Panel was aware of the related proceedings.³¹

C. CHINA

“[T]he Standing Committee of the National People’s Congress adopted the third major set of amendments to the Patent Law since . . . [its] original adoption” in 1984.³² The Amendments came into effect on October 1, 2009.³³ The State Council is still working on the Implementing Regulations to the Amendments.³⁴

Previously in assessing the novelty of an invention one would consider publication anywhere in the world, but public use or public knowledge only inside China. . . . [p]rior art’ is not defined as ‘publicly known art anywhere in the world before the filing date’. . . . China has three types of patents: invention, utility, and design patents. . . . Many inventors have applied both for an invention patent and a utility patent. . . . The Amendments make it clear that [an invention patent cannot be granted unless] the utility patent claim is abandoned. . . . [The Amendments introduce] an absolute novelty standard for design patents and prohibited the registration of trademarks and labels as design patents. . . . [For genetics-related patents,] applicants must disclose the direct source of genetic resources . . . [and establish] that access to the genetic resources was lawfully obtained.³⁵

Provided that the applicant clears with the State Intellectual Property Office (SIPO) that the invention does not disclose state secrets, the applicant may file first for patent protection outside of China even if the invention is completed in China.³⁶

The Amendments clarify the grounds for compulsory licenses and both restrict their general application, [but make compulsory licensing easier for pharmaceuticals (Article 50) and semiconductor technology (Article 52)]. . . . Other amendments [specifically include] the prior art defense in patent law, clarify joint-ownership rights, create a safe harbor exemption for research (a “Bolar” exemption), clarify [] the international exhaustion of patent rights. . . [and the] procedures and requirements for preliminary injunctions, and codify [] evidence preservation procedures and increased statutory damages.³⁷

31. *See id.* at 1337-39.

32. ABA INT’L INTELLECTUAL PROPERTY CMM., CHINA PATENT DEVELOPMENTS 1 (2009), available at <http://meetings.abanet.org/webupload/commupload/IC750000/newsletterpubs/China.Patents.YIR.1Q2Q.combined.pdf>.

33. Quan guo ren min dai biao da hui chang wu wei yuan hui guan yu xiu gai “zhong hua ren min gong he guo zhuan li fa” de jue ding [Decision of the Standing Comm. Nat’l People’s Cong. on Amending the Patent Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 27, 2008, effective Oct. 1, 2009) (P.R.C.), available at http://www.npc.gov.cn/huiyi/lfzt/zlfxzaca/2009-02/05/content_1517164.htm. A link to a Table of the Amendments to the Patent Law together with the respective clauses in the previous version of the Law, in Chinese, is available at <http://www.chinaiprlaw.cn/file/2009010214269.html>.

34. Zhong hua ren min gong he guo zhuan li fa [Patent Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 12, 1984, effective Apr. 1, 1985) (P.R.C.).

35. CHINA PATENT DEVELOPMENTS, *supra* note 32, at 1-2.

36. *Id.* at 2.

37. *Id.* at 2-3.

In other developments this year, the utility model patent dispute between China and Schneider Electric of France settled for approximately US\$23 million.³⁸ The design patent cases involving Fiat and Great Wall³⁹ and Neoplan of Germany and Zhongtai were resolved.⁴⁰ Additionally, the Supreme People's Court issued a draft Interpretation on issues in patent infringement disputes as affected by the amendments to the Patent Law.⁴¹

D. LATIN AMERICA

The President of Ecuador issued Decree No. 118,⁴² making drug patents subject to mandatory licenses for public health. Approximately 2000 products for "public health problems" are affected by the Decree. Any entity willing to produce drugs may request a license; the national IP office will determine the duration of the grant.⁴³

E. EUROPEAN UNION

On March 20, 2009, the Commission adopted a Recommendation⁴⁴ to the Council of Ministers asking the Council to provide the Commission with negotiating directives for a proposed Unified Patent Litigation System.⁴⁵ The proposal would create a system of local first instance courts and a central second instance court, with exclusive jurisdiction over infringement and validity of European and Community patents, but not over national patents.⁴⁶ Preliminary reference to the European Court of Justice (ECJ) would be available on points of law.⁴⁷

38. In 2007 Wenzhou Intermediate People's Court in Zhejiang Province awarded Zhengtai Group (正泰集团股份有限公司) (also known as "Chint Electric": <http://www.chint.com/staging/home/index.html>) damages of RMB 334 million (approximately \$49 million USD) against Schneider Electric of France for the infringement of Chint's utility patent on a type of for a miniature low-voltage circuit breaker. *Id.* at 5.

39. 菲亚特奥托有限公司 [FIAT AUTO S.P.A.] v. 长城汽车股份有限公司 [Great Wall Motor Co. Ltd.], (Hebei Higher People's Court, Dec. 29, 2008 冀民三终字第84, available at http://ipr.chinacourt.org/public/detail_sfws.php?id=25808).

40. Currently under appeal. See Press Release, China Court, China Enters the WTO, "Bus Infringement First Case," Pronounced: Domestic Two Compensated German Company 21.16 Million (Jan. 20, 2009), available at www.chinacourt.org/html/article/200901/20/341206.shtml.

41. 最高人民法院关于审理侵犯专利权纠纷案件—Several Provisions of the Supreme People's Court on Issues Concerning Rules Applicable to the Trial of Patent Rights Infringement Disputes. Zhong hua ren min gong he guo zhuan li fa shi shi tiao li xiu ding cao an (song shen gao) [Revised Draft of the Implementing Regulations of the PRC Patent Law (Comment Draft)], (promulgated by the St. Council, June 15, 2001, effective Oct. 1, 2009), art. 26, (P.R.C.) available at http://yijian.chinalaw.gov.cn/lismsPro/law_download/fulltext/1236584702781.doc.

42. Essential Action Access to Medicines Project, Clarifications concerning Ecuador's Declaration on Compulsory Licensing, <http://www.essentialaction.org/access/uploads/EcuadorCLPolicyClarifications.pdf> (last visited Feb. 2, 2010).

43. *Id.*

44. COMMISSION OF THE EUROPEAN UNION, RECOMMENDATION FROM THE COMMISSION TO THE COUNCIL, SEC (2009) 330 final, available at http://ec.europa.eu/internal_market/indprop/patent/index_en.htm [hereinafter Recommendation]; see also Press Release, Europa, Patents: Commission Sets Out Next Steps for Creation of Unified Patent Litigation System (Mar. 24, 2009), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/460&type=HTML&aged=0&language=EN&guiLanguage=fr>.

45. Recommendation, *supra* note 44, at 7.

46. *Id.* at 5.

47. *Id.* at 6.

The president of the EPO has referred to the Enlarged Board of Appeal⁴⁸ a series of questions on the circumstances under which a computer program is patent-eligible subject matter, including whether a computer program can avoid exclusion by being stored on a tangible medium or run in a tangible computer.

F. UNITED KINGDOM

The House of Lords held⁴⁹ that for a patent claiming a novel and inventive compound *per se*, the patentable contribution to the art is the compound *per se*, even though the desirability of that compound was foreseen and the core inventive concept was how to provide it.

For the first time since the law was introduced in 1978, a court awarded compensation to an employee inventor on the single ground that the patent was of outstanding benefit to the employer.⁵⁰ The Patent Act has been amended⁵¹ and now additionally allows an award if the invention, and not merely the patent, is of outstanding benefit to the employer.

The English High Court held that disclosure of a prototype on private property to a limited number of unskilled observers did not make the invention available to the public.⁵²

G. SWITZERLAND

The Swiss Parliament completed its consultation on the drafts of the Federal Patent Court Act (PCA)⁵³ and the Federal Patent Attorney Act (PAA).⁵⁴ Both acts were approved by the Federal Council. The objectives of the acts are to assure qualified counsel in patent matters and highly professional jurisprudence in patent litigation. The Swiss Parliament unilaterally introduced the principle of regional exhaustion into Article 9(a) of the PCA.⁵⁵

48. Letter from Alison Brimelo, President, European Patent Office to Mr. Peter Messerli, Chairman of the Enlarged Board of Appeal (Oct. 22, 2008), *available at* http://breese.blogs.com/pi/files/G308_en.pdf; *see* AMTSBLATT EBA, OFFICIAL JOURNAL EPO 32 (2009), *available at* http://archive.epo.org/epo/pubs/oj009/01_09/01_0329.pdf.

49. *Generics (UK) Ltd. v. H. Lundbeck A/S*, [2009] UKHL 12, ¶ 98. The House of Lords, in its capacity as court of final jurisdiction, has since been replaced by a newly constituted Supreme Court.

50. *Kelly v. GE Healthcare Ltd.*, [2009] EWHC (Pat) 181, ¶ 150.

51. Patents Act, 2004, c.16, §§ 40-41 (as amended) (Eng.).

52. *Folding Attic Stairs Ltd. v. Loft Chairs Co. Ltd.*, [2009] EWHC (Pat) 1221, ¶ 88.

53. Bundesgesetz über die Patentanwältinnen und Patentanwälte [PAG], Federal Patent Court Act, Mar. 31, 2009, Bundesblatt [BBl] Nr. 13, at 2013, *available at* http://www.admin.ch/ch/d/ff/2009/index0_13.html (Switz).

54. Bundesgesetz über das Bundespatentgericht [PatGG] [Federal Patent Attorney Act], Mar. 31, 2009, Bundesblatt [BBl] Nr. 13, at 2023, *available at* http://www.admin.ch/ch/d/ff/2009/index0_13.html.

55. Federal Patent Court Act, Nr. 13, at 2013.

H. RUSSIA

The Russian Federation acceded to the WIPO Patent Law Treaty.⁵⁶ The Federal Patent Solicitor Law No. 316-FZ is now in effect.⁵⁷ It establishes strict qualifications for patent attorneys, including being a resident of the Russian Federation and having a university degree with at least four years of professional experience.⁵⁸ Qualifying attorneys can be certified and included in the Roster of Patent Attorneys.⁵⁹

I. CANADA

The Supreme Court of Canada ruled that “obvious to try” is a proper test for obviousness in Canadian law, although the Court found that in the specific case an optical isomer was not obvious over the known racemate.⁶⁰ In a subsequent case applying the test, the Federal Court of Appeals ruled that a “fair expectation of success” is essential to establish “obvious to try,” even when there is a strong motivation to go to trial.⁶¹

The Federal Court of Canada decided a case between a patentee plaintiff, who had released the commercial embodiment of its invention within the one-year grace period before the effective priority date of its patent, and a defendant who had filed an intervening patent application, acknowledging the plaintiff’s product as prior art.⁶² The court held that the defendant’s patent application was disqualified as prior art, on the basis that the allegedly anticipating matter was derived from the patentee.⁶³

II. Trademarks*

A. UNITED STATES

The Federal Circuit ruled in *In re Bose Corp.* that Bose made material misrepresentations in its opposition application to the WAVE mark by stating that certain audio tape recorders and players were used in commerce, when in fact that was not the case.⁶⁴ The Court ruled “that a trademark is obtained fraudulently under the Lanham Act only if the applicant or registrant knowingly makes a false, material representation with the intent to deceive the PTO,”⁶⁵ and subjective intent to deceive is a necessary element that can be

56. World Intellectual Prop. Org., PLT. Notification No. 22, Accession by the Russian Federation (May 12, 2009), www.wipo.int/treaties/en/html.jsp?file=/redocs/notdocs/en/plt/treaty_plt_22.html.

57. *Russia Enters into Force the Law on Patent Attorneys*, RBC FREE NEWS, Mar. 31, 2009, <http://www.rbc.ru/rbcfreenews/20090331091739.shtml>.

58. *Id.*

59. *Id.*

60. *Apotex Inc. v. Sanofi-Synthelabo Canada Inc.*, [2008] 3 S.C.R. 265 (Can.).

61. *Apotex Inc. v. Pfizer Canada Inc.*, [2009] 2009 F.C. 8, ¶ 44 (Can.).

62. *Uview Ultraviolet Systems Inc. v. Brasscorp Ltd.*, [2009] 2009 F.C. 58 (Can.).

63. *Id.*

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64. *In re Bose Corp.*, 580 F.3d 1240, 1246 (Fed. Cir. 2009).

65. *Id.* at 1244-45.

proved through direct or circumstantial evidence.⁶⁶ This decision elevated the knowledge standard to “willful intent” from the “should have known” standard used by the Trademark Trial and Appeal Board (Board).⁶⁷

In *Honda Motor Co. v. Winkelmann*, the Board denied trademark registration to a foreign applicant. The Board stated that the applicant’s failure to provide documentation of objective intent to use the mark in U.S. commerce legally implied that the applicant lacked the necessary bona fide intent to use the mark in U.S. commerce, as required under Section 44(e) of the Lanham Act.⁶⁸

In *Bayer Consumer Care AG v. Belmora L.L.C.*, the Board rejected Bayer’s likelihood of confusion and fraud claims regarding the mark FLANAX, which Belmora owns in the United States.⁶⁹ The Board held that Bayer’s FLANAX, a registered trademark in countries other than the United States, was not “manufactured and distributed by [Bayer] or even distributed. . . on behalf of [Bayer] in the United States,” and thus was not in prior “use” by Bayer.⁷⁰ The Board also rejected Bayer’s Article 6bis Paris Convention claim, noting that the Convention does not provide an “independent basis for cancellation” of a U.S. trademark, “absent use of the mark in the United States.”⁷¹

In *In re Vertex Group L.L.C.*, the Board declined to register a sound emitted by the AmberWatch (the Alert) because the applicant demonstrated neither that the Alert is inherently distinctive nor that the Alert has acquired distinctiveness.⁷² The Board reasoned that public service announcements advertising the AmberWatch and playing the Alert would not necessarily lead consumers to believe that the Alert differed from a regular alarm; thus, consumers would not necessarily associate the AmberWatch with the Alert.⁷³ Furthermore, the Board held that the Alarm was not registrable because it was functional.⁷⁴

In *Rescuecom Corp. v. Google, Inc.*,⁷⁵ the Second Circuit clarified its previous ruling in *1-800 Contacts, Inc. v. WhenU.Com, Inc.*⁷⁶ Rescuecom alleged that Google was using Rescuecom’s registered mark in commerce by selling it to advertisers as a keyword.⁷⁷ The Court in *Rescuecom Corp.* distinguished *1-800 Contacts, Inc.* by stating that the defendant therein did not sell keywords to advertisers, but merely triggered a pop-up in a different

66. *Id.* at 1245.

67. *Id.* at 1244-45.

68. *Honda Motor Co. v. Winkelmann*, 90 U.S.P.Q.2d 1660, No. 91170522, 2009 WL 962810, at *5, *11 (Trademark Trial & Appellate Bd. Apr. 8, 2009), available at <http://des.uspto.gov/Foia/ReterivePdf?flNm=91170552-04-08-2009&system=TTABIS>; 15 U.S.C. §1126(e) (1947).

69. *Bayer Consumer Care AG v. Belmora L.L.C.*, No. 92047741, at *2, 10, 12, 13 (Trademark Trial & Appellate Bd. Apr. 6, 2009), available at <http://des.uspto.gov/Foia/ReterivePdf?flNm=92047741-04-06-2009&system=TTABIS>.

70. *Id.* at *9-10.

71. *Id.* at *11-13.

72. *In re Vertex Group L.L.C.*, No. 76601697, *18 (Trademark Trial & Appellate Bd. Feb. 13, 2009), available at <http://des.uspto.gov/Foia/ReterivePdf?flNm=76601697-02-13-2009&system=TTABIS>.

73. *Id.* at *22-23.

74. *Id.* at *32.

75. *Rescuecom Corp. v. Google, Inc.*, 562 F.3d 123, 124 (2d Cir. 2009).

76. *1-800 Contacts, Inc. v. WhenU.Com, Inc.*, 414 F.3d 400 (2d Cir. 2005).

77. *Rescuecom Corp.*, 562 F.3d at 124-26.

window of an advertisement related to a consumer's website address search.⁷⁸ But in *Rescuecom Corp.*, consumers could be confused with respect to who owned the trademark.⁷⁹

B. EUROPE

In *Obelix/Mobilix*, Les Editions Albert René Sàrl opposed registration of the trademark Mobilix by telecom provider Orange for telecommunications goods and services.⁸⁰ Les Editions owns the trademarks of the famous cartoon figures Astérix and Obelix and had registered "Obelix" for similar goods and services. The ECJ upheld the global assessment by the Court of First Instance (CFI), concluding that assessment of the likelihood of confusion is based on several elements, including the recognition of the trademark on the market, the association with the registered sign, and the degree of similarity.⁸¹ The ECJ also held conceptual differences can counteract aural and visual similarities (the theory of counteraction), thus rejecting the argument that the theory of counteraction should not be applied when there is only a similarity between the conflicting signs.⁸²

In the *Wellness* case,⁸³ Silberquelle opposed Maselli-Strickmode, which manufactures and sells clothing and owns the mark "Wellness" in Class 25 (clothing) and Class 32 (non-alcoholic drinks).⁸⁴ Silberquelle sought cancellation of the mark in Class 32 for lack of genuine use, asserting that Maselli's drinks were handed out as gifts in bottles marked "Wellness-Drink" as promotional giveaways.⁸⁵ The ECJ stated that genuine use requires a commercial "*raison d'être*," an outlet for goods or services bearing the sign.⁸⁶ The requirement is not fulfilled by handing out promotional items as a reward for the purchase of other goods or to encourage sales of other goods.⁸⁷

In *Intel/Intelmark*, Intel as the owner of a famous trademark filed an application for a declaration of invalidity against "Intelmark," registered for marketing and telemarketing services.⁸⁸ A later mark that takes or would take unfair advantage of, or is or would be detrimental to, the distinctive character or the repute of an earlier mark, can be opposed. For there to be an unfair advantage or detriment, the average consumer must establish a link between the two marks. The ECJ ruled that it is sufficient for that test if the later mark calls to mind the earlier famous mark.⁸⁹

In *Manpower*, the CFI addressed whether the trademark "Manpower" for an employment and temporary personnel agency was "merely descriptive."⁹⁰ The CFI held that the

78. *Id.*

79. *Id.* at 128-29.

80. Case C-16/06-P, *Obelix v. Mobilix*, 2008 E.C.R. 62006J0016.

81. *Id.*

82. *Id.*

83. Case C-495/07, *Silberquelle v. Maselli-Strickmode*, 2009 E.C.R. 62007J0495.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. Case C-252/07, *Intel Corp. Inc. v. CPM United Kingdom Ltd.*, 2009 E.T.M.R. 13.

89. *Id.*

90. Case T-405/05, *Powerserv Personalservice v. Office for Harmonisation in the Internal Mkt.*, 2008 E.C.R. II-2883.

trademark was descriptive in some countries but not in others, but that the mark had already acquired distinctiveness through its use in other countries.⁹¹

C. CHINA

The Trademark Office of the State Administration for Industry and Commerce (SAIC) released a new version of proposed amendments to the Trademark Law of the People's Republic of China (the Trademark Law) and asked for comments. This version may well be the final revision before the amendments are sent to the State Council and from there to the Standing Committee of the National People's Congress. There are significant changes since the 2007 draft and overall they have been well-received. Article 9 will require good faith in applications for registration and use of trademarks. Article 34 has been added prohibiting registration when the applicant knew of the existence of a similar mark for similar goods and services. This provision may rescue many who negotiate with potential suppliers in China before filing trademark applications.

Infringement cases against unauthorized dealers of Harley-Davidson motorcycles⁹² and Porsche automobiles⁹³ further developed the doctrine of nominative fair use in China. The *Harley-Davidson* decision in particular is quite complex, but the doctrine does not appear to be any broader than in the United States, and may in fact be narrower.

The Trademark Law contains public order provisions that prohibit the use of marks "detrimental to socialist morality or customs, or having other harmful influences."⁹⁴ Such broadly-stated provisions are common in trademark legislation of most countries, but each provision is also state-specific because different countries have different social values, moralities, cultures, and customs.

The Trademark Office Examiners have cited these provisions against a wide variety of marks, and the bar has followed suit. The courts have not welcomed this expansion (*see* the *Sony Ericsson* case).⁹⁵ But Beijing No. 1 Intermediate People's Court upheld a decision of the Trademark Review and Adjudication Board rejecting Paul Franck Industries' application to register a design mark that consisted of a skull and crossbones drawn in a cartoon

91. *Id.*

92. 密执安公司诉北京哈雷商贸中心, 北京市第二中级人民法院, (2007)二中民初字第10758号 [Harley-Davidson Motor Co. v. Beijing Harley Trading Center] (Beijing Second Intern. People's Ct., Mar. 11, 2009), available at <http://bjgy.chinacourt.org/public/paperview.php?id=49113>.

93. 北京泰赫雅特汽车销售服务有限公司诉保时捷股份公司 (Porsche AG), 北京市高级人民法院 民事判决书 (2008) 高民终字第326号 [Beijing TechArt Auto. Sales & Serv. Co. v. Porsche AG] (Beijing Sup. People's Ct., Mar. 10, 2009), available at <http://bjgy.chinacourt.org/public/paperview.php?id=49062>.

94. Trademark Law of the People's Republic of China, art. 10(8) (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 23, 1982, effective Mar. 1, 1983, approved and amended by the Decision on Amending the Trademark Law by the Standing Comm. Nat'l People's Cong., Feb. 22, 1993 & Oct. 27, 2001) LAWINFOCHINA (last visited Jan. 28, 2010) (P.R.C.).

95. 索尼爱立信移动通信产品(中国)有限公司诉国家工商行政管理总局商标评审委员会北京市第一中级人民法院 (2008)一中行初字第196号 [Sony Ericsson Mobile Comm'ns Products (China) Co., Ltd. v. State Administration for Industry and Commerce Trademark Review and Adjudication Board] (Beijing First Intermediate People's Court, Aug. 10, 2008).

manner typical of Halloween decorations in North America.⁹⁶ The use of the mark was considered to have a negative effect on society.

D. SWITZERLAND

In its *Post* decision, the Federal Administrative Court (FAC) refused to register the trademark “POST,” declaring that ‘post’ is not distinctive for the dispatch of letters and packages, belongs to the public domain, and must be freely available for competitors.⁹⁷ The FAC held that a denomination acquires distinctiveness if it is considered by the relevant public as a mark, without the addition of any other element. Since the Swiss Post had primarily provided evidence for the use and the popularity of the sign ‘the post’ and not ‘post’ only, the FSC consequently denied the acquisition of distinctiveness for the denomination ‘post’.

In *Afterhours*, the FAC overturned the Federal Institute for Intellectual Property’s (IIP) refusal to register the trademark “AFTER HOURS” for retail sale and repair services for watches and jewelry.⁹⁸ The IIP had rejected the mark as advertising as well as descriptive, because average Swiss residents and tourists in Switzerland understand the meaning of “after hours,” and therefore expect the above-mentioned services to be rendered after hours. The FAC held that although the relevant consumers possess a basic range of vocabulary in English, it cannot be assumed that they comprehend the expression after hours.

The FAC overturned the IIP’s refusal to register a sound mark filed for chocolate products, consisting of a sequence of seven tones. The IIP had said that a sound mark without related text lacks distinctiveness.⁹⁹ The FAC stated that the enumeration of signs registrable as trademarks in the Trademark Act is not conclusive. Further, the FAC held sound marks can be trademarks, can be inherently distinctive, and should be treated the same as word marks.

E. RUSSIA

The Supreme Arbitration Court of the Russian Federation (SAC) issued two decisions that changed the Customs agencies’ application of Article 14.10 of the Administrative Offense Code on parallel importers in the gray market. Previously, Russian courts treated import of goods into Russia as an independent use of a trademark and gray market goods were subject to confiscation. Russian Customs officials had been zealously confiscating products of parallel imports, and prosecuting such importers.

96. 保罗弗兰克实业有限公司诉中华人民共和国国家工商行政管理总局, 北京市第一中级人民法院 (2009) 一中行初字第435号

[Paul Frank Co., Ltd. v. State Administration for Industry and Commerce Trademark Review and Adjudication Board] (Beijing First Intermediate People’s Court, Mar. 20, 2009), available at <http://bjgy.chinacourt.org/public/paperview.php?id=82020>.

97. Bundesgericht [BGER] [Federal Court] Dec. 1, 2009, Entscheidungen des Schweizerische Bundesgerichts [BGE] 4A_370/2008 (Switz.), available at the FSC database <http://www.bger.ch>.

98. Bundesgericht [BGER] [Federal Court] Jan. 23, 2009, Entscheidungen des Schweizerische Bundesgerichts [BGE] B-516/2008 (Switz.), available at the FAC database <http://www.bundesverwaltungsgericht.ch>.

99. Bundesgericht [BGER] [Federal Court] Apr. 7, 2009, Entscheidungen des Schweizerische Bundesgerichts [BGE] 4A_566/2008, available at the FSC database <http://www.bger.ch>.

Now the courts' decisions favor parallel importers, finding that gray goods manufactured but not imported by the trademark owner are not counterfeit goods. In *Central Excise Customs and Porsche Russland v. Genesis* the lower court had held Genesis' import of a Porsche Cayenne without consent of the trademark owner or its authorized importer, Porsche Russland, a violation of the mark owner's rights and ordered confiscation of the vehicle along with a fine.¹⁰⁰ The SAC overturned the decision, declaring the confiscation unlawful on the grounds that the vehicle was not counterfeit.

In *Vyborg Customs v. AVTO-Logistika*, Honda and Nissan had requested the Vyborg Customs Post at the Finnish border to confiscate AVTO's imported automobile spare parts bearing Honda and Nissan trademarks.¹⁰¹ After the goods were seized, Vyborg Customs sought to hold AVTO liable while AVTO argued that the imported spare parts were genuine and should not be subjected to confiscation. The court found in favor of AVTO because only counterfeit goods could be subject to confiscation. Subsequently, the Ninth Arbitration Court of Appeals and Moscow Arbitration Court upheld this ruling.¹⁰²

III. Copyrights*

A. UNITED STATES

The Register of Copyrights issued a determination on January 26, 2009, contravening a decision by the Copyright Royalty Judges to accept a settlement agreement regarding Internet streaming of music.¹⁰³ The three-judge panel operates as a unit of the Library of Congress and is charged with setting license rates for making and distribution of phonorecords of musical works, among other licenses. The Register found that the Judges had erred by not referring to the Register questions of substantive copyright law, including the question of whether interactive streaming constituted a digital phonorecord delivery under the Copyright Act, and by approving points that were contrary to law, including the statement, contrary to statute, that "[an] interactive stream is an incidental digital phonorecord delivery under 17 U.S.C. 115(c)(3)(C) and (D)."¹⁰⁴ The Register confirmed that the Judges' authority encompasses the ability to alter settlement agreements among parties.

Proposed legislation pending before Congress could create a statutory license for all audio transmissions of sound recording performances. Both bills contain provisions pro-

100. [The Highest Arbitration Court of the Russian Federation] 2009, No. 10458/08.

101. [Moscow Arbitration Court] 2008, No. A40-34264/08-94-320.

102. [Ninth Arbitration Court of Appeals] 2009, No. 09AP-14817/200-Aa; [Moscow Arbitration Court] 2009, No. KA-A40/4185-09.

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104. Review of Copyright Royalty Judges' Determination, 74 Fed. Reg. 4537 (Jan. 26, 2009).

viding for special treatment of radio stations with small budgets and public broadcasting radio stations.¹⁰⁵

A U.S. District Court applied the “hot news” doctrine to the Internet for the first time, ruling that the Associated Press could sue All Headline News Corp. for allegedly copying AP’s headlines and news stories from the Internet and reselling it as its own content.¹⁰⁶ The “hot news” doctrine is a common-law cause of action for appropriation of news content that has been created through “the expenditure of labor, skill, and money.” The court applied New York law, noting that the Second Circuit has already held that federal copyright law does not preempt state “hot news” claims. In addition, the court departed from prior decisions to find that, since the Copyright Act defines “copyright management information” to include identifying information such as the copyright notice about the copyright owner of the work,¹⁰⁷ the removal of a textual copyright notice or author attribution may violate the copyright management information provisions of the Digital Millennium Copyright Act.

A U.S. Court of Appeals issued decisions in the appeals of the first two determinations of the Copyright Royalty Board (CRB). These two decisions set the statutory royalty rates for satellite radio for 2007-2012¹⁰⁸ and for webcasting for the period 2006-2010.¹⁰⁹ The Court found the CRB met the Copyright Act standard for reasonable rates, but remanded the webcasting decision for a determination of the appropriate minimum fee per webcasting licensee, based on the cost to administer such a license.¹¹⁰ In addition, the Court remanded the satellite radio case to determine a rate for the ephemeral reproduction right in Section 112 separate from the Section 114 public performance right.¹¹¹

The Supreme Court denied certiorari in a case that held the functioning of a remote digital video recorder system did not infringe copyright.¹¹² The underlying case dealt with a cable company’s system that allowed customers to select programs to record, but stored the programs at a remote location and not on the customer’s DVR. The Court held that the copies were made by the users, not the cable company, so the cable company could not be directly liable. It also held that the buffer copies created by the system to stream the programs back to the customers were not sufficiently fixed to constitute “copies” within the scope of the Copyright Act, and that the resulting playback of programs was not made “to the public” for purposes of the Copyright Act.¹¹³

Live365, a prominent webcaster filed a lawsuit challenging the constitutionality of the CRB. The suit alleges that the three Copyright Royalty Judges are appointed in violation of the Appointments Clause of the Constitution. Live365 requested a preliminary injunction to halt the CRB proceeding that will set royalty rates for Internet webcasting through

105. Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 73 Fed. Reg. 57033, 57034 (Oct. 1, 2008) (to be codified at 37 C.F.R. pt. 385).

106. S. 379, 111th Cong. (2009); H.R. 848, 111th Cong. (2009).

107. *Associated Press v. All Headline News Corp.*, 608 F. Supp. 2d 454 (S.D.N.Y. 2009).

108. Copyright Protection and Management System, 17 U.S.C. §1202(c)(3) (1999).

109. *SoundExchange, Inc. v. Librarian of Cong.*, 571 F.3d 1220, 1221 (D.C. Cir. 2009).

110. *Intercollegiate Broad. Sys. Inc. v. Copyright Royalty Bd.*, 571 F.3d 69, 74 (D.C. Cir. 2009).

111. *Id.* at 77.

112. *Id.* at 72.

113. *Cable News Network, Inc. v. CSC Holdings, Inc.*, 129 S. Ct. 2890 (2009).

2015 until the constitutionality issue can be resolved, but the motion was denied on September 28, 2009.¹¹⁴

The Second Circuit ruled that the Yahoo! Launchcast webcasting service is not required to obtain a direct license to perform sound recordings over the internet, but instead can rely on the Section 114 statutory license for the public performance of sound recordings.¹¹⁵ The service offers users a large amount of control over the songs played, but the service creates individual playlists for each user based on the user's preferences.¹¹⁶ The case was the first interpretation of the vague statutory standard for determining what services are eligible for a Section 114 statutory license. The Court concluded that Launchcast "does not provide sufficient control to users such that playlists are so predictable that users will choose to listen to the webcast in lieu of purchasing music, thereby—in the aggregate—diminishing record sales."¹¹⁷

B. CHINA

The WTO panel released its decision on the case brought by the United States and other nations against China with respect to China's copyright laws.¹¹⁸ Both parties claimed victory in the dispute. Three claims were asserted:

1. Thresholds for Criminal Measures: No criminal procedures and penalties were imposed for willful trademark counterfeiting or copyright piracy on a commercial scale.
2. Disposal of Infringing Goods by Customs: Measures for disposing of confiscated goods were inconsistent with China's obligations because some goods could re-enter the stream of commerce.
3. Denial of Copyright Protection To Works Not Yet Authorized For Publication or Distribution: Article 4 of China's Copyright Law¹¹⁹ denied protection to commercial works still being reviewed by China's censors.

The panel did not find sufficient proof for item one, but found against China on items two and three. The case is significant both because it involved a joint effort by the U.S. FBI and China's Ministry of Public Security and because of the high level of sophistication of the counterfeiters and their focus on the export market. Just before the WTO decision was announced, the Futian District People's Court in Shenzhen¹²⁰ sentenced eleven people to jail for a sophisticated counterfeiting ring that manufactured and distributed pirated Microsoft products around the world.¹²¹

The process of amending the Copyright Law has begun. Initial research has apparently been completed and a draft is being prepared for consultation.

114. *Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121, 133, 139 (2d Cir. 2008).

115. *Live365, Inc. v. Copyright Royalty Board*, No. 09-01662 (BRW) (D.C. Sep. 28, 2009) (ORDER).

116. *Arista Records L.L.C. v. Launch Media Inc.*, 578 F.3d 148, 164 (2d Cir. 2009).

117. *Id.* at 150-51.

118. *Id.* at 163.

119. Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26, 2009).

120. Copyright Law (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, effective June 1, 1991, approved and amended by the Nat'l People's Cong. Standing Comm. Oct. 27, 2001, effective Oct. 1, 2009) (P.R.C.).

121. Shenzhen is a special economic zone located just across the border from Hong Kong SAR.

Perhaps the most significant development in 2009 was the issuance of pretrial seizure orders in two infringement actions against karaoke bars. An Intermediate People's Court in Hefei froze the bank accounts of two karaoke bars based on a motion to preserve assets under the Civil Procedure Law.¹²² The Intermediate People's Court in Yichang City issued an order seizing karaoke videos to preserve evidence.¹²³ Such orders are generally highly effective in stopping infringement, but notaries have been reluctant to participate in such seizures, fearing their personal safety.

C. SWITZERLAND

In the first notable case, a claimant, having edited and made available on the internet a compendium for pharmaceutical products in Switzerland, filed a claim against a competitor administrating a similar database, based on copyright infringement and unfair competition.¹²⁴ The FAC held that no copyrights of claimant were infringed because the compendium was considered not to have the "statistical singularity" (i.e. individuality and creative scope) required for copyright protection.¹²⁵ The FAC further determined that there was no unfair competition because claimant had already sufficiently amortized production costs for the compendium.¹²⁶

In the second notable case, the heirs of the designer of the classic Swiss Railway Clock attempted to bar the licensee of the Swiss Federal Railways from producing and marketing the clock.¹²⁷ The designer had worked as a Railways employee and had transferred his rights to the Railways in or before 1987 by implication. The heirs argued that such transfer was invalid because the designer was not aware of his copyright in the clock. The FAC ruled that the designer need not be aware that the right he had transferred was a copyright for such transfer to be valid.¹²⁸ It was sufficient that the designer was aware at the time of the transfer that he had any kind of original rights in the clock.¹²⁹

In the last case, an architect claimed his copyright for architectural plans was infringed by significant changes in the construction.¹³⁰ The FAC held that even though the construction infringed claimant's copyright in the architectural plans, it would be disproportionate to demolish the infringing construction and to rebuild it according to claimant's

122. David Barboza, *Chinese Court Jails 11 in Microsoft Piracy Ring*, N.Y. TIMES, Jan. 1, 2009, <http://www.nytimes.com/2009/01/01/business/worldbusiness/01soft.html?partner=rss&cme=rss>.

123. See China IPR Law, *Audio-visual Works Infringement Lawsuit in Hefei "Ice-Breaking" China's First Implementation of the Preservation of Property Right Place*, July 20, 2009, <http://www.chinaiprlaw.cn/file/2009072915481.html>.

124. See China IPR Law, *China's First Premises of the Kara*, Oct. 29, 2009, <http://www.chinaiprlaw.cn/file/2009110115870.html>; Franchise Law, *Yichang Intermediate People's Court Premises on the Kara*, Nov. 10, 2009, <http://www.fclaw.com.cn/Details.asp?id=14420>.

125. Bundesgericht [BGer] [Federal Court] Feb. 13, 2008, *Entscheidungen des Schweizerische Bundesgerichts* [BGE] 4A 404/2007, available at <http://www.bger.ch>.

126. *Id.*

127. *Id.*

128. Bundesgericht [BGer] [Federal Court] May 8, 2008, *Entscheidungen des Schweizerische Bundesgerichts* [BGE] 4A_104/2008, available at <http://www.bger.ch>.

129. *Id.*

130. *Id.*

plans, noting that the Federal Act on Copyright and Neighboring Rights provides that buildings are excluded from the principle of demolition of copyright infringing objects.¹³¹

D. RUSSIA

Russia's accession to the WIPO Copyright Treaty entered into effect.¹³² While some believe that this development, along with the recent enactment of Part IV to the Russian Civil Code, has brought Russian copyright legislation into compliance with WTO requirements, critics cite a continuing lack of anti-piracy enforcement. There are no surprise inspections where pirated goods are produced, particularly counterfeit optical disks. There are many rogue "collecting societies" that negotiate "licenses" with illegal internet sites offering pirated music without any authority to do so. The United States is pressuring the Russian government to investigate and prosecute these groups through "full empowerment" of the Computer Crimes Unit of the Ministry of the Interior.

Responding to calls for more aggressive IP enforcement, the Russian Supreme Court and High Arbitrazh [Economic] Court issued a joint directive to the lower courts on application of Part IV of the Civil Code. Local IP practitioners view this as a step forward even though two of the most contentious issues, IP enforcement on the Internet and parallel imports, were excluded from the directive pending additional consideration.

The U.S. Trade Representative issued its annual Special 301 report,¹³³ in which Russia continues to appear on the Priority Watch List. The report notes "some progress in improving IPR protection and enacting necessary legislation," but cites continuing concerns about Russia's "slow implementation" of its commitments in the 2006 bilateral agreement with the United States.¹³⁴ The agreement was intended to facilitate Russia's long anticipated accession into the WTO. Russian commitments included amendments to the Russian Customs Code and Civil Code, all or most of which have been implemented, and a Law on Medicines that has been introduced but not yet enacted.¹³⁵ The Law on Medicines would provide for the protection of pharmaceutical data submitted in the course of government approval and clinical trials, without which pharmaceutical companies are vulnerable to copying by generic drug providers.

Although the Russian government has shut down websites offering pirated music in the last two years, others have sprung up in their place. The Moscow City Government recently banned DVD/CD kiosks in the public transport system and pedestrian spaces, eliminating a major source of retail pirated videos and music.¹³⁶

131. Bundesgericht [BGer] [Federal Court] Jan. 20, 2009, Entscheidungen des Schweizerische Bundesgerichts [BGE] 4A_341/2008, available at <http://www.bger.ch>.

132. *Id.*

133. World Intellectual Prop. Org., WCT Notification No. 72, Accession by the Russian Federation, Nov. 5, 2008, http://www.wipo.int/treaties/en/html.jsp?file=/redocs/notdocs/en/wct/treaty_wct_72.html.

134. U.S. TRADE REPRESENTATIVE, 2009 SPECIAL 301 REPORT (2009), available at <http://www.ustr.gov/sites/default/files/Full%20Version%20of%20the%202009%20SPECIAL%20301%20REPORT.pdf>.

135. *Id.* at 16.

136. *Id.*