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NEW TREATY

RETURN OF THE LION



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AVIAN FLU DRUGS: Patent Questions

Letter from the Editor

Welcome to WIPO Magazine – with a new look.

Since its inception, the WIPO Magazine has been in a state of evolution. We are constantly seeking to provide our readers with more useful and interesting articles about current intellectual property issues and insights into the work of WIPO, in an appealing and accessible format. With this issue we are pleased to introduce an updated look for the Magazine, to better reflect its more dynamic content.

To ensure that this evolution continues in the right direction, we recently carried out a **reader survey**. We thank the many readers who participated and sent thoughtful comments and suggestions. These are already helping to inform our decisions about the future development of the Magazine.

The survey confirmed the geographical diversity of our readership. We received responses from readers in 130 different countries – from Tajikistan to Tuvalu, from Mozambique to Myanmar, from Iceland to Iraq – with the greatest numbers from India, Mexico and the U.S. The highest proportion of respondents were from legal practices, IP offices and universities. Science and technology fields and creative and business sectors were also well represented. The diversity was reflected in your differing interests and needs. But a number of common threads emerged:

■ What you liked: The ratings were overwhelmingly positive as to the overall interest and standard of the Magazine. Readers particularly appreciated the breadth of coverage, both geographically and in terms of subject matter; the clarity of writing; the educational and outreach value of examples of IP in action; and the fact that the Magazine keeps them up to date with developments at WIPO and in the international IP arena.

■ What you didn't like: Many readers expressed frustration with the online pdf version of the Magazine. They will be glad to learn that we are moving ahead with plans to create an interactive, html version of the Magazine online. On the content side, there was some criticism that the Magazine focused too exclusively on the benefits and successes of the IP system, rather than on the controversies. These concerns will be met with more articles examining current debates on IP, with more external contributors representing different viewpoints.

■ What you want more of: We received many requests for greater coverage of litigation – which coincided with our recent move to incorporate more IP case law studies in the Magazine (see the *The Case of Relaxin*, and *The Return of the Lion* in this issue). A number of readers were keen to see more in-depth, expert analysis of specialist issues. And there was a notable appetite for articles on geographical indications, on traditional knowledge, and on biotech-related subjects.

Encouraged by the survey to capitalize on the wealth of diverse experience and opinions among our readers, we are starting a **Readers Letters section**. Further details will appear shortly on the WIPO Magazine page of the WIPO website. But in the meantime please send your letters to The Editor at: WipoMagazine@wipo.int

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NEW INTERNATIONAL TREATY

The Singapore Treaty on the Law of Trademarks

WIPO Member States on March 28 adopted a new international treaty on trademarks. The new treaty, to be known as the Singapore Treaty on the Law of Trademarks in recognition of the country that hosted the final round of negotiations, provides simplified and internationally harmonized administrative rules for trademark registration, and creates a framework for defining the reproduction of non-visible marks, such as sound and smell marks. It concludes efforts by Member States to update the 1994 Trademark Law Treaty (TLT) and bring it in line with the technological developments of the past decade. "In establishing the Treaty, the governments of WIPO's Member States collectively send out a pow-

erence recognized the importance of the treaty," commented Ambassador Burhan Gafoor, the President of the Diplomatic Conference and Singapore's Permanent Representative to the World Trade Organization and the United Nations in Geneva. "It will boost international trade and deliver an enhanced and harmonized trademark procedure that will benefit nations, brands and businesses."

Common standards

The Singapore Treaty deals mainly with procedural aspects of trademark registration and licensing. By agreeing to common standards, Member States create a level playing field for all economic operators that invest in branded goods. Moreover, it creates a dynamic regulatory framework for brand rights. The Treaty establishes an Assembly of the contracting parties, providing a built-in review mechanism for administrative details of a lesser order, but of great practical importance for brand owners.

Recognizing developments in the branded goods industry, the Treaty marks a new approach to securing investment in product differentiation. Brands are no longer confined to labels on goods; a brand today stands for the product's identity. Creativity and investment go into the development of brands, and businesses need to be able to secure that investment. New rules contained in the Singapore Treaty, applicable to all types of trademarks, address those needs.

The Singapore Treaty takes into account the advantages of electronic filing and communication facilities, while recognizing the different needs of developing and developed nations. Concerns expressed during negotiations by some developing and least developed states about their ability to fully benefit from the Treaty resulted in a commitment by industrialized countries to provide technical assistance and other support to strengthen the institutional capacity of those countries to enable them so as to take full advantage of the Treaty.

For the official documents of the Diplomatic Conference see: http://www.wipo.int/meetings/en/details.jsp?meeting_id=6982

Photos: Lee Lay Na



Delegates worked hard to ensure that the outcome was satisfactory to all parties.



Director General Kamil Idris: "The adoption of the new Treaty marks a major milestone."

erful message ...that intellectual property has a central role to play in the new information society," said WIPO Director General Kamil Idris in his message to the closing ceremony of the Diplomatic Conference. He added "The Singapore Treaty, as the first international treaty in the field of intellectual property in the new century, reaffirms the importance of trademarks in promoting domestic and international trade and in enhancing enterprise development and consumer confidence."

A total of 162 delegations from Member States, as well as a number of intergovernmental and non-governmental organizations, participated in the Diplomatic Conference for the Adoption of a Revised Trademark Law Treaty, which opened on March 13 and was slated to end on March 28. The positive atmosphere and strong commitment of Member States to concluding the treaty resulted in negotiations ending three days ahead of schedule. "I believe this was because every delegate in the con-

WORLD INTELLECTUAL PROPERTY DAY 2006

Six years ago, WIPO Member States decided to designate a World Intellectual Property Day. Their aim was to raise awareness of the role of intellectual property in daily life, and to celebrate the contribution made by innovators and artists to the development of societies across the globe. They chose April 26, the date on which the Convention establishing WIPO entered into force in 1970.

The response has grown more enthusiastic every year, with ever more government ministries, NGOs, industry groups, and educational institutions joining the celebrations with new activities and events. This year the theme proposed by WIPO focuses on ideas, as the starting point of all intellectual property. WIPO has dispatched posters and promotional materials to IP offices and

organizations around the world; and a 30-second spot promoting World Intellectual Property Day will be broadcast on international television channels.

The next edition of the Magazine will include a round up of reports from Member States on this year's events.



Message from Director General Kamil Idris

World Intellectual Property Day is an opportunity to encourage people to think about the role played by intellectual property in everyday life, and about its importance in stimulating and safeguarding innovation and creativity. This year we celebrate the starting point of all intellectual property, the seeds from which all innovations and creative works grow – ideas.

Mankind's inexhaustible capacity for producing ideas makes us unique. Yet this extraordinary ability is often taken for granted. We hardly notice the countless ideas we generate every day, or how much of what we value is the fruit of others' ideas: labor-saving inventions, pleasing designs, life-saving technologies.

Ideas shape our world. They are the raw materials on which our future prosperity and heritage depend. This is why it is important to provide environments in which innovative ideas are encouraged and rewarded. This is why intellectual property exists.

From the words, music and images which move us to the brands which attract us; from the bicycle to bio-fuel; from the microchip to mobile phone – it all starts with an idea.



RECENT CHALLENGES FOR ENFORCEMENT

of Intellectual Property Rights

Intellectual property (IP) rights exist to protect the works of creators and innovators from misappropriation or copying by unauthorized parties. Such protection is in the interests not only of the individual creators, but of wider economic development and consumer interests. Counterfeiting and piracy hamper the growth of national economies, depriving legitimate enterprises of turnover, and the state of revenues. The phenomenon deters investment and innovation, and often violates employment, health and safety legislation. On a transnational scale, counterfeiting often involves and sustains organized crime.

Changing patterns of counterfeiting and piracy

Today counterfeiting and piracy affect a huge spectrum of different goods, from aircraft parts to detergent, from alcohol and perfumes to security holograms. No industry is spared. Whereas previously high-end branded goods were a principal target, the latest trend is also to copy ordinary branded consumer goods – even those as mundane as toothbrushes. The type of goods counterfeited is changing constantly in line with market trends.

Counterfeiters are getting cleverer. They are exploiting technological advances to produce copies hardly distinguishable from the originals, in some cases even outsmarting the proprietors. They are making extensive use of the Internet, resulting in the sale and distribution of fake goods at enormous speed and with no geographical limitations. And they are seeking to circumvent border measures by moving imitation goods across borders in “disassembled” form, i.e. waiting until the consignment has passed through customs before sticking on the trademark labels which would make it obvious that the goods are counterfeit.

The problem is escalating, as demonstrated by the ever greater quantities and types of counterfeit goods seized each year. In 2004, seizures of fake foodstuffs and alcoholic beverages doubled at the European Union external borders, while seizures of computer hardware increased nine-fold over the previous year (see table). The scale and nature of the problem demands a coordinated approach to enforcement measures at the national, regional and international levels.

Calculating the Cost: OMO

OMO is a detergent, sold and distributed by Unilever. In 2004, a counterfeit version came on the market for a few months in Mozambique. The counterfeit product, AMO, imitated the OMO graphics, carried Unilever’s Mozambique address on its label, and sold in identical one kilogram packs.

During the short period that the counterfeit was on the market, OMO sales declined to 40 percent of its normal monthly rate – a loss not only for Unilever, but more importantly for Mozambique, one of the least developed countries. The 60 percent drop in sales meant an estimated total revenue loss to the state of US\$ 588,000 in value added tax, import duty and corporate tax that were not paid by the counterfeiters.

Source: Unilever



WIPO's role

Working jointly with Member States, industry representatives and other stakeholders, WIPO aims to assist governments and industry in developing effective anti-counterfeiting and piracy strategies. The focus is on awareness-raising, legislative assistance, improved coordination, improving information exchange between right holders and enforcement agencies, and capacity building.

These priorities are pursued on an international level through WIPO's on-going cooperation with organizations such as World Customs Organizations (WCO), Interpol, World Health Organisation (WHO) and, in an observer capacity, in the Group of G-8. WIPO's intensive cooperation with WCO, Interpol and NGOs in the framework of the Global Congress Steering Group led to the high-level Global Congress on Combating Counterfeiting and Piracy in Brussels in 2004 and Lyon in 2005 (see the January/February 2006 edition of WIPO Magazine), as well as regionally focused conferences in Rome, Shanghai and Rio de Janeiro. Two more regional forums will be held this year in Romania and in the Gulf States prior to the third Global Congress, which will be hosted by WIPO in Geneva in January 2007.

European Union – Counterfeit Seizures (comparison 2004 to 2003)

Computer equipment (hardware) > **899%**

Electrical Equipment > **707%**

Foodstuffs, alcohol and drink > **197%**

Clothing and accessories > **102%**

Toys and games > **47%**

Perfumes and cosmetics > **-22%**

Watches and jewellery > **-27%**

Audio CDs, games, software, DVD > **-43%**

Percentile increase in number of articles seized

Training

Training for law enforcement agencies are a key part of the work under taken by WIPO. Such training programs bring together the different government agencies, as well as judges and magistrates, so that all involved can better understand the work done by their counterparts and the need for inter-agency cooperation. Cooperation with the private sector is a cornerstone of the success of much of this training.

International Collaboration: Rome Declaration on Combating Counterfeit Drugs

"Counterfeiting medicines... is a vile and serious criminal offence that puts human lives at risk and undermines the credibility of health systems ... Because of its direct impact on health... [it] should be combated and punished accordingly." –These words are from the Rome Declaration, issued by the World Health Organization (WHO) International Conference on "Combating Counterfeit Drugs: Building Effective International Collaboration," which took place on February 18.

WIPO participated in the Conference and welcomed the declaration, which recognizes the need for the "coordinated effort of all the different public and private stakeholders that are affected and are competent for addressing the different aspects of the problem." It concludes that the WHO should establish an International Medical Products Anti-Counterfeiting Taskforce (IMPACT) of governmental, non-governmental and international institutions aimed at:

- "raising awareness among international organizations and other stakeholders at the international level in order to improve cooperation in combating counterfeit medicines, taking into account its global dimensions;
- raising awareness among national authorities and decision-makers and calling for effective legislative measures in order to combat counterfeit medicines;
- establishing effective exchange of information and providing assistance on specific issues that concern combating counterfeit medicines;
- developing technical and administrative tools to support the establishment or strengthening of international, regional and national strategies; and
- encouraging coordination among different anti-counterfeiting initiatives."



Training sessions typically include a review of international obligations *vis-a-vis* provisions in the local laws; and discussion of the importance of deterrent criminal penalties and destruction orders, as well as of adequate damage awards in favor of the prejudiced right holders. Workshops for judges then typically focus on the analysis of IP case law, both from within the country and from other countries. Workshops for prosecutors focus on how to draft charges, to present evidence and to request the court to hand down deterrent sentences, including orders to destroy the counterfeit goods and the implements used in their creation. Training for police investigators aims to provide a clear understanding of the elements requiring proof, in order to increase the chances of successful prosecutions. Customs officials benefit from in-depth training sessions on how to spot those shipments more likely to contain counterfeit goods; as well as how to identify such goods and to secure the cooperation of the right holder in the subsequent border enforcement process.

Advisory Committee on Enforcement

WIPO Member States will shortly be meeting in the Advisory Committee on Enforcement (ACE), the third session of which will be held from May 15 to 17 at WIPO headquarters. The main objectives of the ACE are to enhance information exchange between law enforcement agencies, to assess training and education needs, and develop teaching materials and methodologies, with a view to contributing to the creation of a legal, organizational and technical framework for effective enforcement of IP rights. The forthcoming session will focus on the theme of education and awareness-raising, including presentations by a number of delegations detailing current efforts in this field.

Through all its activities, WIPO will continue, on request from Member States, to offer advice, training and facilitation in order to assist those Member States in their efforts to render the enforcement chain more effective, to improve the handling of IP disputes, to set up appropriate anti-counterfeiting mechanisms and to strengthen essential partnerships between the public and private sectors.

Operation Jupiter, South America

Interpol's first Operation Jupiter ran from November 2004 to April 2005 with the participation of the Argentinean, Brazilian and Paraguayan national police forces, Brazilian customs, and representatives from pharmaceutical, recording, motion picture and tobacco cross-industry bodies. This was the first time that four different industry sectors had joined with representatives of federal police and customs agencies from the three countries to combat IP crime. The results were impressive, and there were immediate benefits for participating industry sectors, including the identification of common efficiencies, crime prevention measures, investigation methodologies and good practices.

In Brazil, customs authorities made 36 seizures – for a total estimated value of US\$3.5 million – and detained 79 suspects for smuggling and counterfeiting offences. On the border with Paraguay, Brazilian customs seized 2.24 million blank CDs, an increase of 80 percent from previous levels. The Federal Highway Police also routinely seized buses and truck loads of blank CDs and DVDs in the border area destined to be used for the piracy of optical disks. In Paraguay, there were seizures of some 8,700 cartons containing over 87 million counterfeit cigarettes.

The success of the operations depended on close cooperation between the law enforcement agencies at national and transnational level; as well as on the willingness of the participating industries to engage in the frank exchange of information with their counterparts in other industry sectors for the common good. The results of the first Operation Jupiter have encouraged a number of other countries to request the launch of similar operations on their borders. A second Operation is planned to begin in 2006.

(source www.interpol.int/public/FinancialCrime/IntellectualProperty/Cases/)

THE ROLE OF AUTHENTICATION TECHNOLOGIES

in Combating Counterfeiting

This article was written for WIPO Magazine by Mr. Ian M Lancaster, Director of Reconnaissance International, an expert on authentication devices as a means of detecting and deterring piracy and counterfeiting.

With the problem of product counterfeiting and software piracy now high up the international policy agenda, there is a growing need for quick and easy ways to differentiate fake products from genuine as a means of detecting and deterring counterfeits. Authentication products and technologies – the effective deployment of which requires close collaboration between IP rights holders and the organizations that inspect products – plays an important role in this area.

The function of authentication technology is to help examiners – customs, police and consumer protection agencies – identify the genuine product in ways that are *not obvious* to counterfeiters, who have become adept at accurately copying products and packaging. It enables the examiner to look beyond the obvious characteristics of the product in order to determine to a reasonable level of certainty whether the item is genuine. Conversely, the absence of the non-obvious characteristics will betray a fake, even though it may look exactly like the genuine product.

An authentication device embedded in a product may need to be multi-layered, so that, for example, the top layer is visible to the consumer, while a lower layer may contain a means of examination that is not apparent to the counterfeiter. The examination may be a two-stage process: the first in the field – in a raid on a warehouse or shop; the second in the laboratory, to obtain forensic proof that will stand up in court.

The layering of an authentication device is achieved through combinations of technologies which are characterized as follows:

- **Overt devices.** These are visible to the naked eye under standard viewing conditions, including holograms, color-change inks, iridescent thin films and retro-reflective materials.
- **Hidden (also semi-covert) devices.** These are revealed to the human eye through use of a handheld inspection tool, such as a plastic film overlay, a UV light, a magnifying glass or a laser pointer. Includes ultraviolet/infrared-sensitive inks, microtext, scrambled images, holograms.
- **Covert devices.** These require a more sophisticated detection tool or kit. They may be chemical-based, such as chemical taggants and markers incorporated in the product

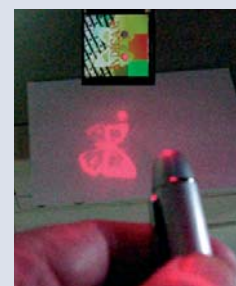
or the packaging; or electronic, such as a code number or similar identifier (which may require connection to a central database). Covert devices also include DNA and molecular taggants, magnetic labels and embedded codes.

- **Forensic devices.** These require laboratory analysis, which can include analysis of the composition of the product as well as forensic analysis of the authentication marker.

These elements may be found separately or incorporated into a single authentication device. For example, a hologram – the most commonly used device – is an overt feature which can contain hidden and covert images, plus the optical “fingerprint” of the original hologram, which can be examined in a laboratory.

Research conducted by Reconnaissance or by the IPR owners themselves – including case-studies on Allied Domecq, Microsoft, Chanel, Epson and the Turkish Caykur Tea Company – indicate that the properly applied use of authentication devices within a comprehensive anti-counterfeiting strategy can make an effective contribution to reducing counterfeiting and more than recover their cost.

For more information see: www.Reconnaissance-Intl.com



The hidden image in an embossed hologram is revealed using a simple laser pointer

Courtesy of Light Impressions

THE RETURN OF THE LION



Courtesy of Spoor and Fisher

Dr. Owen Dean, author of the reference work, *Handbook of South African Copyright Law*. He identified a little-known statute as the key to unlock the *Lion Sleeps* case.

Hot on the heels of the settlement in “The Lion Sleeps” copyright case, this first hand account was written for WIPO Magazine by leading South African copyright expert, Dr. Owen Dean of Spoor and Fisher. Dr. Dean personally directed the litigation on behalf of the Linda family.

In 1939, a Zulu migrant worker and entertainer who called himself Solomon Linda stood before a microphone in Johannesburg’s first recording studio, improvising falsetto vocal lines against a rolling, driving vocal chant. He called the song *Mbube*, Zulu for lion. On the third take, Linda came up with a haunting skein of notes that went on to become the most famous melody ever to emerge from Africa. The English-speaking world knows it as the central theme from the song *The Lion Sleeps Tonight*. There are versions in French, Japanese, Spanish, Danish and many other languages. More than 150 different artists have recorded it and it features in at least 15 movies and musicals. It has earned by some estimates over \$15 million in composer royalties. Linda’s role in the song’s creation is undisputed, but he died a pauper, leaving his family too poor even to afford a headstone for his grave.

lion”). *Wimoweh* was successful in the United States in the 1950s, and was later reworked into another version in the 1960s by song writers George Weiss, Hugo Peretti and Luigi Creatore, as *The Lion Sleeps Tonight*. In this form the song became a major hit and has remained popular for more than 40 years. Then in the mid-1990s it was incorporated into the Disney musical *The Lion King*. But neither the origins of the song, in *Mbube*, nor the role played by Solomon Linda was acknowledged, and the song was presented as being of American origin.

The rights

Solomon Linda had assigned his worldwide copyright in *Mbube* to the Gallo Record Company for a consideration of 10 shillings. He died in 1962, leaving a wife, Regina, and four children. In 1983 the American music publishing company, Folkways, which had gained control of *Wimoweh*, exacted for a consideration of one dollar an assignment of Regina’s rights (as his legal heir) to the renewal term of *Wimoweh* under United States copyright law, and threw in at the same time her worldwide rights to the song, such as they may have been. Regina died in 1990. In 1992, with litigation raging in the United States regarding *Wimoweh* and *The Lion Sleeps Tonight*, the rights to which had been acquired by Abilene Music, Folkways exacted a further assignment of worldwide rights to *Mbube* from the Linda daughters for another dollar. No stone had been left unturned to ensure that the Linda family had no claim to the copyright in *Mbube*.

While the derivatives of the song had made millions of dollars, the Linda daughters were living in abject poverty. . .

This is the story of the legal battle to claim back for Linda’s children a share in the proceeds from their father’s creation.

The song

In the early 1950s the recording of *Mbube* released by Gallo Records, already a good seller in South Africa, found its way to America and came to the attention of Pete Seeger, the folksinger. He liked what he heard and transcribed the music from the record to make his own song, which he called *Wimoweh* (a corruption of the Zulu lyrics, *Uyimbube*, or “he is the

In the late 1990s, journalist Rian Malan wrote an article for *Rolling Stone* magazine exposing the machinations which had taken place and making the point that, while the derivatives of *Mbube* had made millions of dollars, the Linda daughters, one of whom had recently died from AIDS, were living in abject poverty in South Africa and deriving no material benefit from the fruits of their father’s cre-

Courtesy of Spoor and Fisher



**Solomon Linda (left)
and his band,
the Evening Birds**

ative work. The article caused an outcry in South Africa. And it fostered a resolve to take legal steps to stake a claim on the part of the family to proceeds from the song, especially *The Lion Sleeps Tonight* version, and to gain due acknowledgment of Solomon Linda's role in creating the song, and of its South African origin.

The law

The action brought by Spoor and Fisher on the part of the family relied on a little known legal provision: Section 5(2) of the 1911 Imperial Copyright Act. This was a British statute, which was made law throughout the British Empire as it existed in 1911, including South Africa. According to this provision, where an author assigned his copyright during his lifetime, 25 years after his death the copyright reverted to the Executor of his estate, as an asset in that estate, *notwithstanding* any other assignments of copyright which might have taken place in the meantime. This "reversionary copyright" provision was tailor-made for the facts of the *Mbube* case, save that

both Regina and the daughters had already assigned their claim to copyright in *Mbube* to Folkways. It was reasoned, however, that the reversionary copyright had been vested in the Executor since 1987 (i.e. 25 years after Solomon Linda's death) and did not become the property of either Regina or her daughters unless and until such time as it was transferred to them by the Executor. As such a transfer had never happened, the assignments made by Regina and the daughters in favor of Folkways accordingly had no force or effect.

The litigation

The estate of the late Solomon Linda was reopened and an Executor, Stephanus Giesel, appointed in 2004. Litigation was begun in the name of the Executor in his representative capacity. Since the Executor could only claim rights to *Mbube* in countries which were formerly members of the British Empire, it was decided to bring the litigation before the South African court. This in turn meant that the case could not be brought directly against Abilene



Music, as the South African court can only exert jurisdiction over a defendant who has a place of business or other assets in South Africa, against which an eventual judgment could be enforced. Since Abilene Music had no known assets in South Africa, Spoor and Fisher opted to sue the most prominent and high profile licensee of the song against which it was possible to secure jurisdiction before a South African court, i.e. Walt Disney Enterprises Inc. This could be done by "attaching" some 200 registered trade marks owned by Walt Disney Enterprises in South Africa, in effect holding the Disney trade-marks hostage to provide security for the enforcement of payment of a debt.

The application to attach Disney's registered trademarks, as well as the copyright in the movie *The Lion King*, was granted by the High Court of South Africa. Spoor and Fisher then instituted an action against Disney and certain other licensees or sublicensees of Abilene, claiming that the defendants had infringed the Executor's copyright in *Mbube* by reproducing and publicly performing a substantial part of it in the guise of *The Lion Sleeps Tonight* without his authority.

Walt Disney Enterprises reacted immediately by bringing an urgent application before the South African court to set aside the attachment on the grounds that the Executor had no case against it. The court refused the application, in which all the legal issues were set out, thus in effect endorsing the Executor's cause of action.

The settlement

The action was set down for trial commencing on February 21, 2006. Shortly before the trial date a settlement was reached between the parties to the litigation, as well as with Abilene Music, the true defendant behind the litigation, which had granted an indemnity to Disney when it had licensed the use of *The Lion Sleeps Tonight*. The settlement, which operates worldwide and in settlement of all claims, encompasses the following:

- The Linda heirs will receive payment for past uses of *The Lion Sleeps Tonight* and an entitlement to future royalties from its worldwide use.

- *The Lion Sleeps Tonight* is acknowledged as derived from *Mbube*.
- Solomon Linda is acknowledged as a co-composer of *The Lion Sleeps Tonight* and will be designated as such in the future.
- A trust will be formed to administer the heirs' copyright in *Mbube* and to receive on their behalf the payments due out of the use of *The Lion Sleeps Tonight*.

The legal implications

The settlement and the judgement of the court in the application to set aside the attachment of Disney's trademarks, demonstrated that the reversionary interest under the Imperial Copyright Act is enforceable under current South African copyright law, despite the fact that the Imperial Copyright Act itself was repealed in 1965. The case has thus set a precedent for heirs of authors who are not benefiting from the copyrighted works of their forbears, to obtain remuneration arising from the exploitation of such works. This applies not only to heirs in South Africa, but in any countries of the former British Empire in which the Imperial Copyright Act of 1911 (i.e.) was made law.

A happy ending

The remuneration which the Linda daughters will receive should ensure that they will be able to sustain themselves economically into the future. The settlement implicitly acknowledges that *The Lion Sleeps Tonight* is of South African origin and rooted in South African culture. From a South African perspective the saga has a happy ending and there is some pride in having successfully championed the cause of the small creator among entertainment industry giants. The record will, however, read: Griesel NO v Walt Disney Enterprises Inc. and others: case withdrawn.

For more information see: <http://www.spoor.co.za>

USING COPYRIGHT FOR DEVELOPMENT IN NIGERIA

BBC World Trust

“We didn’t just parachute into countries with all our western expertise and then parachute out again.”

Mr. Akim Mogaji, Creative Director for the BBC World Service Trust, Nigeria, was one of a number of industry and civil society representatives to speak on the use of intellectual property (IP) for development in the margins of the meeting of the Provisional Committee on Proposals related to a Development Agenda for WIPO in February.

The BBC World Service Trust is an international development organization. It helps students in developing countries to create radio and television programs, which aim to improve quality of life through a combination of education and entertainment. For example, Mr. Mogaji directs the hugely popular Nigerian radio series, *Story Story*, which addresses poverty, governance and HIV/Aids through the soap opera format of the lives of its characters. The Trust first sought Mr. Mogaji’s services six years ago to help realize a project to raise awareness about human rights in Kenya, Brazil, Nigeria and Mexico. At the premiere screening in Geneva of his documentary film, *Wetin Day*, Mr. Mogaji discussed how copyright is critical to building sustainable film and media-based industries in developing countries. The following comments are extracted from our interview with Mr. Mogaji after the screening.

“*Voices*, our main project since 2003, has been training broad-

casters in various skills and producing programs. We hope that when we leave, in 2, 4 or 5 years time, that we leave a production unit, that is stand alone. We also hope that the people we have trained will act as trainers to the industry – we are hoping to transform the industry that way. In the end, this has got to be a commercial enterprise, and to have a commercial enterprise you need copyright in place for the money to come back. We target the young to get students aware of copyright, before they come into the industry.”

“We like to see ourselves as a diaspora project, we try to bring as many people as possible back to Nigeria to train Nigerians. Some of the brightest and the best in the industries around the world, in the UK, in the US, in France, are Nigerian or are Africans certainly. There had been this massive brain drain in Nigeria, and there still is. It needs to be reversed for Nigeria to rejuvenate.”

“There is a connection between good copyright protection and enforcement and attracting people to come back home. If these things were in place, they would earn money and this would generate a new industry. Nigeria needs a new industry. Africa needs a proper self-standing media in order to be able to speak for itself, to be able to show itself and most importantly to be able to reflect itself.”



Photo: WIPO

Akim Mogaji. Good copyright protection can help reverse the brain drain.

“Right now copyright plays very little part in “Nollywood”, Nigeria’s cinema industry. Soon after films are released – they’re released on video, not celluloid – they are copied. And there are no returns on that. The marketers make money back from their initial outlay to have the movie made, but there is no further trickle down to the producers, to the creators. Legislation is no good unless it’s enforced. This is a concern for those of us working, trying to build a *sustainable* creative industry in Nigeria.”

“Why are we doing all this training? To improve the quality of the product. Make a quality product, your audience will appreciate it, they will realize that it’s something worth paying for. But we have to be realistic. Nigeria is a country of maybe 140 million people, 90 million of whom live on a dollar a day or less. We say to the producers that they must set realistic prices if they want their work respected. I think there is an education both ways there.”

RESOLVING IP DISPUTES THROUGH MEDIATION AND ARBITRATION

Intellectual property rights are only as strong as the means to enforce them. One way in which WIPO addresses issues of enforcement and dispute resolution is through its Arbitration and Mediation Center which has offered efficient specialized alternative dispute resolution (ADR) procedures since 1994.

The potential of mediation and arbitration for preventing and resolving intellectual property (IP) disputes has not been fully realized as most IP owners and IP lawyers still rely on traditional means of court litigation. But perceptions have started to change due to a number of related developments that have taken place over the last ten years. First, the economic importance of IP has grown to the extent that, for many companies, IP rights are their basic assets, and disputes involving these rights can interfere with, or even paralyze, their activities. At the same time, as IP assets are marketed and exploited across borders, disputes involving these assets are likely to concern multiple jurisdictions. In addition, IP owners are increasingly engaged in complex contractual relationships which involve parties in different forms of cooperation in research and development, production or marketing.

The trend towards ADR has been reinforced by the success of domain name dispute resolution procedures such as the Uniform Domain Name Dispute Resolution Policy (UDRP), which provides trademark owners with an efficient remedy against the bad-faith registration and use of domain names corresponding to their trademark rights. Moreover, a growing number of procedural laws encourage, or even require, the use of ADR.

Advantages

The advantages of ADR are increasingly recognized. They include the following:

■ *A single procedure.* Court litigation in international IP disputes can involve a multitude of procedures in different jurisdictions with a risk of

inconsistent results. Through ADR, the parties can agree to resolve in a single procedure a dispute involving a right that is protected in a number of different countries, thereby avoiding the expense and complexity of multi-jurisdictional litigation.

■ *Party autonomy.* Because of its private nature, ADR offers parties greater control over the way their dispute is resolved. Unlike in court litigation, the parties may choose the procedural rules, the applicable law, the place and the language of the proceedings.

■ *Neutrality.* ADR can be neutral to the law, language and institutional culture of the parties. It can thus eliminate any home court advantage that one of the parties might otherwise enjoy in the context of court litigation, where familiarity with the applicable law and local processes can offer significant strategic advantages.

■ *Expertise.* The parties can select arbitrators or mediators who have special expertise in the legal, technical or business area relevant for resolving their dispute.

■ *Confidentiality.* ADR proceedings are private. Accordingly, the parties can agree to keep the proceedings and results confidential. This is particularly important where – as is often the case in IP disputes – confidential information or trade secrets are at stake. It also enables the parties to focus on the merits of the dispute, without being concerned about its public impact to their reputation.

■ *Finality and enforceability of arbitral awards.* Unlike court decisions, which can generally be contested through one or more rounds of litigation, arbitral awards are not normally subject to appeal. Their enforcement across borders is greatly facilitated by the United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards of 1958, known as the New York Convention, which requires all 137 Member States to recognize arbitral awards without review on the merits.

Limitations

ADR does also have its limitations, and certain objectives can only be attained through court litigation. In particular, it is not possible to obtain through ADR a decision that would set a public legal precedent. The results of an ADR procedure, an arbitral award or a settlement agreement, are in principle binding only on the parties involved. So for example, if a party wished to obtain a generally binding decision that the claims of a particular patent were valid/invalid, the only means of obtaining such a "public" decision would be a court judgment.

procedure is initiated. These clauses can be found on the Center's website.

Against the background of the increasingly international commercialization of intellectual property assets, the Center has, over the last three years, observed an increase in the number of WIPO arbitrations and mediations. By March 2006, 47 arbitrations and 44 mediations had been filed covering disputes arising from patent or software licenses, joint ventures, R&D or trademark co-existence agreements, distribution agreements for pharmaceutical products, as well as domain name and patent infringement disputes.

The success of an ADR procedure depends in large part on the quality of the mediator or arbitrator

In addition, the consensual nature of ADR makes it less appropriate if one of the two parties is uncooperative. Since both parties must agree to use ADR, no party can force another to participate.

WIPO's Arbitration and Mediation Center

In order to promote the use of ADR in intellectual property disputes, WIPO offers the following procedures through its Arbitration and Mediation Center:

■ *Mediation.* A non-binding procedure in which a neutral intermediary, the mediator, assists the parties in reaching a settlement of the dispute.

■ *Arbitration.* A neutral procedure in which the dispute is submitted to one or more arbitrators who make a binding decision on the dispute.

■ *Expedited arbitration.* An arbitration procedure that is carried out in a short time and at reduced cost.

■ *Mediation followed, in the absence of a settlement, by arbitration.*

These procedures are administered under rules which were developed with the active involvement of many leading ADR and IP practitioners and scholars. To facilitate the submission of disputes to one of these procedures, the Center has developed model clauses, which contain the elements on which parties should reach agreement before a

Mediators and arbitrators

Whatever the merits of the rules, the success of an ADR procedure depends in large part on the quality of the neutral, i.e. the mediator or arbitrator. In the case of IP disputes, a high level of dispute resolution skill and experience must be accompanied by specialized knowledge of the subject matter of the dispute. WIPO therefore places great emphasis on identifying suitable candidates to fill these roles. In referring a dispute to WIPO, parties can draw on a growing database containing the professional profiles of over 1,000 arbitrators and mediators from around 70 countries. These range from seasoned dispute-resolution generalists to highly specialized experts, covering the entire legal and technical spectrum of IP.

Conclusion

Disputes interfere with the successful use and commercialization of IP rights. Providing means for resolving them as fairly and efficiently as possible, without disrupting underlying business relationships, is therefore an important challenge for international IP policy. ADR has a number of characteristics that can serve this purpose, and as such offers an important option for resolving IP disputes.

For more information, see WIPO's Arbitration and Mediation Center website on: <http://arbitrator.wipo.int/center/>

AVIAN FLU DRUGS: PATENT QUESTIONS

The world is scrambling to defend against the threat of an influenza pandemic, which some predict could prove even more disastrous than the flu pandemic which left over 40 million people dead in 1918-1919. If the highly pathogenic H5N1 avian flu virus mutates into a form transmissible between humans, it could trigger a public health crisis. Ensuring sufficient supplies of flu drugs is a central concern for public authorities, and one which is closely linked to the intellectual property rights which cover these drugs. Commentary in the press and among the general public, however, suggests some uncertainty as to how the international patent system applies in practice. The following answers to a few frequently asked questions seek to clarify some of the basic facts.



A microbiologist at the U.S. Center for Disease Control investigates the pathogenicity of the H5N1 virus.

Background: The two main products currently available to treat the flu virus are Tamiflu (oseltamivir) and Relenza (zanamivir). These are not vaccines, but a class of medicines called neuraminidase inhibitors, which work by limiting the spread of the influenza virus inside the body. Tamiflu has been highlighted because of its relative ease of use. As gov-

ernments stockpile millions of doses of Tamiflu, widespread concerns have been raised about the capacity of Roche, the Swiss pharmaceutical company that manufactures and distributes the drug, to supply the need.

First, what is the difference between Tamiflu and oseltamivir?

They are the same drug. Oseltamivir is the *generic* name of the anti-viral drug which Roche markets under its *trademark* Tamiflu.

And Roche owns the oseltamivir patent?

No. A quick search of patent databases shows that the patents covering the invention of oseltamivir are owned by the California-based biopharmaceutical company, Gilead Sciences. (See e.g. U.S. patent no 5763483, for a "novel carbocyclic compound", filed in 1996 and in force in principle until at least 2016.) Rather than further develop and manufacture the drug within the company, Gilead opted in 1996 to license to Roche certain of the exclusive rights conferred by the patents.

What IP rights does the licensing agreement give Roche?

Gilead granted Roche a sole and exclusive license. Broadly speaking, this gives the legal right to Roche – and only to Roche – to undertake or sublicense the manufacture, sale and distribution of oseltamivir-based products covered by their patents. The text of the Gilead-Roche license is available on an open database.¹

Does Roche hold these rights worldwide?

No, because patent rights are territorial. They have legal effect only in the specific countries in which a patent was applied for and granted. Gilead never acquired a patent for oseltamivir in, for example, Thailand, Philippines, Indonesia or many other countries. So there are no oseltamivir patent rights to license or otherwise exercise in those countries.

So other drug manufacturers in those countries can freely produce and sell oseltamivir?

Legally, yes, provided there are no other rights covering the technology a manufacturer wishes to use. Indonesia was among the first of such countries to announce plans to manufacture oseltamivir. This does not infringe any patent rights, provided the drug is not subsequently exported to a country where a patent is in force.

Why aren't more countries doing this?

Patent protection is only part of the story. The manufacturing process is highly complex, and in many of the countries where oseltamivir is not patented there are no drug manufacturers with the capability or resources to produce it. There may be other economic, commercial and regulatory factors as well.

1. <http://contracts.corporate.findlaw.com/agreements/gilead/roche.lic.1996.09.27.html>
 2. See e.g. the USPTO patent database for the patents filed by Gilead: <http://www.uspto.gov/patft/index.html>
 3. For WTO's TRIPS Fact Sheet see: http://www.wto.org/english/tratop_e/trips_e/public_health_faq_e.htm

“Breaking the patent” actually refers to government authorities using the flexibilities permitted within international IP law.

And presumably Gilead and Roche keep the formula secret?

No. Public disclosure is central to the patent system. All patent applications have to reveal the knowledge required to reproduce the invention. So basic knowledge about how to produce oseltamivir is easily accessible through free patent information databases.² That said, Roche has, of course, in the meantime built up much additional manufacturing know-how in the production of oseltamivir.

If Roche can't meet the world's demand, and if the manufacturing capacity in countries outside the patent protection is inadequate, what are the other options?

First, Roche can voluntarily grant sublicenses permitting more companies to manufacture and sell Tamiflu. So far it has issued sublicenses to the Shanghai Pharmaceutical Group in China and to Hetero Drugs in India. (Note, this is distinct from Roche's negotiations – reported in press releases – with possible additional “partner companies” in order to expand capacity. These companies would not get a full sublicense to produce the drug independently, but would be integrated into Roche's own supply chain network, taking over specific production steps.)

Voluntary licensing may seem adequate in normal circumstances. But faced with a public health crisis like this, can governments not break the oseltamivir patents, as some have threatened?

Yes, that is also an option. But let us clarify the terminology: “Breaking the patent” actually refers to government authorities using the flexibilities permitted *within* international IP law. These allow a government in certain situations to decide to issue a compulsory license, or a government use authorization, for production of the patented product without the consent of the rights holder.

These flexibilities are defined in Article 31 of the World Trade Organization's Agreement on Trade-



The starting material of the Tamiflu production process, shikimic acid, is extracted from the pods of the star anise, grown in mountain provinces in the south west of China.

Related Aspects of Intellectual Property Rights (TRIPS)³ and in the Doha Declaration on TRIPS and Public Health, together with the subsequent decision by WTO Members regarding compulsory licenses for the supply of drugs to countries with limited manufacturing capacity.

If a government issues a compulsory license, does that negate all Roche's IP rights in that country?

No. Roche would still have the right to market its own product there. And the authorized use would probably be limited to one, specific pharmaceutical – whereas the Gilead patents actually cover a wider array of new neuraminidase inhibitors.

Moreover, the use authorized by the government would be limited to the authorized purpose and would still be subject to compensation, or to what the TRIPS Agreement calls “adequate remuneration...taking into account the economic value of the authorization.” TRIPS also sets several other conditions on the issue and use of compulsory licenses, such as the requirement normally to have first sought a voluntary license, although this provision can be waived for public non-commercial use or in times of emergency.

Note: WIPO Magazine has prepared the above to aid public understanding. It does not represent an official interpretation of the legal provisions or of the position of any of the parties mentioned.

BIOETHICS AND PATENT LAW

The Relaxin Case

This article introduces an occasional series, which highlights issues that have arisen in some significant patent law cases concerning biotechnology. We begin by outlining some bioethical questions that arise in connection with patenting biotechnological inventions; and we look at how European Patent Office (EPO) jurisprudence dealt with the issues surrounding the patenting of a human gene in the Relaxin case.

Painting by Albert Edelheit (1854-1905)



Louis Pasteur's patent on isolated yeast is an early example of patenting living organisms.

Biotechnology is booming. Innovation in biotech is producing new medicines, treatments and processes with the potential to save or transform the lives of millions. As new technological frontiers are crossed, our expectations continue to rise. But so too do the complexities of the associated bioethics, i.e. the ethical questions relating to the implications and applications of biological research. One aspect of this complex area concerns the way in which biotechnological

inventions are protected – or excluded from protection – by intellectual property (IP) rights.

When considering bioethics in an IP context, some critical distinctions have to be kept in mind. For instance, ethical arguments for or against permitting researchers to undertake research on certain technologies (e.g. on embryonic stem-cells) should be distinguished from the rights or wrongs of permitting the outcomes of such research to be patented. But the patent system does not exist in a moral vacuum. The intersection between bioethics and IP lies rather in questions such as: Is it morally acceptable to grant exclusive patent rights over a particular technology, such as isolated DNA sequences? What issues of prior informed consent arise when genetic resources are used to develop a patented invention? What ethical concerns arise regarding the way that exclusive rights over a technology are exercised, such as patents on diagnostic tools?

The same, but different...

In the patent laws of most countries, the same basic rules and principles govern the patenting of biotechnological inventions as other technologies:

only genuine inventions – not mere discoveries – are eligible; the same conditions of novelty, inventive step and industrial applicability apply; the applicant must fully disclose how to carry out the invention, and so forth.

But biotechnology is special, not least because it is based on living organisms. Indeed, biotechnological inventions can be self-reproducing and self-disseminating, as in the case, for example, of a genetically engineered seed (which may itself be considered an invention if it is truly novel and inventive). Patent law has accordingly developed certain special rules for biotechnological inventions. These include public interest exceptions to patentable subject matter – some countries exclude patents on plants or animals, for instance – and some provide special disclosure requirements relating to inventions based on genetic resources. There are also some distinctive legal mechanisms, such as the deposit of micro-organisms, when access to the actual materials is needed to understand the invention.

Patenting human genes – The case of relaxin¹

The central debate on bioethics and IP revolves around the morality of what is loosely referred to as patenting life. This is not new. Back in 1873 Louis Pasteur received a patent on isolated yeast, a living organism. Debate intensified from the 1980s onward, when patents began to be filed on human genes.

The jurisprudence of the EPO offers a more recent illustration of legal and ethical concerns about patenting genes. In question was a patent for relaxin, a hormone which relaxes the uterus during childbirth, and which, it was hoped, could have medical application in reducing the need for caesarean deliveries in difficult pregnancies.

1. Howard Florey/Relaxin; Oppositions by Fraktion der Grünen im Europäischen Parlament; Lannoye; EPO 6/1995 388

Relaxin from pigs was first described in 1926, but it was not until 1975 that the Howard Florey Institute in Australia isolated and determined the chemical structure of a human form of the hormone. Their subsequent research revealed a second form of human insulin, the existence of which had not previously been suspected. The structure of human relaxin was found to differ from other species, such that only human relaxin could be used for the medical purpose envisaged.

In order to obtain sufficient quantities of the hormone to explore its therapeutic use, it was necessary to manufacture it in synthetic form. So having

isolated the nucleotide sequence that coded for relaxin, recombinant DNA techniques were used to clone the gene, making it possible subsequently to produce synthetic relaxin.

In the Howard Florey Institute's patent application, the claimed invention concerned the gene coding for the unexpected second form of human relaxin, and the synthetic form produced through cloning technology. A patent was issued in Europe in 1991, but opposed in 1992 by members of the Green Party in the European Parliament. The following summarises some of the legal and ethical issues addressed in this case.

Challenge by the opponents

- The claimed invention was not **novel**, since the gene encoding relaxin had always been present in the female human body.
- There was no **inventive step**, because a conventional method was used to isolate the DNA.
- Relaxin was a mere **discovery**, and as such "no more patentable than the moon or a new animal found in a remote area."
- The patent was contrary to **morality** or *ordre public*:
- Isolating a gene from tissue taken from a pregnant woman was an offence to **human dignity**, as it used the pregnancy for a technical profit-oriented process;
- Patenting human genes "amounts to a form of modern slavery since it involves the dismemberment of women and their piecemeal sale to commercial enterprises;"
- Patenting human genes was tantamount to **patenting human life**, and would as such be intrinsically immoral.

Response by the EPO Opposition Division

- This gene sequence was itself novel, as it was in the form of complementary DNA, which **does not exist in nature**. The form of relaxin that it coded for was also unknown until the inventor isolated it for the first time.
- As the inventor was providing to the public for the first time a product whose existence was previously unknown, the method used to obtain it was **immaterial**.
- A discovery of a substance freely occurring in nature was not patentable; but if the substance was **newly isolated** and characterized, then it was not a mere discovery; it was an industrially applicable technical solution to a technical problem.
- It would not be viewed by the public as too abhorrent to be patentable.
- The tissue was donated with **consent** within the framework of gynaecological operations. Many life-saving substances were isolated in this way, patented and welcomed by the public;
- Gene patents do not confer any rights over individual human beings. There was no dismemberment of humans since the point of the invention was to synthesize the hormone;
- "The patenting of a single human gene has nothing to do with the patenting of human life. Even if every gene in the human genome were cloned it would be impossible to reconstitute a human being from the sum of its genes". **No moral distinction** was seen between the patenting of genes and the patenting of other important human substances, such as adrenaline.

USING PHOTOGRAPHS OF COPYRIGHTED WORKS and Trademarks

An advertising photographer sets up a photo shoot for a toy company. Her photographs feature a young boy in t-shirt and jeans playing with toys in a park. He is artfully arranged in front of a sculpture of a dog, which is temporarily on display in the park. But when the photos are published, both the photographer and the toy company who used her photos in their advertising find themselves facing accusations of copyright infringement. Where did they go wrong?



Photographing a copyrighted work may constitute an unauthorized reproduction.

This article provides an overview of some general legal principles applicable to taking photographs – for commercial or non-private purposes – which feature in them copyrighted works or trademarks. As most lawsuits are filed against the *users* of photographic material, this is as relevant to businesses who use photographs in their advertising, company literature, catalogues etc., as it is to photographers themselves. Though most countries have similar laws in the area of photog-

raphy, important national differences exist. These cannot be covered in a general article of this sort, which is not a substitute for advice from a competent local lawyer.

Advertising, fashion and interior design photographs frequently feature some kind of artistic work, such as a painting on a background wall. Many photographers are unaware, however, that including such a work in a photograph for non-private use without permission from the copyright owner may constitute an **unauthorized reproduction of the work**. As such, it could in some circumstances leave the photographer or publisher of the image liable to judicial pursuit for infringement of the copyright in that work. So when is permission required to photograph copyrighted objects? The response is somewhat complicated. It depends on a number of questions about the *subject* or *object* to be photographed, and about the intended *use* of the photograph.

What is protected?

First, it is worth briefly recalling what sort of objects may be protected by copyright. Most photographers are aware that literary, artistic and photographic works benefit from copyright protection. But how many know that the same protection also extends to maps, globes, charts, advertisements or labels? And that it may also extend to “works of applied art” such as jewelry, wallpaper, carpets, furniture, toys and fabrics? It is all too easy to incorporate such items in a photograph without giving a second thought to the question of whether there may be rights involved which need to be cleared.

Of course, even if an object does fall within the scope of copyright protection, no permission is required to photograph it if the term of copyright protection has already expired. In most countries, copyright protection covers the lifetime of the author (artist) plus 50 years after his death. In a number of countries, this period extends to 70, 90 or 95 years after death. If several authors are involved, then the term of protection is calculated from the death of the last surviving author.

Whether or not permission is required also depends on **how much of the work** appears in the photograph. Generally, prior consent is needed to reproduce a *substantial part* of the work. But there are, and can be, no general rules on this. Often, the *quality* of what is used may be more important than how much is used. For example, “The Son of Man,” a painting from René Magritte, depicts a man whose face is obscured by an apple. If a photographer reproduces only the face with the apple, permission would still be required, though it is only a small part of the total

Tips for photographers

- The best way to protect oneself against lawsuits – when feasible and appropriate – is to get a prior **written permission** from the owner of copyright and other rights in any object or property to be photographed. Even when it is lawful to photograph without authorization, it may be advisable to get permission.
- If a photo is **licensed** to a client for purposes of manufacture, sale or publicity, the licensee should be required to **indemnify** the photographer for any liabilities arising out of the licensed use (this is more a contract law than IP question).
- If written consent has not been obtained for a particular photograph, it may be a good idea to add a **disclaimer** on the back of the picture. This may limit liability should someone make unauthorized use of the photograph.

painting, as it is a vital or recognizable part of Magritte's work. Determining what constitutes a substantial part is done on a case-by-case basis. If in doubt, it is always best to ask prior permission from the copyright owner.

Fair use

The above, if unqualified, would place significant restrictions on the photographer's choice of subject. But a number of important legal exceptions to copyright aim to strike a just balance between, on the one hand, protecting the rights of the copyright holder and, on the other hand, the wider public interest. These exceptions often enable photographers to reproduce copyrighted works without permission. They are enshrined in the concepts of *fair use* or *fair dealing*, in common law, or *limitations* or *exceptions*, specifically mentioned in national copyright law. They vary from country to country, and specific facts and circumstances will determine each case. But common exceptions from copyright protection, in simplified terms, include the following:

Buildings

Architectural works are protected by copyright to some degree, but in most countries a building may be freely photographed if located in – or visible from – a public place. The photo may also be published and distributed without permission.

Copyright works in public places

In some countries, permission is not required to photograph certain artistic works displayed in a public place, such as a park. These photos may also be published and sometimes even commercialized without infringing copyright. However, this exception applies only to

- *works of certain types* (usually works of art or even only three-dimensional works of art);
- *works displayed in public* (permission may on the other hand be required to photograph a sculpture in a private home);
- *works displayed permanently* (whereas permission may be required to photograph a sculpture that is only temporarily sited in a public place, such as the dog sculpture in the park above).

Important legal exceptions to copyright aim to strike a just balance

Photos to accompany news reports

Copyrighted works may be photographed to report the news, although there is generally an obligation to identify its creator and the title of the work. For example, a photograph of a work that won a prize in an art competition can be used in a news report announcing the results of the competition.



Photos to accompany a review or critique

In most countries, copyrighted material may be used to illustrate critiques or reviews, for example, publishing photos of cartoons in a book that reviews or critiques those cartoons. Again, the name of the artist and the work must be indicated.

Photos of a work to advertise its sale

Photographing an artistic work for the sole purpose of advertising its sale, for example, in an auction or sale catalogue, will usually not need prior authorization.

aesthetic purpose or commercial reason, then there is probably no need for permission.

For example: A newspaper publishes a photograph to illustrate a report on a meeting of world leaders. The photograph incidentally shows a copyright-protected sculpture in the meeting room. Authorization would not normally be required as the sculpture adds no meaning to the main subject matter. On the other hand, our photographer in the photo-shoot scenario above deliberately posed the boy in front of the dog sculp-

Changing a Copyrighted Work

It is a common practice for graphic artists and others to download images from the Internet and modify or adapt them by using graphics software. The altered images are often used in magazines, books or advertisements. One of the exclusive rights of a copyright owner is the right to exclude others from creating *derivative works* from his work – that is, new works based upon or adapted from the original work. Care should therefore be taken if digitally manipulating images of other's works, as this is likely to be a copyright infringement unless prior permission has been obtained from the copyright owner.

In the *Mendler v. Winterland Production, Ltd.* case, a photographer granted a textile company a license to use his photographs on t-shirts. The textile company scanned one of the photos and then digitally altered it: the image was flipped, some details were reconstructed and colors were changed. The photographer sued for copyright infringement. The court concluded that this use of the photograph constituted copyright infringement.

See: laws.lp.findlaw.com/9th/9816061.html.

Incidental background

In most countries, permission is not needed to include a copyrighted work in a photograph if it is merely an incidental part of the background, or is otherwise incidental to the principle object/subject represented in the photograph. It may, however, be difficult to assess what is incidental. The photographer should ask himself: Why do I want to include that particular work? If it is essential to the purpose of the photograph, then it cannot be said to be "incidental." Conversely, if it is not in the photograph for any

purpose for aesthetic reasons. As such, the inclusion of the copyrighted work in the background was not incidental. It should be noted that courts are typically much more reluctant to accept free incidental use of works in cases of commercial and advertising use than in connection with the reporting of news and current affairs.

Obtaining permission

If, after consideration of all the above, it transpires that permission is required to reproduce a copy-

righted work in a photograph, the photographer needs to obtain permission from the copyright owner of the work. In addition, permission from the owner of the work itself may be required. Obtaining permission(s) may therefore sometimes be difficult. A gallery or agent, representing the artist, may be able to assist. Some collective management societies also grant copyright permission on behalf of artists.

Copyright law also provides authors with **moral rights** to protect their reputation and their works against certain abuses. An important moral right is that of authorship or paternity, which is the right to be named as the author of the work. If a photo including copyrighted works is to be exposed to the public, then the author's name must appear on or in relation to the work, whenever feasible and considered reasonable, unless prior permission to omit the name is obtained from the author or artist.

Photos of trademarks

Unlike copyright law, trademark law as such does not restrict the use of a trademark in a photograph. What it does forbid is the use of a trademark in a way that can cause *confusion* regarding the affiliation of the trademark owner to the image. If consumers are likely to mistakenly believe that the trademark owner sponsored a photograph, then there may be trademark infringement. For example, if a Nike logo was visible on the t-shirt worn by the boy in our photo-shoot scenario, this could be seen as an attempt to appropriate consumer goodwill associated with the Nike trademark. So, caution is required if photographing someone wearing or consuming a trademarked product.

Conclusions

A number of fairly complex questions determine when a photographer does – or does not – need to clear rights before photographing copyrighted materials and trademarks for non-private use, and the legal provisions vary from country to country.

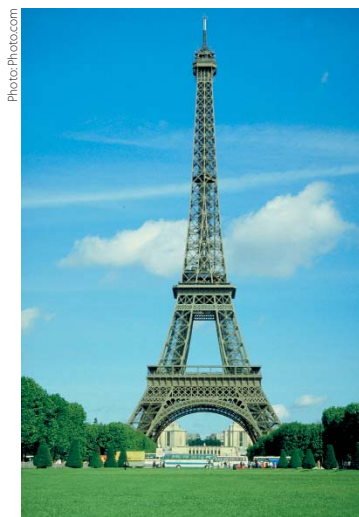


Photo: Photo.com

The design of the lighting used to illuminate the Eiffel Tower at night is considered a work of art in itself. The Tower's official website states: "There are no restrictions on publishing a picture of the Tower by day. Photos taken at night when the lights are aglow are subjected to copyright law, and fees for the right to publish must be paid to the Société Nouvelle d'exploitation de la Tour Eiffel."



Photo: Pratyeka

Phoenix near Nanning city, China. Rights would not normally need to be cleared to use a photograph of a copyrighted sculpture on permanent display in a public park.

Photographers need to be aware of the most common legal restrictions as well as of the scope allowed by "fair use" exceptions. But each situation should be evaluated on a case-by-case basis. Similarly, businesses that use images created by photographers need to familiarize themselves with the potential legal liabilities. It is a good practice to require a warrant from the photographer, guaranteeing that the photographer owns or has permission to use all materials provided, and that the contents do not violate any law or regulation.

PCT PORTRAITS

The People Behind the Patents

More than 1.2 million international patent applications covering new technology of every description have been filed since the Patent Cooperation Treaty (PCT) began operating in 1978. In our series of snapshots, WIPO Magazine selects a few of the inventions and seeks out the people behind them. In this edition, we find innovative engineering techniques applied to architecture, neurosurgery and train travel.

On Track for Safer Trains



Photo: Apurva Bahadur (2005)/Indian Railways' Fan Club

The Raksha Kavach anti-collision device is now installed on all routes of India's Konkan Railway.

Mumbai, 1999 – another train collision on India's western coast shook the Konkan Railway Corporation. Something had to be done. "We could not allow another life handed to us in trust to be lost in another accident routinely classified as human failure," declared Bojji Rajaram, then managing director of the railway.

Mr. Rajaram, an engineer with a track record of innovation, refused to believe that no technical solution could be found. Surely, he thought, in this age of instant radio communication, microprocessors and Global Positioning System (GPS) technology, it must be possible to devise a fail-safe system. Setting himself a "war like target" of 90 days to produce a prototype, he began work on a device which, mounted on two approaching

trains, would enable them accurately to assess each other's course and, in case of collision risk, to initiate an automatic braking system.

"The toughest challenge," Mr. Rajaram relates, "was how to make the GPS, which has only 20 – 30 meters accuracy, differentiate tracks which are only five meters apart." With no local GPS equipment or expertise to draw on, Mr. Rajaram bought a GPS over the Internet late one night, plugged it into his laptop, and enlisted the help of his five year old grandson to wander around the garden with it, while he scrutinized its capabilities. His resulting "Deviation Count theory" confounded the skeptics, and led to his anti-collision device, *Raksha Kavach*. In January 2006, the Indian Railway Ministry announced that the device, already installed on all Konkan Railway routes and many Northeast Frontier Railway routes, was to be extended to the entire broad gauge rail network by 2013.

And why the PCT? "Because," said Mr. Rajaram, "I wanted to save public expenditure, and to take the most cost-effective manner of protecting in a fair manner the IP rights." He cites a total of 17 patent applications, and potential royalty streams estimated by Price Waterhouse Cooper at up to Rupees 8000 crore (over US\$1 billion) over three years. Uninterested by personal profit, however, Mr. Rajaram chose to assign all patent rights to the Indian nation via the state-owned Konkan Railway Corporation.

Now retired, Bojji Rajaram has lost none of his fervor: "I believe," he writes, "it is in the realm of reality to make food, travel, communication and dwelling virtually free to all humans through the bold application of science and technology to infrastructure development."

For more see: <http://www.atrilab.com/>

Healing the Whole Head



Courtesy of Osteopore International

Used to repair skull fractures, this bioabsorbable mesh implant allows new bone tissue to grow over the damaged area

A neurosurgeon repairing a skull fracture, or patching a "burr hole" drilled in the skull to drain a brain hemorrhage, will usually use either a titanium plate, or replacement bone taken from the hip of the patient or donor. Problems, including cost and infection risks, are particularly acute in developing countries, where a lack of medical imaging equipment can result in a surgeon having to drill and plug multiple holes to

find the right point. But a team of six doctors and engineers from Singapore's National University, National University Hospital, and Temasek Polytechnic, have come up with a new alternative.

Using a bio-degrading polymer, polycaprolactone, the team engineered a mesh of bio-absorbable tissue, able to plug a hole in the skull, while facilitating the growth of new bone over the damaged area. The mesh can be cut easily to shape, and is significantly cheaper than Titanium plates. Accepting the Gold

Concrete in a New Light

Concrete jungle, concrete monstrosity... Concrete is one of the world's most ubiquitous building materials, yet its aesthetic reputation has become tarnished.

Challenging such negative perceptions is a young Hungarian architect. Combining artistic inspiration, technical innovation and entrepreneurial flair, Áron Losonczi has created concrete building blocks which transmit light. By arranging thousands of very thin glass fibers in parallel rows, then casting them within the concrete, he enables light to pass through the blocks. The result is a transformation. A solid gray mass becomes a luminous wall, alive with shadows.

"The idea came from a work of art I saw in my hometown, Csongrád," Mr. Losonczi told Associated Press. "It was made of glass and ordinary concrete, and the idea of combining the two struck me. Then I went to Stockholm to do post-graduate work in architecture and devel-

oped it there." He filed a PCT application for his light-transmitting building blocks in 2003.

To market his translucent concrete, Áron Losonczi set up LiTraCon in Csongrád in 2004. It won the Red Dot "Best of the Best" Design Award last year, and is attracting widespread interest from architects, designers and artists. First used in 2004 as a sunscreen in a private house in Budapest, it is now being considered for use in New York's Freedom Tower.

Readers should not expect, however, to see their cityscapes transformed just yet. Production costs and the optic fibre content currently make this a luxury product. But speaking at the "Liquid Stone" exhibition at Washington's National Building Museum in



The play of light and shadow through translucent concrete

Photos: copyright LiTraCon Bt. 2001-2006

January, Mr. Losonczi looked forward to being able to reduce costs through international licensing deals and large scale production.

For more see: <http://www.litracon.hu>

See also www.wipo.int/pct/en/inventions/ for WIPO's PCT website Gallery of Notable Inventions and Inventors, featuring a selection of other interesting innovations.

Award at the 2004 Asian Innovation Awards, team member Professor Teoh Swee Hin spoke of "a message of hope" for patients undergoing reconstructive surgery for head injuries.

Clinical trials, described in the journal of the Congress of Neurological Surgeons (February 2006), reported new bone growth filling the porous space within 12 months with no complications. Following successful treatment of some 80 patients, Professor Teoh Swee Hin told us, trials have now been extended to eye

socket reconstruction; and to the treatment of young children suffering from craniosyntosis, in which the skull fails to grow normally.

A PCT application for the Bioabsorbable Plug Implants and Method for Bone Tissue Regeneration was filed in 2004 by the National University of Singapore. Osteopore International, set up to commercialize the applications, estimates the potential global market to be worth over US\$300 million.

For more see: <http://www.osteoporeinternational.com/>

FROM BRIGHT IDEA TO PRODUCT TESTING

The Role of Inventions Exhibitions

Visiting an inventions exhibition for the first time, let alone exhibiting at one, can be a somewhat disconcerting experience. The atmosphere is often one of exuberant disorder, particularly when the inventions are grouped by country of origin. Within a few dizzying steps, the visitor moves from biotech to electronic engineering; from mechanics to civil engineering; from high tech to simple gadgets. Eye-catching demonstrations of some exhibits attract attention, while it is too easy to overlook significant inventions presented only on a poster and prospectus.

It all makes for a fascinating day out. But what are the real functions of an inventions exhibition?

Inventor seeks entrepreneur

Jean-Marie Schatt, an engineer and manager of a small company specializing in heat exchangers, is a typical representative of a "small inventor." He presented his *thermoturbine* at the 2005 Brussels Eureka Exhibition in the form of an ingeniously simple prototype, consisting of a bicycle wheel, bottles and water-filled circular tube, with halogen lamps providing a heat source. The device, in effect a Stirling engine reduced to its simplest expression, is designed to convert heat energy from any source – primary or recovered – into rotary energy. Mr. Schatt compares the efficiency of his invention to the energy lost in the exhaust fumes of conventional engines, citing the positive views of thermodynamic engineering experts whom he had consulted as to its expected output.



Jean-Marie Schatt's *Thermoturbine* prototype, ingeniously constructed from a bicycle wheel and bottles, produces rotary energy from thermal energy

But from principle to practice is a long way. "I have reached the limits of what I can do myself," said Mr. Schatt, explaining his presence at the Eureka exhibition. "I am now seeking a partner interested in developing the concept and the industrial and commercial application of the *thermoturbine*."

This, indeed, is the main purpose of invention fairs – to bring together investors in search of innovative products, processes or ideas, with inventors seeking entrepreneurs to enable them to commercialize their inventions.

It is not without risk. By the very fact of exhibiting, the inventor runs the risk of having his idea copied by others and receiving nothing in return. So prior to participating in an exhibition, it is important to analyze the situation carefully and take appropriate protection measures. – In Mr. Schatt's case, a Belgian patent application.

New IP Procedure at China Hi-Tech Fair

Organizers of the China Hi-Tech Fair in Shenzhen last year adopted a special procedure to protect and manage the intellectual property (IP) rights of exhibitors. As a condition of participation, all exhibitors were required to sign a commitment to respect the IP rights of fellow exhibitors, and to accept mediation in the event of any IP rights disputes. Two disputes were satisfactorily resolved in this way at the October 2005 Fair. "In the past exhibitors quarreled and even fought in the hall," one of the organizers explained in a press statement. "This year, disputes were solved smoothly." The Chinese Ministry of Commerce plans to draft a national management law for exhibitions based on the procedure.

Testing wider interest

Léon Jourdain had likewise filed a patent application before registering for the Eureka Exhibition. He, however, was further down the line, having already found an industrial partner to help develop his invention. Mr. Jourdain had invented a device for generating mechanical energy from small watercourses on flat land, where the flow would be too slow for exploitation through existing technologies. He explained its potential application in developing countries for use in the production of mechanical or electrical energy, for elevating water for irrigation purposes, or, linked to a compressor, for producing heat or cold. For Mr. Jourdain and his partner, the exhibition represented a good way of testing wider interest in the machine.

Exchanging information

Invention fairs are also an important forum for the exchange of information. The WIPO information stand at any fair is kept busy with as many enquiries



Professor Vira, WIPO gold medal-winner at the February 2006 Bangkok exhibition, demonstrates the improved safety features of his motorcycle helmet

Invention exhibitions are a vibrant demonstration that invention and innovation are not the exclusive preserve of large companies. They are a place where technology transfer is initiated and carried out; where the existence of centers of excellence and know-how is demonstrated; where links are forged across regions and across continents. South East Asia was strongly represented at the Brussels Eureka Exhibition in November 2005; contacts were made between organizers, inventors' associations and enterprises, with the result that Belgium was strongly represented at the Bangkok Exhibition in February 2006. At both, inventors shared a com-

Invention Awards

Prizes and medals awarded by expert panels are a popular feature of most invention fairs. In some cases such awards provide a real boost to inventors and to the future of their creations, either financially, or by generating valuable publicity and recognition.

WIPO invention medals aim to promote innovation and inventive thinking at all levels and in all societies. Medals are awarded in different categories, targeting for example inventors from developing countries. Young people, tomorrow's innovators, are also a priority. Take, for example, Yoshiaki Okada, the young WIPO Prize winner at the recent **64th Concours of Schoolchildren's Inventions**, organized by the **Japan Institute of Invention and Innovation**. His model "vibrating amusement park," constructed from sawn-off toothbrushes, plastic cups and his parents' massage machine, may not have been about to make his fortune; but his inventive spirit and ingenuity will be a great future asset.

from the visiting public as from the exhibitors. The most frequent question: "I have this idea – what should I do?" Others seek a better understanding of how to use the PCT to file an international patent application, or the Madrid system to register a trademark for their new product.

mon interest in promoting their own works, and the satisfaction in being part of national and international efforts to promote innovation.

NEWS ROUNDUP

Open Forum on the Draft Substantive Patent Law Treaty

What should be the purposes and limits of international patent law harmonization? How might the definitions of prior art, novelty and inventive step be harmonized? To what extent should exclusions from patentability be harmonized? What can be done to improve patent quality? What is the impact on upstream research of increased patenting in the life sciences? How well does the current patent system serve public health objectives? What alternative models exist to promote innovation?

These were just a few of the questions addressed by speakers at the Open Forum on the Draft Substantive Patent Law Treaty (SPLT), hosted by WIPO from March 1 to 3. The forum, which was open to the public, resulted from a decision by Member States at the 2005 General Assembly, and was conceived to help clarify the future of negotiations to conclude an international treaty that would harmonize substantive patent law. While these negotiations have made headway since they were launched in May 2001, a number of issues are outstanding, and Member States have expressed divergent views on the future work plan of the Standing Committee on the Law of Patents (SCP).

Eminent scientists, industry representatives and legal experts joined speakers from civil society and governments for three days of wide-ranging discussion. The well-attended forum was characterized by a will to avoid polarization in the interest of a constructive exchange of information and of experience regarding the complexities of patent harmonization.

For more see http://www.wipo.int/meetings/2006/scp_of_ge_06/en/

Madrid System - Record Numbers of Filings



Registrations from companies in Turkey increased by over 30 percent in 2005. This one was filed for use with e.g. cosmetics, food and drinks.

A record 33,565 international trademark applications were received in 2005 by WIPO under the Madrid system – a 13.9 percent increase on the previous year's figures. Germany topped the list for the 13th consecutive year. Applications from developing countries – led by China – increased by 30.6 percent over 2004. China also unseated Switzerland as the most designated country in international trademark applications.

WIPO Director General Kamil Idris welcomed the continuing growth in WIPO's IP registrations services to the private sector as reflecting

the growing integration of these procedures into business strategies. Mr. Ernesto Rubio, WIPO Assistant Director General who oversees trademark questions, added "all companies large and small can reap significant time and cost savings in using the Madrid system." He highlighted the use of the Madrid system by small and medium-sized enterprises.

In its second full year as a member of the Madrid system, the United States of America moved from sixth to third place, with a 63.9 percent increase in international filings. Other countries showing a marked increase in international trademark applications in 2005 include Australia, Bulgaria, China, Japan, Singapore and Turkey.

IP Hall of Fame

Arpad Bogsch, Director General of WIPO from 1963 to 1997, under whose leadership the Patent Cooperation Treaty was established, is among the first inductees in a new IP Hall of Fame, which was launched in February by the Intellectual Asset Management (IAM) magazine, London.

A panel of IP experts drawn from industry, academia and law, selected 23 contemporary and historical figures, all of whom were judged to have made an outstanding contribution to the development of IP law and practice. Notable historical figures included:

- Thomas Jefferson and James Madison, the third and fourth Presidents of the United States of America, who were both instrumen-

tal in ensuring that IP rights were specifically safeguarded in the U.S. constitution.

- Minister Korekiyo Takahashi, the first commissioner of the Japanese Patent Office, recognized as the founding father of the Japanese patent system with his promulgation of the Patent Monopoly Act in 1885.
- The great 19th century French author, Victor Hugo who, as Honorary President and founder of the *Association Litteraire et Artistique Internationale*, was a prime mover behind the creation of the Berne Convention on Copyright.
- Thomas Edison, one of the greatest inventors and industrial leaders in history, who obtained an extraordinary 1,093 U.S. patents for his inventions.

IAM editor Joff Wild explained: “For many organizations now, patent, trademark and copyright rights are the most important assets they own. By creating the IP Hall of Fame we hope to publicize the hugely valuable work all the inductees have done in developing this vital asset class, which not only helps to drive the global economy but also makes a significant contribution to the wellbeing of people around the world.”

IAM will induct new members to the IP Hall of Fame each year, and is planning the launch, later this year, of an on-line IP Museum and resource center, designed to make IP issues more accessible to the general public.



A 1903 advertisement for Thomas Edison's “perfected phonograph” – just one of his 1,093 U.S. patented inventions.

7 Millionth U.S. Patent Issued

The United States Patent and Trademark Office (USPTO) announced on February 14 the issue of patent No. 7 million to DuPont senior researcher John P. O'Brien for “polysaccharide fibers” and a process for their production. The biodegradable fibers have cotton-like properties, and are useful in textile applications.

The USPTO reports that it took 75 years to get from patent No. 1 to patent 1 million, but less than one tenth of that time to go from 6 million to 7 million patents.

Patent No. 1 was issued in 1836. Earlier patents were not numbered, although the first U.S. patent was issued in 1790.

MEMBER STATES DISCUSS THE DEVELOPMENT AGENDA

The Provisional Committee on Proposals related to a Development Agenda for WIPO (PCDA) met in Geneva from February 20 to 24. Member States submitted 111 proposals, in 'actionable and operational' form, which they agreed to structure under the following six main themes:

- Technical assistance and capacity building
- Norm-setting, flexibilities, public policy and public domain
- Technology transfer, information and communication technology and access to knowledge
- Assessments, evaluation and impact studies
- Institutional matters including mandate and governance
- Other issues

This structure will constitute the basis for discussion at the second meeting of the PCDA in June. The Chairman of the PCDA, Ambassador Rigoberto Gauto Vielman of Paraguay, announced that he would conduct informal consultations with all interested parties ahead of the June meeting, after which Member States are expected to make recommendations for submission to the WIPO General Assembly in the autumn.

See the WIPO website at www.wipo.int/meetings/en/details.jsp?meeting_id=9643 for documents submitted to the PCDA.

Calendar of Meetings

MAY 15 TO 17 ■ GENEVA

■ *WIPO Advisory Committee on Enforcement (ACE) (Third session)*

The Committee will continue its work within its mandate. As agreed at its second session, the Committee's work in the third session will focus on the issue of education and awareness-raising, including training, concerning all factors relating to enforcement, primarily such that are indicated in requests for assistance by Member States.

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

JUNE 26 TO 30 ■ GENEVA

■ *Provisional Committee on Proposals Related to a WIPO Development Agenda (PCDA) (Second session)*

This session will continue discussions and consideration of the proposals submitted by Member States.

Invitations: As members, the States members of WIPO; as observers, other States and certain organizations.

JULY 3 TO 7 ■ GENEVA

■ *Standing Committee on the Law of Patents (Twelfth session)*

The Committee will continue its work on further harmonization and other issues relating to patent law, as agreed at its informal session in April 2006.

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

SEPTEMBER 25 TO OCTOBER 3 ■ GENEVA

■ *Assemblies of the Member States of WIPO (Forty-second series of meetings)*

Some of the assemblies will meet in extraordinary session, other bodies in ordinary session.

Invitations: As members or observers (depending on the assembly), the States members of WIPO; as observers, other States and certain organizations.

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