



**e-News**

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International Association for the Protection of Intellectual Property  
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#### [AIPPI Bureau](#)

##### [AIPPI Bureau Meeting in Tokyo: 14-17 March 2014](#)

(John Bochnovic, President of AIPPI)

Bureau members were in Tokyo from 14-17 March 2014 for the Bureau's Annual Spring face-to-face meeting and in conjunction therewith, AIPPI Japan organised a one-day IP Seminar. Some Bureau members also took part in visits with the Commissioner of the JPO, the Chief Judge of the IP High Court and the Secretariat of AIPPI Japan.

##### [The Annual visit to the EPO by a delegation of the Bureau of AIPPI](#)

(Laurent Thibon, Deputy Secretary General of AIPPI)

A delegation of the Bureau of AIPPI visited the EPO on 12 February this year. The AIPPI delegation was composed of John Bochnovic, President, Felipe Claro, Vice-President, Stephan Freischem, Secretary General, Laurent Thibon, Deputy Secretary General, John Osha, Deputy Reporter General, and Ralph Nack, Chair of the Patents Committee.

##### [Visit to Independent members in Asia](#)

(Laurent Thibon, Deputy Secretary General of AIPPI)

In March this year, after the Bureau meeting in Tokyo, a delegation of the Bureau visited Asian Independent members of AIPPI. The visited regions were Taiwan, Hong Kong and Vietnam.

##### [Prior User Rights — Patents Committee](#)

(Thierry Calame, Reporter General of AIPPI)

AIPPI intends to study prior user rights and adopt a Resolution on the topic at the upcoming Executive Committee Meeting in Toronto. Members of the Patents Committee and the Reporter General Team have prepared a Questionnaire to this effect. The National and Regional Groups have been requested to respond to the Questionnaire by April 30, 2014.

#### [AIPPI 2014 Toronto Congress](#)

##### [Registration for Toronto is open](#)

(Laurent Thibon, Deputy Secretary General)

The next AIPPI Congress will be held in Toronto, Canada, from Sunday 14 September to Wednesday 17 September 2014. Toronto awaits you. This Congress of AIPPI will be a fabulous opportunity for AIPPI members to exchange views about IP topics and to network in the city of Toronto.

Don't miss the opportunity to register for the AIPPI 2014 Toronto Congress, by 9 June 2014 in order to take advantage of the reduced registration fees. Registration is open at [www.aippi.net](http://www.aippi.net).

Download the Preliminary Programme.

Download the Accomodation & Social Events brochure.

##### [Announcing the Workshops for AIPPI Congress in Toronto](#)

(Thierry Calame, Reporter General of AIPPI)

The preparations for the educational programme of the AIPPI Congress in Toronto are well under way. The Congress will again offer 12 Workshops over three days (Monday through Wednesday, 15-17 September 2014) covering a wide array of hot topics in intellectual property law such as IP implications of 3D printing, cross-border infringement of IP rights, freeriding and parasitism, computer implemented inventions, use of survey evidence in trademark cases, as well as copyright aspects of embedding, framing and linking. Following on from the success of the mock patent trials at the Boston Congress in 2008 and the Seoul Congress in 2012, the Toronto Congress will showcase a mock International IP arbitration. The mock participants will include leading IP arbitrators and litigators from around the world conducting the arbitration of a design case. Finally, building on the success of the Pharma Day at previous meetings, 4 out of the 12 Workshops will again be special pharma Workshops dedicated to topical issues in the pharmaceutical industry such as requirements for disclosure of utility or industrial applicability, biosimilars, PTEs and SPCs, as well as early resolution mechanisms for patent disputes regarding approved drug products.

Here is a description of all of the Workshops.

[AIPPI 2014 Toronto Congress - cultural evening \(September 15 2014\)](#)

(Philip C. Mendes da Costa, Chair Organizing Committee)

The cultural evening is a centre point of the AIPPI Congress and allows participants to be exposed to the local culture of their host country. A challenge for the Organizing Committee was how to show off the culture of Canada (a country that spans 4 and a half time zones) in one night without a lot of travel. We will achieve this with our Taste of Canada.

[AIPPI 2014 Toronto Congress, Sponsorship opportunity](#)

(Toronto 2014 Organizing Committee)

With only 5 months to go before the AIPPI 2014 World Intellectual Property Congress in Toronto, now is the time to become a sponsor or exhibitor. There are still plenty of great sponsorship opportunities available. We encourage you to review the Sponsorship and Exhibition brochure at <https://www.aippi.org/download/toronto14/Sponsorship.pdf>.

[Forthcoming Events](#)

[April 2014: World IP Day 2014](#)

(WIPO)

26 April marks the World Intellectual Property Day. Since the year 2000, WIPO has been celebrating together with its member states this date as a tribute to innovation and creativity. The theme of this year is Movies: a global passion. It offers a unique opportunity for all those who professionally deal with IP protection and those who enjoy IP protected content in their private lives to share their experiences and knowledge around the world as well as in their local communities. It also creates a space for discussions around the role of IP in today's societies and economies and about the current status of IP systems in different countries. Such discussions should enhance the acceptance of IP protection and also create new ideas for the future. AIPPI encourages all its members to take an active part in the celebrations in their countries. For further information please refer to the World IP Day web page.

[May 2014: AIPPI booth at INTA Annual Meeting, Hong Kong, 10-14 May 2014](#)

(AIPPI General Secretariat)

AIPPI will be at the INTA annual meeting. Come and visit us at booth no.138 and 140 in the Exhibition hall to gather information and gadgets of Toronto, Canada and Rio de Janeiro, Brazil (Host cities of the AIPPI events in 2014 and 2015).

[June 2014: 33rd Annual Conference, 18-21 June 2014](#)

(ECTA)

The 33rd ECTA Annual Conference will take place this year in Alicante (Spain), 18-21 June, 2014. This conference on Trade Marks and Designs will celebrate the 20th Anniversary of the European Community Trade Mark. More information is available at [www.ecta.org](http://www.ecta.org).

[November 2014: FICPI 15th Open Forum, Barcelona, 5-8 November 2014](#)

(FICPI)

The FICPI 15th Open Forum in Barcelona will take place on 5-8 November 2014.

[Articles and notes](#)

[Australia: Generic pharmaceuticals and competition law: ACCC v Pfizer](#)

(Matthew Swinn, Corrs Chambers Westgarth, Melbourne, Australia)

The Australian Competition and Consumer Commission has recently commenced proceedings against Pfizer alleging misuse of market power and exclusive dealing, marking the ACCC's first public foray into issues relating to patent expiry strategy.

[Colombia: Colombian Government tightens rules against Consumer Protection Law infringements](#)

(Diego Pardo Amézquita, Pinzón Pinzón & Asociados S.A., Bogota, D.C., Colombia)

Colombia's consumer rights enforcement bureau has recently issued a number of decisions that provide guidelines for the proper understanding and implementation of the relatively new Consumer Protection Statute (2012). In particular, producers and retailers of goods and services may now be held accountable for not providing sufficient information and/or for disseminating false advertising.

[Germany: Public Consultation on the Review of EU Copyright - AIPPI Files Answers](#)

(Jan Bernd Nordemann, BOEHMERT & BOEHMERT, Berlin, Germany)

In Paris 2010 and Hyderabad 2011, AIPPI intensively debated copyright in the digital age. In December 2013, the European Commission launched the “Public Consultation on the Review of the EU Copyright Rules”. With a questionnaire, the European Commission invited stakeholders to share their views on a reform of EU copyright law in the further progressing digital age. AIPPI’s Special Committee Copyright in cooperation with AIPPI’s Bureau filed answers to this questionnaire.

[Germany: Proposal for a Trade Secrets Directive](#)

(Karolina Schöler, HARTE-BAVENDAMM Rechtsanwälte, Hamburg, Germany)

By a proposal for a Directive on the protection of trade secrets the European Commission seeks to harmonize the law in this important area and to strengthen the ability of companies in the European Union to innovate and compete.

[Switzerland: Swiss law: The Emirates Airline company gets back the www.emirates.ch domain](#)

(Thomas Widmer, LALIVE, Geneva, Switzerland)

Following a recent WIPO decision on the “www.emirates.ch” domain name, it is discussed to which extent, under Swiss law, inactive domain names may infringe Intellectual Property rights.

[UK: Apple & Samsung - Post-judgment patent amendment at the EPO](#)

(Gary Moss, EIP, London, UK)

This report relates to the worldwide litigation between Apple and Samsung: this latest judgment comes from the English Court of Appeal and involves Samsung being allowed to centrally amend their patent at the EPO after a first instance trial.

[US: Sherlock Holmes and the Peculiar Case of the Partial Copyright](#)

(Uli Widmaier, Pattishall, McAuliffe, Newbury, Hilliard & Geraldson LLP, Chicago, USA)

Can modern authors freely draw on the elements from Sir Arthur Conan Doyle’s Sherlock Holmes stories, some of which are in the public domain while others remain copyright-protected? The answer, my dear Watson, is anything but elementary — a resounding “It Depends,” according to *Klinger v. Conan Doyle Estate Ltd*, -- F. Supp. 2d --, 2013 WL 682493 (N.D. Ill. Dec. 23, 2013).

[US: U.S. Supreme Court creates new standard for false advertising claims](#)

(Uli Widmaier, Pattishall, McAuliffe, Newbury, Hilliard & Geraldson LLP, Chicago, USA)

In *Lexmark Int’l, Inc., v. Static Control Components, Inc.*, No. 12-873 (March 25, 2014), the U.S. Supreme Court held that a party alleging false advertising must show “an injury to a commercial interest in sales or business reputation proximately caused by the defendant’s misrepresentations.” This holding creates a new standard for false advertising claims and invalidates familiar legal doctrine.

[National Groups](#)

[Spain: AIPPI - 50th anniversary of the Spanish Group](#)

(Pedro Merino, Vice-President of the Spanish Group)

The Spanish National group of AIPPI recently celebrated its 50th anniversary in Barcelona. Personalities from national and international IP institutions, as well as numerous Spanish Judges, Professors, Lawyers, Trademark and Patent Attorneys and Spanish companies participated in the event.

[AIPPI Bureau](#)

[AIPPI Bureau Meeting in Tokyo: 14-17 March 2014](#)

(Article by John Bochnovic, President of AIPPI)

The AIPPI convened for its Spring face-to-face meeting in Tokyo recently to enjoy the gracious hospitality of our National Group members in Japan. The occasion also provided some Bureau members with an opportunity to visit the JPO, the IP High Court and the Secretariat of AIPPI Japan.

A meeting of the Bureau, as well as meetings of the RGT and SGT, took place over the weekend of 15-16 March. On Friday, 14 March members of the Bureau presented on various topics in a one day AIPPI IP Seminar covering patents, trade-marks and designs. The topics were particularly of interest in Japan, where the trade-mark law is currently being revised to allow for registration of non-traditional trade-marks and where design law issues, including implementation of The Hague Agreement, are currently under active discussion. The day ended with a reception hosted by Commissioner Hideo Hato of the JPO, followed by a dinner with Executive members of AIPPI Japan.

On Monday, 17 March, some Bureau members were able to visit with Commissioner Hato and his officials at the JPO for a discussion of current issues, including the issue of confidential communications between IP owners and their advisors. Members of the Bureau were also received by Chief Judge Jimura of the IP High Court. Judge Jimura was most cordial and informative in answering numerous questions from Bureau members relating to the Court's practice and procedures. Later that day, Stephan Freischem, Laurent Thibon and Cinzia Petruzzello were able to visit the Secretariat of AIPPI Japan.

Overall, the four days spent in Tokyo provided an excellent opportunity for professional and social interaction with members and the Executive of AIPPI Japan, as well as the JPO and IP High Court. The Bureau wishes to acknowledge very gratefully the warm hospitality and tremendous organisational effort of the President, Executive, Secretariat and members of AIPPI Japan, all of which provided for a very successful and productive visit.

From Tokyo, John Bochnovic, Stephan Freischem and Laurent Thibon set off for visits in the region (reported further hereunder). On 18 March 2014, John Bochnovic and Stephan Freischem met with key Executive members of the Chinese Group and were able to enjoy a visit with He Zhimin, Deputy Commissioner of SIPO in Beijing. Mr. He only took office very recently and AIPPI had the distinction of its President and Secretary General being the first international visitors to be received by the Deputy Commissioner.





[The Annual visit to the EPO by a delegation of the Bureau of AIPPI](#)  
(Article by Laurent Thibon, Deputy Secretary General of AIPPI)

The traditional annual visit from the Bureau of AIPPI to the EPO was this year organized on 12 February, to take advantage of the presence in Europe of John Bochnovic, President of AIPPI and Felipe Claro, Vice-President of AIPPI.

The delegation of AIPPI was welcomed by Raimund Lutz, Vice-President, Legal & International Affairs, who highlighted the importance of the collaboration between the EPO and organizations such as AIPPI.

Isabel Auria Lansac, Lawyer International Legal Affairs, updated the AIPPI delegation on recent and future developments concerning the application of the PCT by the EPO. Globally, the intention of the EPO is to align as much as possible the service provided to applicants for EP and PCT applications. An objective of the EPO for 2014 is to accept electronic filing for supplementary documents filed in connection with a PCT application.

Figures for 2013 show that the EPO was the third most popular Receiving Office (RO), the most popular International Search Authority (ISA) and the most popular International Preliminary Examination Authority (IPEA). Over 87,100 International Applications entered the European Phase in 2013.

As from 1 July, 2014, the Written Opinions accompanying the International Search Reports will be publicly available 18 months after the priority date. Further, as of 1 July, 2014, the EPO, acting as IPEA, will perform a "top-up" search to detect possible Intermediate prior art. This search will be automatic and will need neither a request from the applicant, nor the payment of a fee. Furthermore, the revised Rule 164 of the European Patent Convention, which will enter into force on 1 November, 2014, will authorize the applicant to pay, when entering the EP Regional phase, further search fees.

Niclas Morey, Director, Int. Organisations, Trilateral and IP5, presented the recent improvements made by the EPO in terms of the Asian Documentation taken into account by the Examiners. One motivation for these changes is that the source of IP publications has drastically changed in the past 10-15 years. In 2012, among the 2 million applications filed in the IP5 offices, 1.2 million were filed in China, Japan and Korea. Furthermore, whereas in 2001, 60% of applications filed in China, Korea and Japan had a secondary filing in a European language, this percentage was less than 30% in 2011.

At the moment, among the 121 million citations present in the EPO database, which represents the largest citation database in the world, the Examiners have access to nearly the complete collections covering China, Japan and Korea from the beginning of the respective patent systems, with the full texts of most of these documents being available in English.

Jozsef Albert, Examiner Computers, Legal Advisory, Patent Law, reported on the current situation at the EPO regarding the admission of Internet Citations. The issues to be considered include the date of the publication due to the fact that Internet content often gets updated, the possible manipulation of data and how to deal with defensive publications. The current approach of the Examiner is to consider these publications as they do the others, i.e. to apply the balance of probabilities as the standard of proof. However, depending on the situation, the "beyond any reasonable doubt" standard, which is the standard for oral disclosures, is sometimes applied.

Alfred Spigarelli exposed a new process at the EPO, the aim of which is to provide the search report within 6 months from the filing date. This, coupled with a general increase in service to applicants at the end of the search phase, will enable an applicant to make an informed decision, based on reliable search results, on how best to pursue a particular case.

The meeting with the EPO also provided an opportunity to present AIPPI's work. John Osha explained the working process of AIPPI from the Working Guidelines to the Resolutions, and then briefly presented Toronto's Working Questions focusing on Q238 Second Medical Use, and reported to the EPO delegation the AIPPI resolution on Grace Periods. Ralph Nack provided the background to the Prior User Right discussions that will occur in Toronto.

A lunch for the AIPPI delegation was hosted by EPO President Benoit Battistelli, which facilitated informal discussions between the AIPPI and EPO delegations.



[Visit to Independent members in Asia](#)  
(Article by Laurent Thibon, Deputy Secretary General of AIPPI)

After the Bureau meeting, which took place in Tokyo this year, some Bureau members visited Independent members from the region. On 18 March, Laurent Thibon, Deputy Secretary General, was welcomed in Taipei for a meeting with Independent Members. The meeting was attended by around 20 Independent members and a few non-members, and it provided an opportunity to discuss the operation of AIPPI and the participation of Independent members in its activities. The participants were updated on the Unitary Patent and Unified Patent Court, and the meeting ended with an informal lunch.

On 19 March, an IP Lunch Seminar was organized in Hong Kong and hosted by Annie Tsoi, Chairperson of the Delegates for the Independent Members. This Seminar was attended by around 70 participants. The speakers were John Bochnovic, AIPPI President, Annie Tsoi, Laurent Thibon and Christopher Britton (Deacons, Hong Kong). The speakers addressed the recent development of laws and regulations on plain packaging; certification requirements affecting trade mark use; an update on the recent development of the Unitary Patent System and the Unified Patent Court, and the setting up of an originating grant system in Hong Kong. In the afternoon, the AIPPI delegation visited the IP Department of Hong Kong and was welcomed by Peter Cheung, Director of the IP Department of Hong Kong.

Finally, on 20 March, John Bochnovic and Laurent Thibon visited the Independent Members in Hanoi (Vietnam). A

number of Independent Members attended this meeting during which the participation of Vietnamese Members in AIPPI and the formation of a Group in Vietnam were discussed.



### [Prior User Rights — Patents Committee](#)

(Article by Thierry Calame, Reporter General of AIPPI)

AIPPI studied the grace period for patents in the context of Question Q233 at the Executive Committee meeting in Helsinki last year. During the deliberations in the Q233 working committee meeting and the plenary session in Helsinki, it became clear that AIPPI should equally study the partially related topic of “prior user rights”. Accordingly, the Resolution Q233 notes that AIPPI could valuably extend its work on the issue of prior user rights.

The issue of prior user rights has previously been studied by AIPPI, but the Resolution Q89D Prior Use dates back to 1989 (Amsterdam ExCo). The passage of time and changes in relevant national laws make this topic ripe for reconsideration at this time, in particular:

- a. the passage of the AIA in the United States, representing an important move by the US towards global patent harmonization in many respects; specifically, the AIA expands the defense beyond just business methods to cover all technologies.
- b. the perceived change of view of national groups on this issue;
- c. the work of the “Tegernsee Group”, attended by heads of offices and representatives from Denmark, France, Germany, Japan, the UK, the USA and the EPO, which identified prior user rights as one of four topics being key to harmonization.

Against this background, AIPPI intends to study prior user rights and adopt a Resolution on prior user rights at the upcoming Executive Committee Meeting in Toronto. Members of the Patents Committee and the Reporter General Team have prepared a Questionnaire to this effect.

The National and Regional Groups have been requested to respond to the Questionnaire by 30 April 2014.

### [AIPPI 2014 Toronto Congress](#) [Registration for Toronto is open](#)

(Article by Laurent Thibon, Deputy Secretary General of AIPPI)

The AIPPI Toronto Congress will offer AIPPI’s traditional Pharma day with its four workshops, covering: i) Requirements for disclosure of utility or industrial applicability and ramifications for patent validity, ii) Biosimilar pharmaceutical products, iii) Patent term exhaustion and Supplementary Protection Certificates (SPCs) — latest developments, and iv) Early resolution mechanisms for patent disputes regarding approved drug products.



You will also have the opportunity to attend: i) a mock trial, which this year will focus on international IP arbitration, or one of the additional workshops covering different fields of IP, namely, ii) Copyright aspects of embedding, framing and hyperlinking, iii) Client-Attorney privilege — issues for harmonization, iv) Use of survey evidence in trademark cases, v) Patenting computer implemented inventions, vi) Free riding / Parasitism, vii) Cross-border infringement of IP rights, and viii) IP implications of 3D printing.

The debates concerning the four Working Questions of AIPPI promise to provide the participants with interesting discussions, in the fields of patents, second medical use and other second indication claims (Q238), trademarks, the Basic mark requirement under the Madrid System (Q239), in the design/copyright field, exhaustion issues in copyright law (Q240), and in IP commercialization, IP Licensing and insolvency (Q241). In addition, the issue of prior user rights will be the subject of an additional plenary session.

Furthermore, in the tradition of AIPPI, special meetings will be held for first time attendees, for women in AIPPI, and for in-house counsel.

The social functions will not only enrich your stay in Toronto, but will forever serve as a reminder of this beautiful country. For the day after the congress (September 18), the Organizing Committee has arranged an optional tour in the Niagara Falls area, which will provide you with further opportunities to spend time socializing with your AIPPI friends, while visiting one of the world's great natural wonders.

The Organizing Committee has been working for several years to provide you with an unforgettable experience in Canada during this meeting, at which every possible step has been taken to facilitate working, networking, learning and having fun. See you in Toronto!

#### [AIPPI 2014 Toronto Congress - cultural evening \(September 15, 2014\)](#)

(Article by Philip C. Mendes da Costa, Chair Organizing Committee)

As you may not be able to visit other regions of Canada during your trip to Toronto, we have designed a cultural evening that will immerse you in the various cultures of Canada. The cultural evening, which we refer to as your "Taste of Canada", is included in your registration fee. The Taste of Canada will allow you to discover the sights, sounds and flavors of Canada's vast landscape all in one location. Different culinary specialties and delicacies will be offered in each room. The featured themes will be the Northern Lights, the Prairie cowboy lifestyle, Niagara Falls, the Quebec joie de vivre and an East Coast Kitchen Party. Be sure to tour the whole complex to experience and taste it all. Since no AIPPI event is complete without a good dance party, we have a separate room that will be set up to go all night. So bring your appetite and your dancing shoes!

#### [AIPPI 2014 Toronto Congress, Sponsorship opportunity](#)

(Article by The Toronto 2014 Organizing Committee)

AIPPI 2014 Toronto World Intellectual Property Congress is taking place September 14 to 17 in Toronto, Canada. That is only 5 months from now! With over 2000 participants from around the world expected to attend, this is a unique opportunity to reach a wide audience of intellectual property professionals by becoming a sponsor, an exhibitor or a media partner.

#### Sponsorship

There are still plenty of items and social events to choose from. Sponsorship not only creates visibility tailored to meet your specific marketing requirements but also provides an opportunity to enhance your organization's recognition.

#### Exhibition

As an exhibitor at the AIPPI World Intellectual Property in Toronto, you will gain full access to the wide-ranging exhibition area. As an exhibitor, you will have the opportunity to meet with participants as well as to network with other exhibitors. We would be pleased to reserve space for you.

## Advertisements

Advertising space is available in a number of publications that will be coming out both prior to and during the Congress, including the Congress brochure and the list of participants. Both publications will be distributed to all attendees of the Congress.

14 September is rapidly approaching and a number of items and events have already been spoken for. For further information please refer to our Sponsorship & Exhibition Brochure, which is available at:  
<https://www.aippi.org/download/toronto14/Sponsorship.pdf>

Thank you for your interest and for supporting the AIPPI 2014 World Intellectual Property Congress in Toronto!

The Toronto 2014 Organizing Committee

## Articles and notes

[Australia: Generic pharmaceuticals and competition law: ACCC v Pfizer](#)

(Article by Matthew Swinn, Corrs Chambers Westgarth, Melbourne, Australia)

In recently commenced Federal Court proceedings, the Australian Competition and Consumer Commission (ACCC) alleges that commercial offers made by Pfizer Australia Pty Ltd (Pfizer) to pharmacies before the expiry of the patents for its blockbuster Liptor drug breached prohibitions in the *Competition and Consumer Act 2010* on the misuse of market power and exclusive dealing.

Competition between originator (or “branded”) and generic pharmaceutical companies has lately been scrutinised by US and European competition regulators. The ACCC’s action against Pfizer relates to patent expiry strategy, and is the first public foray by the ACCC into this complex area.

## Background

Atorvastatin is a blood cholesterol lowering drug and was marketed in Australia by Pfizer as LIPITOR Atorvastatin (Lipitor). The patent for atorvastatin expired on 18 May 2012. According to the ACCC, in settling a previous patent dispute, Pfizer had agreed to license a competitor to launch a generic atorvastatin product on 18 February 2012.

## The alleged contravening conduct

The ACCC alleges that Pfizer implemented a strategy to protect its market share in the face of impending generic competition comprising:

- changes to their distribution arrangements;
- commencing an “accrual fund scheme”; and
- offering discounts to pharmacies that purchased a proportion of their forward requirements for atorvastatin in one shipment.

## *Pharmacy supply arrangements*

On about 31 January 2011, Pfizer ceased the conventional supply of prescription pharmaceuticals to pharmacies via wholesalers and commenced supply direct to pharmacies.

## *Accrual fund scheme*

On about 31 January 2011, Pfizer established an accrual fund scheme under which:

- accrual accounts were established for each pharmacy; and
- Pfizer credited each account with a “rebate” equal to a percentage of the pharmacy’s purchases of non-generic prescription pharmaceuticals, including Lipitor with a rebate of 5% (the Lipitor Rebate).

Each pharmacy received monthly statements of the credit in their accrual fund and were told that they be able to access the Lipitor Rebate upon expiry of the atorvastatin patent.

*Discount offers*

The ACCC alleges that on 16 January 2012, Pfizer made offers to virtually all pharmacies in Australia that it would:

- supply Atorvastatin Pfizer, a new generic atorvastatin;
- provide access to Lipitor Rebates; and
- give discounts in relation to the supply of Lipitor and Atorvastatin Pfizer (AP Offers).

The AP Offers were categorised into different classes and made on the condition that pharmacies:

- purchased 75% of their anticipated generic atorvastatin supply requirements for the following 12, 9 or 6 months (the longer the term, the higher the discount);
- nominated a conversion rate, being the percentage of sales of Lipitor they anticipated being converted to sales of generic atorvastatin (higher conversion rates meant higher discounts on Atorvastatin Pfizer);
- accepted the entire volume of Atorvastatin Pfizer before 30 April 2012; and
- accepted the offer before 24 February 2012 in order to receive that pharmacy’s Lipitor Rebate.

The Lipitor Rebate was to diminish in value if pharmacies accepted the offer between 24 February and 24 August 2012, after which time Pfizer would not release any accrued Lipitor Rebate.

The ACCC’s concern focuses on the timing of the offer that, if accepted, would stock pharmacies’ shelves with Pfizer’s generic atorvastatin arguably before competitor generic companies could supply an atorvastatin product.

The complex facts and the history of market power and exclusive dealing cases in Australia suggests that the ACCC will face a difficult and protracted fight. The proceedings should provide valuable guidance on how holders of expiring patents can legitimately seek to compete with new entrants and is being closely watched by the pharmaceutical industry in Australia.

[Colombian Government tightens rules against Consumer Protection Law infringements](#)  
(Article by Diego Pardo Amézquita, Pinzón Pinzón & Asociados S.A., Bogotá, D.C., Colombia)

In recent weeks, the Deputy Superintendence for Consumer Protection of Colombia’s Superintendence of Trade and Commerce (the local competition regulator, consumer protection enforcer and industrial property bureau) announced several administrative sanctions to important and renowned companies for violating consumer rights. The most talked about sanctions are against Alpina S.A. (a leading dairy producing company), Decameron Hotels (all inclusive hotels and resorts) and Despegar.com (an online travel agency). In these three cases, the imposed fines (of up to USD \$ 450,000 in the case of Alpina) were caused by the dissemination of false advertising and/or insufficient information, among other charges, with respect to the goods and services they provide.

The relatively new Consumer Protection Statute changed the rules on trade, but related decisions have only recently been issued to provide guidelines for the proper understanding and implementation of the Statute. In particular, these decisions relate to guidelines regarding insufficient information and/or false advertising, which must be observed by all producers and retailers of goods and services, irrespective of their sector of the economy.

Investigating consumer rights violations, caused by, for example, insufficient information and/or false advertising, poses a particular challenge for marketing departments of companies. This is especially true when dealing with commercial promotions, since it is not always clear what information must be reflected in an advertisement in order to comply with the guidelines. While the Statute sets out the minimum information that must be disclosed to the public, it is clear that, either for aesthetic reasons, space constraints or for strategic reasons (e.g. expectation campaigns), advertisements tend to not - or cannot - contain all the necessary information to enable a consumer to make an informed decision. Hence, the use of the very well known, but immediately suspicious, phrase “conditions and restrictions may apply.”

This situation is further complicated by the use of slogans such as “Best Price Guaranteed”, as in the case of Despegar.com, which poses a difficult - if not impossible - obligation to comply with consumer expectation. The Statute is clear in this regard, in that “The objective and specific conditions announced in advertising compel the advertiser”.

Producers and retailers can only be exempt from liability when breaching the guidelines in the event of force majeure, accident or duly proven tampering with advertisements, and, in addition, all provisions of the Consumer Protection Statute must be interpreted and applied for the protection and benefit of the consumer (pro consumatore principle). It is thus a priority for every company to carefully revise its advertising campaigns to ensure compliance and not face sanctions as severe as business closure and/or fines of up to USD \$1 million. In particular, promotions need to be carefully considered and structured, and in some cases authorization needs to be obtained for the use of incentives and promotional games of chance.

#### [Public Consultation on the Review of EU Copyright - AIPPI Files Answers](#) (Article by Jan Bernd Nordemann, BOEHMERT & BOEHMERT, Berlin, Germany)

Copyright is everywhere. It is also at AIPPI. In intensively debated Q216. (Paris 2010) and Q216B (Hyderabad 2011) “Exceptions to copyright protection and the permitted uses of copyright works in the high-tech and digital sectors”, AIPPI tried to find solutions for copyright in the digital age.

Now, also the European Commission, as the European law maker, is investigating, whether the progressing digital age requires a further copyright reform. In 2001, the EU Commission published the directive “on the harmonization of copyright and related rights in the information society”, 2001/29. But over recent years, digital technology and the internet have further reshaped the ways in which content is created, distributed and accessed. The Commission explains that new opportunities have emerged for those that create and produce content (e.g. a film, a novel, a song), for new and existing distributions platforms, for institutions such as libraries, for activity such as research and for citizens who now expect to be able to access content – for information, education or entertainment purposes – regardless of geographic borders.

In December 2013, the European Commission launched a so-called “Public Consultation on the Review of the EU Copyright Rules”. The focus of this Consultation was “ensuring that the EU copyright framework stays fit for purpose in the digital environment to support creation and innovation, tap the full potential of the Single Market, foster growth and investment in our economy and promote cultural diversity.” With a questionnaire, the European Commission invited stakeholders to share their views on certain areas identified, e.g. territoriality in the EU Single Market, harmonization, limitations and exceptions to copyright in the digital age, fragmentation of the EU copyright market, and how to improve the effectiveness and efficiency of enforcement while underpinning its legitimacy in the wider context of copyright reform.

AIPPI’s Special Committee Copyright in cooperation with AIPPI’s Bureau also answered this questionnaire. For some of the relevant issues, AIPPI was able to refer to passed resolutions, such as the above mentioned resolution Q216 and Q216B, in particular concerning copyright limitations and exceptions and enforcement. Also Q235 on “Term of Copyright Protection” was used. On certain issues, AIPPI could not provide any answers, because they had not yet been sufficiently discussed by AIPPI. One example is “exhaustion” of copyright for content downloaded online; such questions will be discussed and voted on in a resolution in September 2014 in Toronto within Q240 “Exhaustion Issues and Copyright Law”. AIPPI’s work remains relevant for the front of copyright politics.

AIPPI’s submission to the “Public Consultation on the Review of the EU Copyright Rules” may be downloaded here.

### [Proposal for a Trade Secrets Directive](#)

(Article by Karolina Schöler, HARTE-BAVENDAMM Rechtsanwälte, Hamburg, Germany)

On 28 November, 2013 the European Commission announced a proposal for a Directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, COM(2013) 813 final. The objective is to approximate the national laws which according to the European Commission are currently fragmented. The proposed Directive establishes consistent definitions of central terms such as “trade secrets”, “confidential information” and “unlawful acquisition, use and disclosure”. It also provides a catalogue of various types of conduct that are considered lawful by definition. This relates to situations in which the person concerned or the general public has a legitimate interest in disclosing or using certain confidential information of another person or enterprise (e.g. reverse engineering or whistleblowing).

The proposal also introduces a system of measures and remedies that shall apply in cases of misuse of trade secrets. This appears necessary because in the opinion of the European Commission, the Enforcement Directive (Directive 2004/48/EC) is not applicable in cases of misuse of trade secrets. The measures and remedies included in the current draft are largely in line with those of the Enforcement Directive, except for certain remedies facilitating the access to information and evidence in the possession of the respondent or third parties.

Furthermore, the European Commission suggests a limitation period of two years to bring claims; the limitation period shall start to run from the date on which the applicant became aware or had reason to become aware of the last fact giving rise to the action.

To date, in Germany as well as in many other Member States there is no comprehensive and consistent legal system to protect trade secrets in a way that is both effective and well-balanced.

The proposal for the Trade Secrets Directive is partially based on Article 39 para. 2 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 1994. According to this provision, natural persons as well as legal entities must have the possibility to inhibit the acquisition, use and disclosure of confidential information. Article 39 para. 2 is, however, only aiming at establishing a minimum standard of protection; the signatories of the TRIPS Agreement are free to establish a higher standard of protection of trade secrets.

Whether and in which respects the European Commission seeks to reach a full or a partial harmonization of national laws is not totally clear. In case the Directive leads to full harmonization, concerns have been expressed in Germany that the level of protection of trade secrets could fall below the standard established under national law. This would be a somewhat ironic result of an initiative that primarily aims to create solid, deterring and efficient legal instruments to combat the misappropriation of trade secrets.

An aspect of the proposal that has been particularly criticized is that the definition of “unlawful” acquisition, use and disclosure of trade secrets includes subjective requirements, namely negligence or intention, respectively (Art. 3 of the proposal). If this is not changed in the further process of legislation, it may become impossible to take successful legal action against misuse of trade secrets if the applicant is unable to prove negligence or intentional conduct on the part of the respondent. Again, this would considerably weaken the protection compared to existing standards of German law and practice.

The European Commission aims to have the Directive adopted by the end of 2014. It remains to be seen whether this timeframe can be met and whether in the end Member States will remain entitled to maintain or introduce a level of protection above the standard provided by the Directive.

[Swiss law: The Emirates Airline company gets back the www.emirates.ch domain](#)  
(Article by Thomas Widmer, LALIVE, Geneva, Switzerland)

As previously reported in the AIPPI E-News (n° 28), inactive domain names cannot, under Swiss law, infringe trademark rights, save in the particular case of “well-known” trademarks. Similarly, inactive domain names cannot breach company name rights (Alberini/Guillet, *L’incidence du contenu du site internet dans les litiges en matière de noms de domaine*, in sic! 2012, 305, 313). Indeed, art. 956 of the Swiss Code of Obligations (“SCO”) only protects registered company names against use by third parties of identical or similar signs which are used in the capacity as company names also. Use of a company name for different purposes, such as a sign to identify products or services instead of a company, is not covered by art. 956 SCO (decision of the Civil Court of Canton Vaud dated 4 December 2012, n° 140/2012/PBH, para 3b; WIPO UDRP decisions DCH2008-0025, DCH2007-0006 and DCH2005-0012; F. Dessemontet, *La propriété intellectuelle et les contrats de licence*, Lausanne 2011, § 619).

However, inactive domain names may violate Swiss unfair competition law, provided that the registrant’s behaviour constitutes an active disruption of the complainant’s business interests and activities. This can be the case if the registrant prevents, without legitimate interest, the complainant from reflecting its trademark or (business) name as a domain name.

In this regard, one could question what if the complainant was able to reflect its trademark or (business) name under a TLD other than the “.ch” (Swiss) one? This can be, depending on the circumstances, either seen as evidence that the registration of the litigious domain name is not unfair (DCH2007-0006), or the opposite: “It is obvious that Claimant has a genuine interest in using the Domain Name for Switzerland, since it (...) uses the second level domain (...) in several countries” (DCH2011-0024).

In the WIPO UDRP [www.emirates.ch](#) case (DCH2013-0018) under scrutiny, the domain was inactive when the complaint was filed.

The WIPO expert, first, rightly confirmed that art. 956 SCO was not applicable since the complainant’s “Emirates” company name was not registered in Switzerland. However, the expert stressed that the complainant could rely on art. 8 of the Paris Convention for the Protection of Industrial Property, which applies to foreign company names that are known in Switzerland thanks to a notable use or because they enjoy a worldwide reputation (decisions of the Swiss Supreme Court, 4A\_92/2011, para 5.1 and 4A\_253/2008, para 5.1). These companies are protected against an infringement of their personal names under Swiss law.

The WIPO expert then held that, similar to the above mentioned principles of unfair competition, preventing a third party to register a domain name under its own name constitutes an impairment of that party’s right to its name.

Since the “Emirates” company name had been intensively used in Switzerland and that the registrant of the litigious domain name did not conclusively plead and prove any relevant interest in said domain name, the WIPO expert decided that the complainant’s right over its personal name had been breached.

The expert thus ordered the transfer of the “[www.emirates.ch](#)” domain name in favour of the Emirates airline company.

[Apple & Samsung - Post-judgment patent amendment at the EPO](#)  
(Article by Gary Moss, EIP, London, UK)

Samsung brought action against Apple for infringement of three of its patents. At first instance, the Judge (Mr Justice Floyd) found the patents invalid. At that point, Samsung could, theoretically, have applied to make post-judgment amendments before the Court; but there is existing jurisprudence stating that post-judgment amendments will not be entertained if the effect would be to require a fresh trial to determine whether the patent, as proposed to be amended, would be valid. So, Samsung, instead, elected to apply for central amendment at the European Patent Office (“EPO”) and then requested the Court of Appeal to adjourn its appeal on the grounds that there was a real possibility that the claims would turn out to be in a different form from those considered by the first instance court.

Not surprisingly, Apple opposed the application. It claimed that Samsung should have offered to make the “new” amendments before the first instance court so that they could be considered as part of the trial (In fact, Samsung did put forward amendments at the trial, but they were different from the amendments being proposed at the EPO. The Judge had ruled that those amendments did not save the patent.). In Apple’s view, the course which Samsung was adopted later was potentially an abuse of process because there had been no consideration as to whether or not the claims as proposed to be amended were inventive over the prior art, and the evidence had not addressed that issue, so potentially, if the new amendments were allowed, there would need to be a new trial to re-determine validity. Apple contended that Samsung had two options: they should either abandon the central amendments and fight the appeal on the old claims and amendments, or they should abandon the appeal itself, but they could not do both. Apple also argued that the Court of Appeal should impose that choice on Apple by making it clear that, unless Samsung abandoned the central amendments, it would throw out Samsung’s appeal and give judgment in Apple’s favour.

The Court of Appeal rejected Apple’s contentions. It said that EPC2000 contemplated the possibility of central amendments being made at any time and this had been enshrined in the law of the United Kingdom by amendments to its patent legislation. Therefore, what Samsung was doing was not an abuse of process; but the exercise of Samsung’s legitimate rights. Also, the Court did not accept that this situation could be equated with the position where oppositions and trials were co-pending and the court decides nevertheless to proceed with the trial. Whereas oppositions can take many years and the UK courts generally will not countenance trials being delayed for that length of time, the central amendment process was designed to be relatively quick since it is ex parte and the grounds on which the amendments can be disallowed are limited. Thus, any delay in the UK trial process should be much more restricted.

The Court of Appeal, therefore, ruled that the correct procedure was for it to stay the appeal and see what claims emerged from Samsung’s central amendment application.

This presents a novel situation in English patent trials. As stated, the practice of the English Courts has been to disallow post-judgment amendments if the effect would be to require a fresh trial on validity. However, what is not clear is what will happen if, as a result of the central amendment application, Samsung do indeed obtain amended claims which include integers not considered by the court at first instance and whether the Court of Appeal would then order a fresh trial with fresh evidence. If that happens, the concept of there being finality to litigation is potentially undermined. Another question is whether or not parties will be able to do this repeatedly thereby stringing out the litigation over many more years.

### [Sherlock Holmes and the Peculiar Case of the Partial Copyright](#)

(Article by Uli Widmaier, Pattishall, McAuliffe, Newbury, Hilliard & Geraldson LLP, Chicago, USA)

Sherlock Holmes arrived on the literary scene in 1887 (1890 in the U.S.) with the publication of Sir Arthur Conan Doyle’s mystery novel *A Study in Scarlet*. Even today, audiences still crave new Sherlock Holmes stories. Leslie Klinger co-edits collections of Sherlock Holmes stories by contemporary authors, which he plans to publish without a license from the Conan Doyle Estate.

The Estate is not amused by this facet of its protagonist’s continued vitality. The Estate threatened Klinger and his publisher with legal action for copyright infringement. In response, Klinger filed a federal court action for declaratory judgment of non-infringement. On December 23, 2013, the court ruled on Klinger’s motion for summary judgment.

Under U.S. law, all Sherlock Holmes stories published prior to January 1, 1923, are in the public domain. The ten Sherlock Holmes stories published after that date remain under copyright. Can a new story that draws solely on elements from the pre-1923 works be published without a license from the Estate?

Not at all, argued the Estate, proffering “a novel legal argument that the characters of Sherlock Holmes and Dr. Watson continued to be developed throughout the copyrighted Ten Stories and therefore remain under copyright protection until the final copyrighted story enters the public domain in 2022.”

The court rejected this argument. “The effect of adopting [the Estate’s] position would be to extend impermissibly the copyright of certain character elements of Holmes and Watson beyond their statutory period, contrary to the goals of the Copyright Act.” In other words, once story elements are in the public domain, they cannot be clawed back by showing that they form an integral whole with other elements that remain protected.

What about new Sherlock Holmes stories that draw on themes from still-copyrighted works? The stories in Klinger's planned books mentioned Dr. Watson's second wife and his background as an athlete, as well as Sherlock Holmes's retirement from his detective agency. These elements were introduced after 1923. May a modern author use them without a license?

The answer depends on whether those story elements constitute "increments of expression." Copyright protects only the "increments of expression" beyond what was already contained in the pre-1923 stories. The test originates from the concept of derivative works. "The only originality required for a [derivative] work to be copyrightable is enough expressive variation from the... existing work to enable the new work to be readily distinguished from its predecessors."

Klinger argued that Dr. Watson's second marriage and athletic background, and Sherlock Holmes's retirement, are mere unprotectable "events." The court disagreed. Such a "low threshold [is] required for increments of expression" that even these modest additions to the storyline were sufficient to qualify for copyright protection. Klinger cannot use them without a license.

Klinger requested an injunction barring the Estate from asserting copyright protection as to any Sherlock Holmes story elements whatsoever. While pre-1923 story elements are unprotectable, those dating from 1923 or thereafter remain copyrighted. Klinger's stories used elements from both periods. Since the new elements in the still-copyrighted works qualify as "increments of expression," they are not lawfully usable without a license. Thus, despite Klinger's success on the merits regarding the pre-1923 works, the court denied Klinger's request for an injunction.

In summary, in a story universe that includes both copyrighted and public domain elements, the copyright owner cannot prevent use of the public domain elements by arguing that they form an organic whole with the copyrighted elements. Conversely, the copyrighted elements do not fall into the public domain as long as they constitute "increments of expression" — a very modest requirement — over the public domain elements. Perhaps the answer, my dear Watson, is elementary after all: it depends on the facts of the case.

### [U.S. Supreme Court creates new standard for false advertising claims](#)

(Article by Uli Widmaier, Pattishall, McAuliffe, Newbury, Hilliard & Geraldson LLP, Chicago, USA)

#### 1. The Law Prior to *Lexmark*

U.S. courts have long used "three competing approaches to determining whether a plaintiff has standing to sue [for false advertising] under the Lanham Act." To have "standing" means to have the legal right to bring the claim. If a plaintiff did not have the proper "standing," it could not bring a false advertising claim. The Supreme Court rejected these approaches. They are no longer valid law.

#### 2. The New Law

After *Lexmark*, a plaintiff ability to sue for false advertising is no longer a question of "standing." Rather, it "presents a straightforward question of statutory interpretation: Does the cause of action in [Section 43(a) of the Lanham Act, 15 U.S.C. Sec. 1125(a)] extend to [the plaintiff]?"

To answer the question, the Supreme Court considered two factors: (1) the zone of interests protected by the law invoked, and (2) proximate causation.

##### A. Zone of Interests

For the zone of interests inquiry, the Supreme Court held that the plaintiff must show "**an injury to a commercial interest in reputation or sales.**"

This requirement is not met by "a consumer who is hoodwinked into purchasing a disappointing product," or by "a business misled by a supplier into purchasing an inferior product."



## B. Proximate Cause

For the proximate cause inquiry, the Supreme Court held that the plaintiff must show “**economic or reputational injury flowing directly from the deception wrought by the defendant’s advertising; and that occurs when deception of consumers causes them to withhold trade from the plaintiff.**”

This requirement is not met “when the deception produces injuries to a fellow commercial actor that in turn affect the plaintiff.”

## 3. Application of the New Rule to the Facts of the Case

Lexmark manufactures laser printers and sells toner cartridges for these printers. Static Control makes components for remanufacturers of Lexmark printer cartridges.

Static Control had alleged “lost sales and damage to its business reputation” as a direct result of Lexmark’s false, misleading, and derogatory statements about the remanufacturers, who are Static Control’s customers. These allegations put Static Control “within the zone of interests protected by [Sec. 1125(a)].”

Static Control also satisfies the proximate cause requirement because it alleged “that Lexmark disparaged its business and products by asserting that Static Control’s business was illegal.” “[W]hen a party claims reputational injury from disparagement, competition is not required for proximate cause; and that is true even if the defendant’s aim was to harm its immediate competitors, and the plaintiff merely suffered collateral damage.”

The Supreme Court additionally based its finding of proximate cause on Static Control’s specific business model. Static Control’s products “both (1) were necessary for, and (2) had no other use than, refurbishing Lexmark toner cartridges.” Therefore, any false advertising directed at remanufacturers of Lexmark toner cartridges “necessarily injured Static Control as well.” In these “relatively unique circumstances,” the fact that the “causal chain linking Static Control’s injury to consumer confusion is not direct, but includes the intervening link of injury to the remanufacturers,” is not fatal to a finding of proximate cause.

The Supreme Court noted in concluding that its approval of Static Control’s false advertising claim extends only to Static Control’s *allegations*; Static Control still has to prove both the zones of interest element and the proximate cause element of its Section 43(a) claim with factual evidence.

## National Groups

### [Spain: AIPPI - 50th anniversary of the Spanish Group](#)

(Article by Pedro Merino, Vice-President of the Spanish Group)

On 13 and 14 February 2014, the Spanish National group of AIPPI celebrated its 50th anniversary. The commemoration took place in the city of Barcelona. The event was hosted by the President of Spanish AIPPI, Mr. David Pellisé who had the support of the rest of the members of the board, and in particular, of his assistant, Ms. Andrea Garcés. The two day conference benefitted from distinguished speakers including Mr. Antonio Campinos (OHIM’s President), Ms. Patricia García-Escudero (Director of the Spanish Trademarks and Patents Office) and Mr. Alberto Casado Cerviño (EPO’s Vice-president). The event was enriched by the attendance of a number of members of the International Bureau of AIPPI, including Mr. John Bochnovic (President), Mr. Felipe Claro (Vice-President), who also spoke about data protection, and Mr. Laurent Thibon (Deputy Secretary General). A dinner event at a unique location, the Casa Llotja de Mar or “Sea Exchange”, which is one Barcelona’s most emblematic buildings constructed in the 14th century, completed a successful event.

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AIPPI's (International Association for the Protection of Intellectual Property).  
AIPPI is concerned with all types of intellectual property rights (including patents, trademarks, and copyrights).

AIPPI is the oldest global association for the protection of intellectual property and has the respect and ear of governments and global organizations, such as the World Intellectual Property Organization and the World Trade Organization. Since it was founded in 1897, AIPPI has been consulted (and still is) by decision makers worldwide on current intellectual property issues.

Your contribution please!

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