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AIPPI Submission in the Consultation on the EU Commission Report on the Enforcement of Intellectual Property Rights - Directive 2004/48/EC

Sarah Matheson, Deputy Reporter General

The recent Consultation on the Report of the Commission to the European Parliament and the Council was on the application of the Enforcement Directive. The Directive was to be transposed by April 2006. The recent Consultation arises from the work done to assess the Directive as required under its terms.

The objective of the Directive is, like the work of AIPPI, to harmonise national laws, in this case within the European Union, on the means of enforcing IP rights.

While the report did not expressly touch on many matters that were specifically the subject of AIPPI Resolutions, the Bureau considered it important to record that AIPPI supports the objectives of the Directive and welcomed the achievements of the Directive to date in providing a framework for enforcing intellectual property rights.

As two areas of focus under the Consultation were the specific challenges of the digital environment, and injunctions, AIPPI's submission provided information as to the recent work of the Association in those areas, particularly highlighting Resolution Q216 (“Exceptions to Copyright Protection and the Permitted Uses of Copyright Works in the Hi–Tech and Digital Sectors”) adopted at the Paris 2010 Congress, and AIPPI's present work on Q219 (“The availability of injunctions in cases of infringement of IPRs”), which will be debated at Hyderabad this year.

The Directive has also introduced various obligations for parties to provide information, but does not counterbalance these with the right not to disclose confidential information exchanged between the party concerned and its patent and trade mark attorneys. AIPPI took the opportunity to include in its submission Resolution Q163 (“Attorney–Client Privilege and the Patent and/or Trademark Attorneys Profession”) adopted at the Lucerne ExCo meeting in October 2003. Resolution Q163 supports provision throughout national jurisdictions of rules of professional practice and/or laws which recognise that the protection and obligations of the attorney client privilege should apply with the same force and effect to confidential communications between patent and trade mark attorneys, whether or not qualified as attorneys at law, and their clients.

To view AIPPI's submission, see attached link here

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The Intellectual Property Law Seminar from a Turkish and International Perspective, including mock patent and trademark trials, was successfully held on April 8-9, 2011 in Istanbul.

Nazli Korkut, President of Turkish Group

The Intellectual Property Law Seminar from a Turkish and International Perspective, including mock patent and trademark trials was successfully held on April 8-9, 2011 in Istanbul.

This was the first international seminar organized by the Turkish Group of AIPPI with the very valuable contribution of AIPPI's Bureau Members who had their Bureau meeting in this charming city which has connected different cultures for centuries.

The seminar programme included a trademark mock trial in the morning session and continued with side presentations. These presentations dealt with the following topics: “Gathering of Evidences” and “Compensation/Damages” and were moderated by Turkish IP specialist judges. The speakers examined matters from the different perspectives of Turkish and other countries' legislation. The trademark trial, a Turkish case, focused mostly on the risk of likelihood of confusion, genuine ownership, bad faith and domain name issues. The panel of judges was composed of Judge Türkay Alıca (Ankara 3rd Civil Court of Intellectual and Industrial Property Rights), Judge Adem Aslan (Ankara 4th Civil Court of Intellectual and Industrial Property Rights) and Judge Fethi Merdivan (Ankara 2nd Civil Court of Intellectual and Industrial Property Rights). It announced their decision after the pleadings and the rebuttals were presented by the lawyers of the plaintiff and of the defendant. Within this mock trial and before the announcement of the final decision, the attendees were divided into groups and they had the opportunity to submit their evaluations and opinions.

The second day opened with side presentations dealing with the following issues: “criminal measures”, “experts in IP litigation” and “injunctive measures”. Attendees benefited from these presentations thanks to the contribution of professors who studied the matters in detail and also of attorneys at law from different countries who shared with us the daily problems and dilemmas they faced during the implementation of laws.

The patent mock trial dealt with a pharmaceutical patent dispute. The panel of judges was composed of Judge Gabriella Muscolo (IP and Competition Law Section at Rome Tribunal), Judge Uğur Çolak (Istanbul 4th Civil Court of Intellectual and Industrial Property Rights) and presided by Judge Klaus Grabinski (10th Civil Division of German Federal Court of Justice, Karlsruhe). It adopted the name “the International Patent Court of Istanbul”!

The case was very actively discussed and supported by both the patent attorneys and the attorneys at law of the plaintiff and of the defendant. This mock trial helped attendees to understand better the notion of non–obviousness.

Lunches, dinners and other breaks gave all the participants the chance to discuss the matters among themselves and with the members of the panel of judges, the representatives of the defendants and of the plaintiffs in the mock trials and with speakers of side presentations. These breaks also provided a good networking opportunity. We believe the friendly atmosphere led to the development of a very cooperative, lucid and fruitful discussion about IP enforcement and other related issues. As many participants acknowledged and appreciated, this seminar fulfilled one of its main objectives: to provide a convenient environment for bringing together Judges, Public Prosecutors, attorneys at law, patent attorneys, professors and officials from the related governmental bodies (like the Turkish Patent Institute) to argue and discuss current issues and to seek relevant solutions or suggestions on the basis of enforcement and doctrine.

We were also very glad to welcome our colleagues from other countries such as Italy, Switzerland, Germany, Belgium, Spain, Russia, Ukraine, Hungary, Bulgaria and Egypt. On behalf of the organizing committee we would like to thank everyone who was involved in this seminar and who, with their ideas, inspirations, comments, documents, time, effort, material support and everything they provided, made this event possible. Special thanks go to Professor Mario Franzosi who supported and personally contributed to the mock trial format, and to Mr. Aydin Deriş who, together with members of the organizing committee, handled most of the organization and set high standards for similar events in the future.

As members of the Turkish Group of AIPPI, we hope to be able to organize new seminars/workshops which will make Turkey a good venue in which IP matters can be discussed; knowledge gathered and shared; and new perspectives developed for the benefit of all attending.

We hope to see you in the near future in this charming, legendary and glamorous city of Istanbul.

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New venue for AIPPI's Argentinean Group events

Gastón Richelet, Argentinean Group Reporter

AIPPI's Exco & Forum celebrated in Buenos Aires on October 2009 was a success, not only due to the number of participants that attended and the high academic level of the presentations made but also because of its economic results.

As usual the organizing committee of the Buenos Aires Exco & Forum was given half of the earnings obtained from the organization of the event. In this particular case the Argentinean Group received more than USD 50,000.

AIPPI's Argentinean Group then decided to use the funds in a very positive and useful way.

At the time of the Buenos Aires Exco & Forum, the Asociación Argentina de Agentes de la Propiedad Industrial (AAAPI), the major local Industrial Property Agents Organization, was planning on moving to a better location and expanding their venue.

An agreement was reached between the Argentinean Group of AIPPI and the AAAPI. The former would donate USD 50,000 to the latter so that they could accomplish the goal of moving their premises. The only condition put forward was that permission would be granted to the Argentinean Group of AIPPI to use the premises for its own meetings, seminars and lectures whenever needed.

As a consequence of the agreement the Argentinean Group of AIPPI now has a new venue for holding events. It is important to note that the new venue is large enough to accommodate meetings of the full Argentinean Group.

The new premises were recently inaugurated and all members of the Argentinean Group of AIPPI were invited.

Future AIPPI events of the Argentinean Group to take place in the new venue are already being planned.

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Major Changes Proposed to IP law in Australia

Peter Franke, Franke Hyland, Sydney, Australia

The bill, the extensive explanatory memorandum and the discussion papers are available on the IP Australia website (http://www.ipaustralia.gov.au/resources/news_new.shtml) and comments from stakeholders are permitted.

It is important to understand that this is a draft, and it is to be expected that amendments will be made before it is presented to the Parliament. Further, the Parliament may amend or even reject the bill entirely (although the latter is very unlikely).

IP Australia's stated intentions in proposing the legislation are to raise the quality of granted patents; provide free access to patented inventions for research and regulatory activities; reduce delays in resolving patent and trade mark applications; assist the operations of the IP profession; improve mechanisms for trade mark and copyright enforcement; and simplifying the IP system.

The amendments cover a broad spectrum of topics - the explanatory document runs for 118 pages – but the following are some of the more important aspects:

1. The requirement that prior art for an inventive step attack be “ascertained, understood and regarded as relevant” by the person skilled in the art is removed. Common general knowledge is expanded to include knowledge outside Australia.

2. A new (or at least more explicit) requirement that disclosure in a patent must be clear and complete enough to allow the invention to be performed by a person skilled in the relevant art, and to allow the invention to be performed across the full scope of each claim.

3. A new requirement that, for an invention to be useful, the specification has to include “specific, substantial and credible” use for the claimed invention. The intention is that this has the same meaning as in US case law.

4. Increasing the requirements for disclosure in provisional applications, so that the invention must be fully disclosed; the lower requirement as at present would not be sufficient.

5. Provide a sSpecific infringement exemption for experimental use relating to the patented subject matter.

6. Expansion of infringement exemption for meeting regulatory requirements beyond pharmaceutical inventions.

7. Amendments to extend client attorney privilege when communicating with overseas patent and trade mark professionals – consistent with the AIPPI position on this issue.

8. Incorporation of patent and trade mark attorneys to be permitted.

9. Standard of proof to be raised to a common “balance of probabilities” level for all IP Australia decisions, so that the decision maker must (e.g.) be satisfied on the balance of probabilities before accepting a patent application.

10. Simplification and improvement of amendment provisions, notably prohibiting the addition of new matter.

11. Clarifying the process for amendments associated with patent oppositions.

12. Extending the grace period to include secret use.

13. Improving customs seizure provisions for the benefit of copyright and trade mark owners.

14. Increases in penalties and improved enforcement options for trade mark counterfeiters.

There are many other changes as well. Overall, the thrust of the amendments is very positive, and is generally consistent with the direction of AIPPI resolutions. The Australian group of AIPPI will be making submissions relating to some of the provisions. For example, the proposed transition provisions, which require applicants for pending, unexamined patent applications to meet the new substantive requirements, will be noted as clearly inequitable.

This will be the most significant change to Patent law in Australia in the last 20 years, and the effects will be wide reaching. Updates will be provided as this process continues.

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Yahoo to remove indexing and links to web sites which offer counterfeited versions of Asgharr Farhadi's film “About Elly”.

Barbara Sartori,CBA Studio Legale e Tributario, Italy

In a decision that is going to have a major impact on internet search engines, on March 24, 2011 the Court of Rome ordered Yahoo Italia S.r.l. to remove any links to web sites which offered pirate versions of Asgharr Farhadi's film “About Elly”.

The case was brought by PFA, the Italian distributor of the film, which sued Yahoo Italia for indexing and providing links to sites that allowed the download and streaming of unauthorised copies of the film.

According to the plaintiff, Yahoo Italia continued to host the illegal sites despite PFA's warning letter in which Yahoo Italia was expressly requested to remove indexing and links to such pirate sites. The specific circumstance played a decisive role in the reasoning which led the Court of Rome to grant the requested injunction order against Yahoo Italia. In fact, in conformity with the European Court of Justice's interpretation of Directive 2000/31/EC provided with the decision C278/07 dated March 25, 2010 (Luis Vuitton v. Google case), the Court affirmed that the search engine is qualified as a society service provider pursuant to articles 12 –15 of the Directive, and therefore benefits from the exemption of liability set forth by those articles and cannot be held liable for the data which it stores at the request of a third party. However, the exemption of liability only applies when the provider acts as a neutral operator, whose conduct is merely technical, automatic and passive, with no knowledge or control of the data which it stores.

Conversely, if the service provider becomes aware, due to information supplied by an injured party or otherwise, of the counterfeit nature of contents of the web sites which it hosts, then the service provider must remove indexing and links to such sites or itbecomes liable for contributory infringement.

Based on the reasoning above, and given that Yahoo, notwithstanding PFA's warning letter, kept on providing links to the denounced unlawful websites, the Court of Rome judged Yahoo liable for contributory infringement and ordered the company to remove indexing and links to all sites, other than the film's official website, which contain in whole or in part pirate versions of the film. Yahoo's fatal error, according to the Court, was failing to act on the alleged infringement after it was notified of it.

It is worth mentioning that the decision was issued within a preliminary proceeding for an interim injunction; therefore, the judgement is not only subject to appeal, but it may also be overturned by a subsequent judge, summoned to rule on the merits of the case.

Should the principle stated by the Court of Rome be confirmed, it will be interesting to ascertain if a mere user notification will be sufficient to require content to be immediately removed and, if so, how open this will leave the system to abuse from companies making false piracy allegations aimed at its competitors.

This possibility raises new discussion about whether search engine service providers should have to carry out due diligence procedures in order to determine the rightful copyright holder of online content and by which criteria, and in what time frame such evaluations should be completed.

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Federal Circuit Invalidates Claims to Fully Human Antibodies for Lack of Written Description When Specification Is Limited To Murine and Chimeric Antibodies

Charles A. Weiss, Kenyon & Kenyon LLP New York, U.S.A.

On February 23, 2011, the Federal Circuit held invalid for lack of written description a patent owned by Johnson & Johnson's subsidiary Centocor Ortho Biotech in an appeal from a judgment that Abbott's product Humira (adalimumab), a fully human monoclonal antibody specific to tumor necrosis factor used to treat rheumatoid arthritis and some other autoimmune diseases, infringed the patent.

Centocor's U.S. Patent 7,070,775 was originally based on the discovery of murine and chimeric antibodies to TNF-α. The chimeric antibody was comprised of a murine variable region and human constant region, which made it less immunogenic than the murine antibody. However, because it still contained a murine variable region, it was more likely to elicit an immune response than a fully human antibody. Some eight years after the priority date, Centocor submitted claims to a fully human antibody. An illustrative claim, rewritten in independent form and shortened for clarity, was:

An isolated recombinant anti-TNF-α antibody comprising a human constant region and human variable region, wherein said antibody (i) competitively inhibits binding of A2 to human TNF-α, and (ii) binds to a neutralizing epitope of human TNF-α in vivo with an affinity of at least 1x 108 liter/mole.

After a 5-day trial in the Eastern District of Texas, the jury found Abbott willfully infringed, rejected its argument that the asserted claims were invalid, and awarded Centocor over $1.67 billion in damages. The district court denied Abbott's motion for judgment as a matter of law, and Abbott appealed.

The Federal Circuit reversed, holding the claims invalid for lack of written description under 35 U.S.C. § 112.

The specification of the '775 patent detailed the characteristics of the chimeric antibody, including its ability to bind TNF-α with high affinity, neutralizing activity, and A2 specificity. It also identified the sequence of TNF-α and contained examples of making and using chimeric antibodies to TNF-α. The specification provided the amino acid sequence of a murine variable region of an antibody that had the desired characteristics of high affinity, neutralizing activity, and specificity, but did not illustrate making fully human antibodies with these characteristics.

The Federal Circuit found the specification's failure to illustrate a fully human antibody with the desired characteristics rendered the asserted claims a mere wish-list of properties that a fully human anti-TNF-α antibody should have, i.e., high affinity, neutralizing activity, and A2 specificity.

The opinion recognized that the written-description requirement does not in all cases demand working examples or an actual reduction to practice for a patent's description to be found sufficient under 35 U.S.C. § 112. Responding to Centocor's argument, the court acknowledged that Noelle v. Lederman, 355 F.3d 1343 (Fed. Cir. 2004), taught that disclosure of a well-characterized antigen would sometimes be sufficient to describe claims to antibodies to that antigen. However, it clarified that the adequacy of the description in such cases was premised on discovery of a new antigen to which antibodies were raised using routine methods. In the case at bar, by contrast, the antigen (TNF-α) was in the prior art and the claimed “invention ” was a class of antibodies with desirable therapeutic properties that the applicants had never made.

The opinion also discussed the PTO's Written Description Guidelines example in which the full characterization of an antigen was said to support claims to isolated antibodies capable of binding to that antigen, even without working examples of such antibodies. As with its discussion of the *Noelle* case, the court explained that this example assumed that the specification described a new antigen and that the production of antibodies to that antigen was routine. By contrast, the production of fully human antibodies was assuredly not routine as of the priority date of the '775 patent, rendering the example in Guidelines of no help to Centocor.

The court's distinction of Noelle and the Written Description Guidelines illustrates an often unstated interplay between written description and obviousness. Here, for example, the known role of TNF-α in certain autoimmune diseases and the known desirability of blocking TNF-α with a therapeutically acceptable monoclonal antibody would render obvious the idea of a fully human monoclonal antibody with high and specific affinity for TNF-α that binds in a neutralizing manner. But claiming that desired result in a patent is not the same as doing the work. Stated differently, claiming the solution to a recognized problem without having made a real contribution toward actually realizing that solution–which in this case was the hard work of actually making the fully human antibodies–is not the type of activity the patent laws are intended to promote and protect.

The court also noted that Centocor had not itself made fully human antibodies to TNF-α and instead waited

until after they had been made by Abbott before adding the asserted claims to a pending application. It did not rely on this fact for its holding that the claims were invalid for lack of written description, but the relative timing of the amendment and the creation of the accused infringing product–coupled with the applicants' failure to themselves make the desired antibodies–did not make out a factually appealing case for Centocor.

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A single patent examination for New Zealand and Australia

Philip Thoreau, Partner – Patent & Trade Mark Attorney, New Zealand

On Wednesday 16 February 2011, New Zealand Prime Minister John Key and Australian Prime Minister Julia Gillard announced progress on harmonising the intellectual property laws of New Zealand and Australia. This is part of the Trans–Tasman Single Economic Market agenda between the two countries for the next five years.

Intellectual property has been identified as an important Trans– Tasman business ingredient of the agenda. The aim of the agenda is to make it easier for businesses to run in both countries.

A key feature of the announcement was that New Zealand and Australia will work towards a single examination process for patents.

Currently each country examines patent applications separately with different time frames, examination costs and outcomes. Grant of a patent in New Zealand does not automatically mean grant of a patent in Australia.

It is understood the proposed single examination process will see an applicant's patent applications for the same invention filed in both countries examined by the one examiner in either New Zealand or Australia. The one examiner will examine each country's application under the specific patent laws of that country.

This is proposed to happen in two stages over the next three years. During the first stage both countries will rely on each others examination reports. In the second stage there will be one examiner from either New Zealand or Australia examining for both countries.

It is not clear yet what the precise benefits for applicants will be, but it is likely to reduce the cost of protection and time to grant. Aligning the examination process should also give applicants earlier certainty about the strength of their patent application.

Further areas of possible alignment are a single:

1. trade mark regime,
2. application process for patents,
3. plant variety right regime, and
4. regulatory framework for patent attorneys.

The patent offices of each country are working on the details of each area.

For more information please see:

http://www.iponz.govt.nz/cms/iponz/sem/patents

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Report on a Joint Meeting between the Polish Parliamentary Innovation and Modern Technologies Committee and the Polish Patent Office

Janusz Fiolka, Dr. Janusz Fiolka Patent Attorney Office, Cracow, Poland

On February 23, 2011 a Joint Meeting between the Polish Parliamentary Innovation and Modern Technologies Committee and the Polish Patent Office took place, and the Polish National Group of AIPPI was invited to attend. The Parliamentary Committee was founded in October 2010, and consists of 18 Members of the Polish Parliament who represent all the differing political forces.

The Meeting took place at the Polish Patent Office. The fact that a representative of the Polish National Group of AIPPI was invited to participate in this meeting, represents a significant new development that recognizes the importance of voice from the user community on IP policy matters. The Polish National Group of AIPPI was represented by Mrs. Elżbieta Wilamowska-Maracewicz, a Council Member of the Polish Group of AIPPI.

During the meeting, information on current problems concerning the protection of industrial property in Poland was presented by the President of the Polish Patent Office, Mrs. Alicja Adamczak, and by the Under-Secretary of State of the Ministry of Economy of the Polish Government, Mrs. Grażyna Henclewska.

The President of the Polish Patent Office, Mrs. Alicja Adamczak, pointed out that in 2010 there had been an increase in the number of applications filed before the Polish Patent Office in all fields of technology. One of the main problems which the Polish Patent Office currently faces is the departure of high quality employees, especially computer specialists, to other institutions and employers, and the lack of a specialized court to deal with industrial property protection matters; this makes Court decisions unpredictable.

Work aimed at the amendment of Polish law on the protection of industrial property is underway to bring Polish law into line with The Hague Agreements, the Singapore Treaty and the Guidelines of the OECD regarding genetic inventions. The bill should be notified to the European Commission in the near future.

In the course of the discussion, members of the Parliamentary Committee pointed out that Poland was very low in the rankings of innovative economy and that this was primarily due to the low number of patent applications being filed. The view of the Committee was that young people needed to be educated about IP at a very early stage.f. The Committee members were also interested in comparing the number of diverse application filings between Poland, Finland and Germany..

Finally, the Undersecretary of State of the Ministry of Economy of the Polish Government, Mrs. Grażyna Henclewska, presented works concerning the creation a uniform patent system in the EU.

This report is based on a communication of the Polish Parliament Chancery received by the Polish National Group of AIPPI.

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Is there any hope? – Controversy about the effects of the ECJ opinion on EU Patent Court

Eric De Gryse, Simont Braun, secretary of EPLAW, Brussels

On 8 March 2011, the ECJ published its opinion 01/09 stating that the draft agreement on the creation of a European and Community Patent Court is not compatible with European Union law (see e-News no. 17 / March 2011).

On 5 April 2011, Winfried Tilmann, patent litigator from Düsseldorf, published an article on the patent blog of the European Patent Lawyers Association EPLAW concluding that with a few amendments to the draft and a restriction of the agreement to EU member states, the envisaged court system would be feasible. Tilmann sees no danger of the ECJ being swamped with an infinite number of patent validity cases and of the ECJ interfering substantially with the practice of the Patent Court as the patent law is mostly governed by the European Patent Convention which is not part of EU law.

On the same day, Jochen Pagenberg, patent litigator from Munich, published a blog post on the EPLAW patent blog under the title "Little hope for an EU Patent after the CJ opinion". He concluded that the ECJ challenges some of the corner stones on which the draft agreement was built and warned against substantive patent law becoming part of the EU legal order with the consequence of taking patent law out of the hands of experienced patent judges.

In two subsequent blog posts of 12 and 23 April 2011 the authors commented on the opinions of the respective other authors and identified increasing and converging levels of hope for the EU patent system.

It is to be hoped that additional experts from other jurisdictions join this thorough analysis of the ECJ opinion to help find a functioning and efficient framework for a European Patent Court with jurisdiction to make decisions on European and Unitary Patents.

The EPLAW patent blog can be found at www.eplawpatentblog.com