

WIPO | MAGAZINE

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RUGBY, RIGHTS AND REVENUES p.2 | **WIPO LEX: IP LAW AT YOUR FINGERTIPS** p.14 | **THE CHANGING FACE OF INNOVATION** p.18

Message from WIPO Director General Francis Gurry

I am pleased to introduce a new look and updated approach for the WIPO Magazine.

I am all the more pleased to do so since many of you, in the recent WIPO Magazine reader survey, specifically mentioned the previous graphic design as one of the aspects you would most like to see improved. Our design team has risen to the challenge, and I hope that you will find the new design appealing.

I would like to thank all our readers for your interest in the WIPO Magazine, with special thanks to those who took the time to participate in the reader survey. Your comments will enable us to continue to improve the Magazine and to feature the emerging IP trends and IP success stories of interest to you.

In line with feedback received from the survey, we are expanding our coverage of certain IP issues; how IP is being used in practice, for example, and how the courts are handling IP-related issues in various jurisdictions. We have introduced, in this first issue, two new series, one on IP and Sport and another on Innovation Trends. We will, of course, continue to cover the “hot” issues occupying the minds of IP policymakers, as well as the groundbreaking projects on which WIPO is working.

To meet your expressed interest in more regular online content, we are working to expand the Magazine’s web and social media presence. A more dynamic interface will soon provide you with an opportunity to share your views on the stories featured and to exchange experiences with other readers.

I look forward to an exciting year ahead and wish you enjoyable reading.



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RUGBY,

Rights and Revenues

by **Jonathan Taylor**, Legal Counsel
of Six Nations Rugby Limited (SNRL),
Bird & Bird LLP, UK

This is the first in a series that explores the interface between intellectual property (IP) and sport. In the aftermath of the 2011 Rugby World Cup, and with the 2012 RBS Six Nations Championship being played out in February and March this year, WIPO Magazine kicks off with this view from inside the Six Nations Rugby Championship of how IP helps safeguard the commercial value of rugby.

The RBS Six Nations Championship is rugby union's showpiece event in the northern hemisphere and generates considerable commercial revenues that underwrite the development efforts of each participating union. IP laws protect the commercial value that SNRL and its shareholder unions have created in the Championship, and they provide a robust and effective mechanism for combating online piracy of the Championship's official broadcast coverage. Without effective IP laws rugby union's efforts to grow will be stymied, and its clear public interest benefits – in terms of delivering top-quality sports coverage and promoting health, social inclusion, and racial and gender equality – will be compromised.

RUGBY UNION AND THE PUBLIC INTEREST

Rugby union is played in over 100 countries, across the five continents. The recent inclusion of 7-a-side rugby as an Olympic sport promises to fuel further interest in it. The traditional rugby powerhouses in the northern hemisphere are England, France, Ireland, Italy, Scotland and Wales (collectively known as the Six Nations), and in the southern hemisphere, Australia, New Zealand and South Africa. Popular demand for the sport and, therefore, its commercial value are greatest in these countries.

In addition to regulating and protecting the integrity of the sport, rugby union's governing bodies (or unions) organize and stage international matches, tours and tournaments involving their respective national teams. They sell the rights to these events (principally broadcasting and sponsorship rights) to generate commercial revenue. The prime objective of the unions, however, is to act as custodians of the sport, so that it expands and develops at all levels. Any revenue generated over and above the staging costs is re-invested in the sport, both to improve it at the professional level and to provide facilities and coaching opportunities at the community level. Such investment at the grass roots enables amateur players to enjoy the health, recreational and social benefits of the game and facilitates the identification and development of new talent to join the professional elite.



Photo: Getty Images



Photo: Getty Images

England's Chris Ashton runs for the try line in a match against Wales in the 2011 Tournament

Scotland vs Ireland, 2011 Tournament

Ireland vs England, 2010 Tournament

RIGHT PAGE >>>



The professional game then drives the popularity of the sport and generates additional revenue for further investment. This “virtuous circle” enables the unions to generate consumer benefits, employment opportunities and tax revenues at the professional end of the sport, and public policy benefits at the community level, in terms of better health and greater social inclusion and racial and gender equality.

PROTECTING COMMERCIAL VALUE

IP law allows SNRL to harness the commercial value the unions have created in the Championship. While in many jurisdictions the law does not recognize proprietary rights in a sporting spectacle *per se*, the live feeds and recordings created by the event’s host broadcasters are protected under copyright law. By a combination of controlling access to match venues (using ticket terms and conditions to prevent unauthorized commercial photography) and imposing contractual conditions on host broadcasters (including the assignment of copyright in the broadcast signal and recordings of it to SNRL), it is possible to create protectable and enforceable packages of “exclusive” broadcast rights that can be exploited by reference to media platform, time-window, and/or territory, in line with consumer demand.

SNRL sells the broadcasting rights to the Championship in each of the host countries on a territory-by-territory, platform-neutral basis. It has always granted the rights in the UK, France and Ireland to the main public broadcasters in those countries (i.e., the BBC, France Télévisions and RTÉ), while in Italy most recently it has granted the live broadcasting rights to the Championship to Sky Italia and deferred rights to La7.

These official licensed broadcasters transmit every match in the Championship live and in full, on their most prestigious channels, to huge audiences. In 2010, over 124 million viewers in the six host nations alone watched the Championship. Live or deferred coverage of the tournament can also be seen in over 80 countries outside the six participating nations, thanks to a number of international distribution deals.

In this way, the flexibility of copyright law allows and indeed stimulates SNRL and its broadcast partners to create programming that is appropriate to each local market, with support programming and features such as interviews and commentary that reflect local cultural interests and linguistic requirements. It also enables SNRL to deliver the exclusivity that broadcasters demand and that prompts them to invest not only in the sport (through the rights fees paid to SNRL) but also in innovative production techniques (such as HD and 3D) that offer an enhanced viewing experience for fans.



Photo: Getty Images

USE OF SIX NATIONS COMMERCIAL REVENUES

The tens of millions of euros derived from these broadcasting deals represent more than 80 percent of the total revenue generated by SNRL in relation to the Championship. This revenue is distributed to the six participating unions according to a pre-agreed formula (75 percent distributed equally, to protect competitive balance; 15 percent, based on Championship standings, to boost playing performances; and 10 percent allocated according to the size of each union). It is a vital part of their operating income.

Each year from 2010 to 2013, SNRL will distribute an average of €14 million to each participating union. This allows the unions to increase their investment not only in the professional branch of the game but also in community sport, including junior rugby and women's rugby. For example, from 1999 to 2010, the Welsh Rugby Union's investment in community projects in Wales increased by 154 percent, from €2.6 million to €6.6 million a year. Over the same period, the Irish Rugby Football Union's investment in community projects increased by 131 percent, from €4.8 million to €11.1 million a year.

CURRENT THREATS

IP law recognizes and protects the value the six participating unions have created in the Championship. By conferring exclusive legal rights, it enables SNRL actively to exploit the value of its brand, and to protect that brand against infringement by third parties. This exclusivity is what SNRL's official licensed broadcasters demand, and what they pay millions of euros annually to secure.

Currently, however, there are two serious threats to SNRL's ability to deliver that exclusivity and to capitalize on its value.

Nick Easter, the captain of England, winners of the 2011 Championship, lifts the Six Nations Trophy.

TERRITORIAL EXCLUSIVITY

The first threat is that the judgment of the Court of Justice of the European Union (CJEU) in the Murphy case in October 2011 is being misinterpreted and misapplied. The CJEU did not outlaw the licensing of broadcasting rights to a sporting event on a territorial basis in Murphy (as some commentators have suggested). On the contrary, the CJEU explicitly recognized that the sale of an “exclusive” territorial license, for a “premium”, may be justified in order to remunerate the event organizer appropriately for the value it has created. What the CJEU said was unjustified was the creation of “absolute territorial exclusivity”, resulting in “artificial price differences”, by prohibiting the cross-border supply of satellite decoder devices that would make other licensees’ alternative coverage of the event available in the territory.

What will be crucial in moving forward is how that distinction between an “appropriate” premium for “territorial exclusivity” and an impermissible premium for “absolute territorial exclusivity” is interpreted and applied. In particular, on what side of the line will other typical license restrictions fall, such as language restrictions, Internet geoblocking requirements, and Internet pay-wall requirements? If the line is drawn in the wrong place, so undermining the ability to extract any premium for territorial exclusivity, SNRL’s current business model would be destroyed, and the Six Nations would be prevented from pursuing so effectively their public interest agendas described above.

ONLINE PIRACY

The second threat is the growing menace of digital piracy. Fuelled by technological developments that make it easy to stream audiovisual content online, there are currently a hundred or more unauthorized operators that grab SNRL’s official licensees’ broadcasts of Championship matches and retransmit them live and in full on distributor streaming sites such as *my2p.eu* and *rojadirecta.com*, or via peer-to-peer sites such as *sopcast.com* and *synacast.com*. These sites often attract substantial audiences, and generate significant subscription and advertising revenues.

In sport, the value of the broadcast lies in the uncertainty of the outcome, giving (in contrast to other audiovisual content) the live broadcast window overriding importance. Live online streaming of Championship matches is therefore a significant concern for SNRL’s official broadcasters. They require undertakings from SNRL that any Championship footage made available online by SNRL or another licensed broadcaster will be geoblocked and unable to be viewed in their territory; and they also want no unauthorized online broadcasts by unlicensed operators.

Taking legal action after such activity has occurred is not only expensive and burdensome it is also too late and ineffective in remedying the theft involved. SNRL believes that the law has to provide a robust mechanism to take down illegal streams instantaneously, and stronger remedies to shut down and deter repeat infringement.

Internet Service Providers (ISPs) have a key role in this, given the fact that many of the perpetrators skillfully elude detection by, for example, providing false or proxy registration details. The grant of intermediary injunctions against ISPs (as permitted by the IP Enforcement Directive) to block access to infringing sites would help remedy the situation. Courts across Europe are currently grappling with the terms of these injunctions. SNRL hopes they will recognize the need to provide a strong and practical remedy for right holders and ultimately the public.

IN CONCLUSION

SNRL, individually and as a member of the Sports Rights Owners Coalition (www.sroc.info) believes it is critical for policymakers worldwide to recognize and support its efforts to protect and exploit the commercial value of the RBS Six Nations Championship. This is for the good of the consumer who wants to watch a quality product, and for the many millions of people who want to play, coach, and otherwise benefit from the massive investment that the participating rugby unions can make on the back of the revenue generated from the sale of broadcasting rights to the Championship.

The Internet is a marvelous medium for sport, and SNRL and its broadcast partners are using it to bring the Championship to its millions of fans. But the Internet must not be allowed to become a thief’s paradise, a medium for digital pirates to rip off the efforts of those who invest in and create the value of the sporting spectacle. If digital piracy is not curtailed, official broadcasters will reduce their investment in the sport, the quality of the Championship as a consumer product will be damaged, and the sport’s ability to pursue its public interest agenda will be undermined. ♦

WIPO LEX

IP law at your fingertips

If you are an inventor, creator, entrepreneur or investor seeking to break into new markets, quick, easy and cost-free access to information about how the law protects your work, your intellectual property (IP), or your freedom to operate in different countries offers distinct advantages. For this reason, WIPO is spearheading the development of WIPO Lex, a publicly available, online database that makes information about the current status of IP laws and treaties in 197 countries and jurisdictions easily accessible.

The international IP landscape is constantly changing as countries pass new laws, rules and regulations to spur innovation and creativity for economic growth; address prevailing needs; and meet international commitments. WIPO Lex makes it possible for everyone – from IP users, policymakers and lawyers to researchers and students – to keep abreast of the latest developments in IP law around the world. Access to this information means that entrepreneurs can better adapt their operations to new legal developments and avoid any negative impacts; policymakers can more easily identify and fill gaps in existing systems; and researchers and students can access a treasure trove of data to analyze and probe.

WIPO Lex currently contains over 10,000 legal documents. “It is a work in progress and is expanding every day,” notes the project leader, Jessamyn Honculada. “WIPO Lex is opening up a whole universe of IP legal systems,” she said, “making it possible to compare national IP regulatory frameworks and to identify their common and unique features at the touch of a key.” Another team member added, “the database provides many useful insights into the legal basis on which IP systems are shaped and IP rights protected and promoted both nationally and internationally.”

BUILDING THE RESOURCE

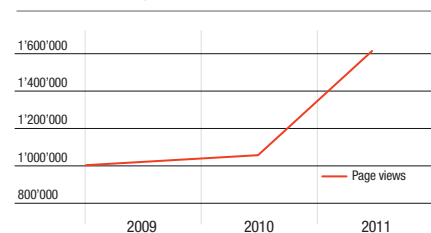
WIPO Lex was initiated in 2010 in the context of a broader drive by the Organization to narrow the global knowledge gap by providing quick and easy access to its extensive collection of searchable IP data and tools. The unveiling, in June 2010, of the WIPO GOLD platform (www.wipo.int/wipogold/en/), marked a significant step towards fulfilling this goal. It facilitates universal access to a broad range of valuable information not only relating to IP laws and treaties (through WIPO Lex) but also to technology, brands, designs, statistics and more.

The enthusiastic collaboration of hundreds of individuals from across the globe has fuelled the expansion of WIPO Lex’s data resources which will eventually include all relevant treaties, statutes, laws and regulations relating to IP. “The willingness and desire among information providers to make WIPO Lex a success has been palpable,” the team notes. “Their shared belief that credible, complete and authoritative data favor the development of a knowledge environment that can enhance innovation and creativity has made it possible for us to develop a comprehensive and reliable IP legal resource accessible to all,” they added.

Top 10 WIPO Lex user countries

	2010	2011
1	USA	USA
2	France	France
3	Spain	Spain
4	United Kingdom	Mexico
5	Mexico	India
6	Germany	United Kingdom
7	India	China
8	Colombia	Peru
9	Switzerland	Colombia
10	Canada	Germany

WIPO Lex page views rose sharply in 2011



WIPO LEX IS A PUBLICLY AVAILABLE ONLINE DATABASE THAT MAKES INFORMATION ABOUT THE CURRENT STATUS OF IP LAWS AND TREATIES IN 197 COUNTRIES AND JURISDICTIONS EASILY ACCESSIBLE

The roll-call of all who have helped make WIPO Lex a reality is long. National institutions, including IP offices, government printing offices and libraries are key in identifying and verifying relevant data sources. Users also play a vital role. Their commentaries help ensure the quality and accuracy of available content. Last, but by no means least, the contribution of the multicultural groups of interns who have worked on WIPO Lex has left a lasting imprint. Young lawyers from Azerbaijan to Viet Nam, China to Colombia, Peru to Portugal, worked painstakingly for months on the legal and technical aspects involved in bringing WIPO Lex together.

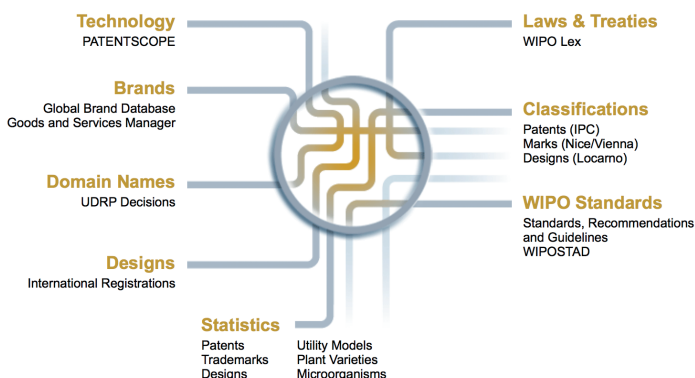
“WIPO Lex continues to develop, and there is still a great deal to do,” the team notes. National IP offices are currently reviewing and giving feedback on content relevant to them. “These push-pull dynamics help ensure the quality of entries and build trust in the resource,” they explain. Even after all national IP legal systems have been incorporated WIPO Lex will continue to be a work-in-progress as its canvass continuously shifts to reflect the ongoing evolution of legal systems.

WIPO Lex contains documents in some 69 languages, including Dzongkha (Bhutan), Romansh (Switzerland) and Tetum (Timor-Leste) and currently offers user-friendly search interfaces in English, French and Spanish. Arabic and Chinese interfaces are under development, with completion scheduled for mid-2012. Documents cover the main IP legislation of 197 countries and jurisdictions. WIPO Lex is a unique and free IP legal resource and, as such, is increasingly included by university law libraries in their suite of legal resources.

As WIPO Lex continues to evolve and usage grows, so too will the benefits it offers multiply. After all, information shared is power multiplied. Policymakers will enjoy unprecedented opportunities to grasp the nuances of the international IP landscape and ensure that it serves wealth creation and economic development goals. Researchers and students will have access to a dynamic and rich reference tool that will help tomorrow’s policymakers and lawyers. WIPO Lex will also save companies time and money, enabling them to avoid costly legal liabilities. In this way it supports robust business development built on respect for IP. In sum, WIPO Lex offers a compass by which to navigate the maze of rules and regulations governing IP in different jurisdictions around the world. It is a free and unique public good that puts IP law at our fingertips. ♦

WIPO | GOLD

The Global IP Reference Resource

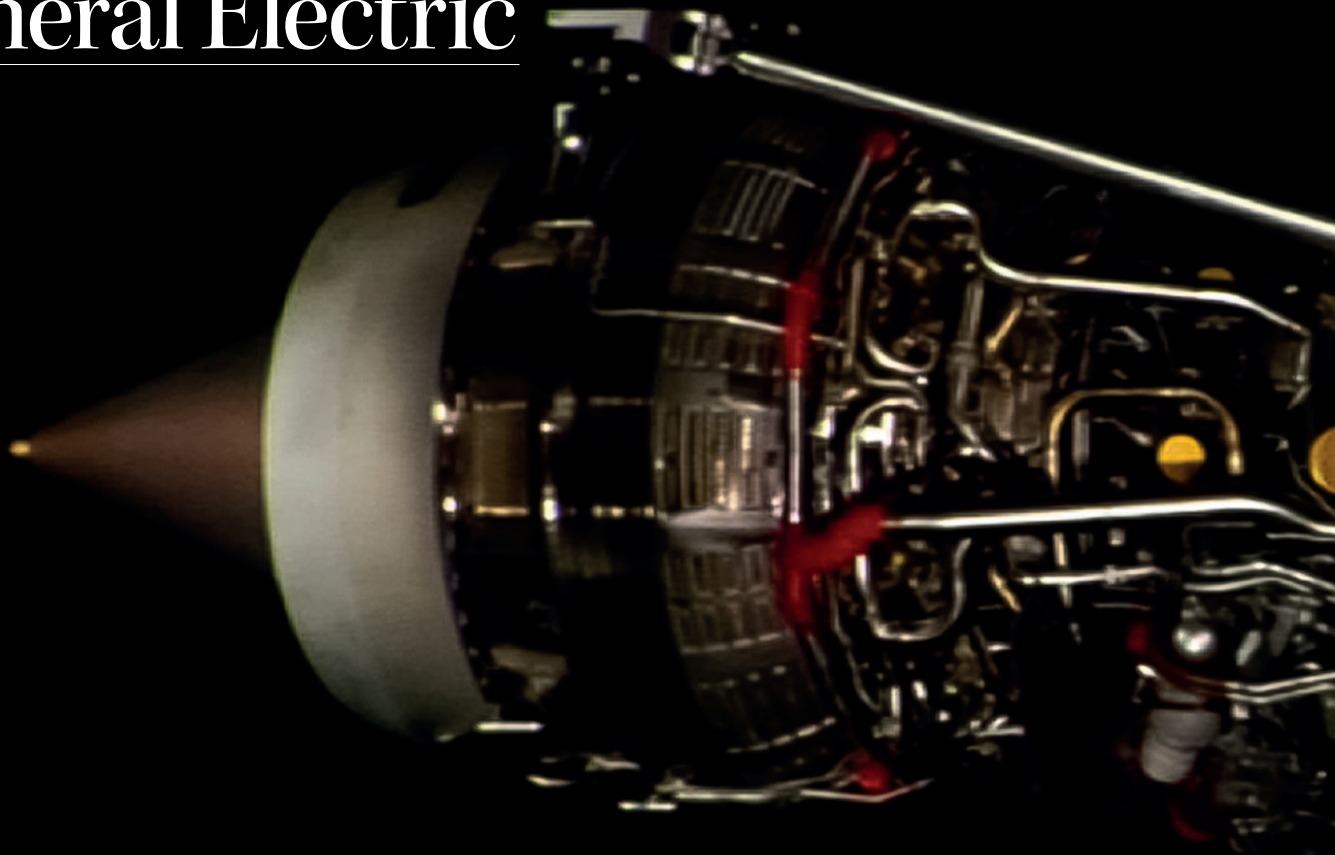


WIPO GOLD is a one-stop gateway to WIPO’s global collections of searchable IP data, including WIPO Lex. It is a free public resource that aims to facilitate universal access to IP information.

www.wipo.int/wipogold/en

PIONEERING GREEN INNOVATION

an interview with General Electric



The GE90-115B is the most powerful commercial engine in service and is also designed to be more fuel-efficient than its closest competitor, resulting in lower emissions and fuel costs.

A fleet of thirty GE90-115B-powered Boeing 777 aircrafts is designed to emit 389,000 fewer metric tons of carbon dioxide annually than its closest competitor. This is equivalent to the annual CO₂ emissions of over 76,000 cars.



The American conglomerate General Electric (GE), which traces its roots to one of the world's most acclaimed inventors, Thomas Edison, is built on innovation. With a sizeable footprint in many markets, the company is driving new trends in innovation and breaking fresh ground in its approach to intellectual property (IP) management. WIPO Magazine sat down with Carl Horton, the company's Chief Intellectual Property Counsel, to find out more about GE's engagement with green innovation and why it considers that IP rights are a positive force in the development and deployment of these technologies.

Why is innovation important for GE?

GE was built on innovation, and we believe that investing in technology is what sets us apart from our competitors. It puts us in a position to help solve big global challenges and to deliver value to our customers. Innovation is the one thing that will make the solution affordable. In the long term, as these technologies become more affordable, governments make greater savings, freeing up additional funds for other development goals.

Does green innovation make good business sense?

Yes. As we have seen with our Ecomagination campaign launched in 2004, a company can be both a good corporate citizen and generate profits. Under the initiative, we committed to:

- boost investment in research and development (R&D) – to the tune of US\$1.5 billion – to produce goods that have a clear eco benefit;
- increase sales revenue from these products – by up to US\$20 billion;
- reduce our own emissions and energy usage; and
- be transparent and keep our stakeholders informed about progress, because we believe accountability drives the right behavior.

What role for government in moving to a low-carbon economy?

Governments have a key role to play in facilitating the transition to a low-carbon economy. For example, the day a carbon tax is introduced, every business decision will be made with a company's carbon footprint in mind. We strongly advocate a carbon tax and believe this will have the biggest single impact on business.



Photo: Getty Images



Photo: Getty Images

The GE WattStation™, a sleek user-friendly and eye-catching dispenser of electricity is a new way to provide energy for electric vehicles (EVs).

EVs have the potential to revolutionize transportation. Widespread adoption requires a power grid of modern charging stations that are accessible, quick and easy to use. The GE WattStation™ is designed to help address these challenges.

For every 10,000 drivers that switch to electric power, CO₂ emissions would be reduced by 33,000 metric tons per year equivalent to the annual CO₂ emissions of 6,500 traditional cars.

“Reverse innovation” is now an important part of GE’s business model. Can you explain what it is?

Over the past decade, GE has made a significant footprint in many countries. Reverse innovation occurs when we innovate in a developing market in response to a specific local need (e.g., an affordable health care or water purification product) before adapting and launching a product into larger and more mature markets. We had never imagined the scale of demand for products developed in this way. In responding to local needs, we have found that many people elsewhere were looking for similar products. Now we develop these products in the regions where the innovation occurred and then export them around the world. It is an interesting dynamic and one of the benefits of having a truly global footprint.

What implications does this have for managing your IP?

It has forced us to adopt a global IP infrastructure that matches the geographical spread of our business. Whereas in many companies IP personnel are headquarter-based, at GE our IP specialists are scattered over some 30 different countries. Because our IP footprint matches our business operations, we are able to leverage the innovation that takes place in particular regions and to tailor our IP strategy to prevailing local business conditions. This is more complicated and harder to manage, but we believe it is a more efficient model for managing our IP.

What changes would you like to see in the patent system?

With greater harmonization, we would all rapidly see massive efficiency gains. It just makes sense. If we have a proven product, we don’t make multiple versions for each separate market. The basic components work everywhere, and anything else just wouldn’t be cost-effective. It’s the same for the IP system. I see no reason why we would want to have multiple variations of the same system. Greater harmonization and standardization would mean lower costs and a faster system. Everyone benefits.

What are GE’s main IP challenges?

Adequate enforcement is our number one challenge on the IP side. What is the point of investing millions of dollars in your IP portfolio and bringing a costly court action against a company you are fairly sure is infringing your rights with no guarantee of obtaining just compensation? We are hopeful that the recent patent reform in the United States will help alleviate some of the problems we face. The upside is the progress being made in the developing world. Before too long, companies in developing countries will be asking for the same things that we are. When that happens, the pace of change will accelerate.

Why is IP important for green innovation?

There are different kinds of green technology innovation. When it comes to incremental improvements – we will see minor advancements in combustion technology until the end of time – IP protection helps reward the company that invests the most, the fastest and has the smartest employees. There is a cost associated with that innovation, and IP gives some benefit and advantage to offset that cost.

When it comes to big breakthroughs, IP is essential. For example, we have been investing in hydrogen energy for over 10 years and spent millions of dollars knowing full well that we won’t find a solution for years. The first wave of patents on whatever we invent will never see the light of day; they are a “sunk” cost. But, without the promise of patent protection for real groundbreaking technologies, we probably never would have invested in the first place. We hope that the wealth of knowledge and expertise we accumulate will eventually lead to a breakthrough that we can effectively commercialize because we have the IP that protects it. If you take IP out of the game, companies will lock down. There will be less collaboration, and capital will be diverted to other sectors that offer a surer return on investment.



Photo: Getty Images

Some commentators argue that IP is an obstacle to green innovation. I don't see any evidence for that. Many green technologies such as those found in cars, jet engines, and gas and wind turbines, have been on the market for years. Most of the fundamental technologies have been off-patent for decades. That means there are multiple companies making the product, each competing to come up with the next incremental improvement. Just because company A holds a patent for a gas turbine doesn't mean it can stop company B from developing their own gas turbine technology any more than company B can stop company A from making a wind turbine. In the green technology market, companies have to fight it out over price and performance. To maintain a competitive edge, they need to innovate more and faster. We protect that if we can with IP, but the bottom line is that what we are fighting over on the IP side is a very small percentage of the total cost of the product, which comes down to the price of materials and labor.

In general, the private sector drives around 70 percent of innovation around the world. In the area of green technology, this rises to 80 percent, which means that private companies fund 4 out of every 5 US dollars invested in R&D. Private companies are motivated by a return on investment. That is why IP is so essential to boosting investment in green technology.

What role does IP play in the deployment of technology?

The first thing a venture capitalist looks for in a start-up company is a viable or proven technology that is IP-protected. They want to know that when they spend US\$50 million on getting it to market another company won't be able to make a copycat version the next day. IP provides a significant incentive for companies like GE to invest in such start-ups and helps them commercialize their technologies. Too many start-up technologies perish, because they don't have the resources to develop and bring a working product to market. IP helps bridge that gap.

A 100 MW wind farm has the capacity to generate more than 219,000 MWh of electricity per year, avoiding the emission of over 72,000 metric tons of CO₂ from traditional EU grid sources. This is equivalent to the annual CO₂ emissions of over 36,000 cars.

Is GE adopting an open innovation model?

We are experimenting with open innovation (OI) and, to the extent possible, we are adopting it. But some technologies lend themselves more easily to an open collaboration model than others. In many of the sectors in which we innovate it is just not that easy to adopt. For example, there are a lot of smart people who can figure out how to design a better electrical infrastructure, but there aren't so many with whom you can chat online about jet engines.

There is sometimes a misperception that OI is IP-free. This is absolutely not the case. IP facilitates open collaboration and is an important part of the equation. I think of IP as an actionable property right. It's not something you buy and sit on. You buy it because you intend to take action, and by owning it you get a commercial return on it. Ultimately, it spurs the commercialization process.

What lessons has GE drawn from its green technology experience?

On the IP front, we have learned a number of lessons, including:

- The importance of IP education. In the area of environmental technologies, for example, very few people know how the IP system works or have thought about its role in advancing the development and deployment of green technologies.
- We have demonstrated empirically that IP is a positive and motivating force in the green technology space and that industry has an important and positive role to play in developing better products at more attractive prices. We have shown that there is a better, cleaner and easier way to reach a solution.
- We have also learned how frustrating it can be when you get stuck because of political considerations; it's just tough. So much of the good we are seeking in the climate change debate calls for a political solution.

When will low carbon become a reality?

I think there are two possible scenarios. First, it will come about when the technology overtakes the politics and gets us to a point where people see that, with the right investment, we can commit to a low-carbon approach without breaking the bank, and that it is the right thing to do. Alternatively, it will come about when there is irrefutable proof that climate change is a reality. At that point, people will have to buy into it and the politics will take care of itself. Either way, I am confident that, with time, we will get to where we need to be. ♦



Photo: Getty Images

GE's Energy Smart® screw-in compact fluorescent lamp (CFL) bulbs have a longer life and use less electricity than the incandescent bulbs they replace, resulting in lower CO₂ emissions on the power grid. For example, GE estimates that if every US household replaced just one 60-watt incandescent bulb with a GE 13-watt CFL, approximately 1.8 million metric tons of CO₂ emissions would be avoided on the power grid per year - equivalent to the annual CO₂ emissions of 349,000 cars.

SAFEGUARDING DESIGN ASSETS

A UK Perspective

by *Dids McDonald,*
CEO of ACID (Anti Copying in Design)



Photo: ACID

Design, whether iconic or “everyday”, is everywhere. In the United Kingdom alone, there are an estimated 232,000 designers working in some 55 different design disciplines. Design is a major contributor to the UK economy. The many micro and small businesses that make up this highly productive sector generate some £33 billion a year, adding around 2.4 percent to the UK’s economy.

These businesses form an important part of the buoyant creative industries sector which itself makes up 8.2 percent of the UK’s gross domestic product (GDP) and is expanding by around 4 percent per year. Professional designers provide the unifying thread in all creative industry sectors. From advertising to computer and video games, from crafts and fashion to music and the performing arts as well as in software and engineering, design is a key element. The country increasingly earns more from designing successful products than from manufacturing them. Given their vital contribution to the UK economy, it is very important that designers have the means to easily protect their creative work, particularly in light of the damage caused by unauthorized copying of their designs.

MAINTAINING INTERNATIONAL COMPETITIVENESS

The UK enjoys worldwide acclaim for its design and innovation excellence, and British designers lead in providing socially responsible and environmentally sustainable innovation. Communications design remains the dominant discipline in the country, followed by digital and multimedia design. Design is a catalyst for innovation and a key ingredient in gaining and maintaining a competitive edge. Design excellence is a hallmark of “Brand UK”. Improving awareness of intellectual property (IP) within the two million organizations that make up the UK’s creative industries sector is a must if the country’s designers are to remain competitive.

Improving awareness and understanding of the economic potential of design and creativity among policymakers and design customers, both private and public organizations, is also a priority. There is currently a disturbing tendency to undervalue professional designers, as demonstrated by the practice of “free pitching” – the supply of design services without payment – in public and corporate procurement.

IP infringement is on the increase, but for micro or small and medium-sized enterprises (SMEs) there is little chance of effective enforcement.

Dids Macdonald, CEO, ACID believes
“it is very important that designers have the
means to easily protect their creative work,
particularly in light of the damage caused
by unauthorized copying of their designs.”

ACID welcomes the UK Government's recent assessment of the need to reform the overly complex IP framework for design in the UK, following Professor Hargreaves' report on "Digital Opportunity: A Review of Intellectual Property and Growth" (see www.wipo.int/wipo_magazine/en/2011/06/article_0004.html). This report underlines the need for "a thorough reassessment of IP and design", in light of its economic importance as "the largest source of intangible investment in the economy".

RELEVANT LEGISLATION

In the UK, design protection is a complex patchwork of different and overlapping rights. Different rights cover different forms of design, offering varying levels of protection, and differing in the requirements to prove infringement and the penalties for infringement. This makes it difficult for designers to effectively protect their interests.

The majority of designers rely on IP rights that arise automatically (copyright, UK and European Union (EU) unregistered design rights and goodwill in a trade name or get up), but other formally registered rights (patents, registered designs or trademarks) are also available.

UK and EU design rights, registered and unregistered, offer protection for the whole of the appearance of a product rather than only its three-dimensional elements. Colors, materials, surface patterns, as well as shape can all be protected.

But designers do not enjoy the same advantages as other creators. Those who rely solely on unregistered design rights have 10 years of protection in the UK – licenses being available as of right during the last five years of the life of the design right – and three in Europe, whereas copyrighted works are protected for the lifetime of the author plus 70 years. The Digital Economy Act 2010 provides remedies for online copyright infringement and places obligations on Internet Service Providers (ISPs) to warn those using their services not to infringe copyright (such as illegally downloading music) and to hand over details of such infringement to copyright owners, if requested. The UK Home Secretary can also order ISPs to, for example, suspend services to infringers. Similar measures to protect the interests of designers would also seem appropriate.



Photo: Atelier Areti

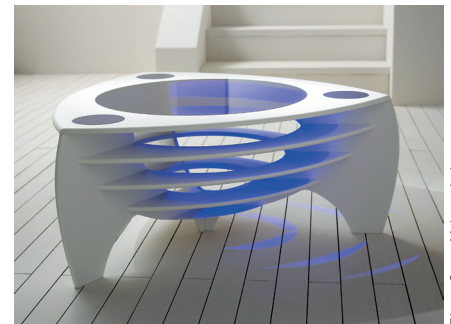


Photo: Stuart Melrose, Ltd.

Examples of designs by ACID members:

Black Bird Light designed by Atelier Areti:
www.atelierareti.com

Apollo Table designed by Stuart Melrose, Ltd.:
www.stuartmelrose.com

ENFORCEMENT CHALLENGES

Under current UK law, the unauthorized copying of a design is not considered a criminal offense. The designer's only recourse is therefore to pursue a civil action, which is not the case for copyright infringement.

The biggest problem facing designers (both in the UK and globally) is that small design businesses have neither the time nor the financial resources to take legal action. On top of this, most designers rely on unregistered or informal rights. This David versus Goliath situation is compounded by low levels of IP awareness, making improved IP education and knowledge about IP rights an absolute must.

Designers are good at setting new trends and creating the "zeitgeist" of tomorrow; that's why good ideas are always copied. A recent survey by ACID indicates that 89 percent of product designers believe infringement is blatant and deliberate and certainly not inadvertent, as is sometimes suggested.

ABOUT ACID

ACID is a membership organization representing over 1,000 companies, mainly microenterprises and SMEs from 25 different industry sectors. It is committed to raising awareness of IP and encouraging respect for IP rights as part of corporate social responsibility (CSR). Its logo has become a strong symbol of design protection. ACID helps protect its members from the potentially devastating financial damage inflicted by IP infringement and works to influence future design policy to create a safe trading environment that enables the sector's continued growth. The organization works to encourage IP creation as a positive force for economic growth and employment.

Practical support

In practical terms, ACID helps designers by providing free access to a Design Data Bank, which currently contains some 300,000 copies of members' designs. While using the databank does not add to existing formal IP rights, nor will it ever replace formal registration, its use does provide independent evidence of a design's existence on a particular date. This can be useful in proving ownership in cases of infringement.

Recently, an ACID member, Temple Island Collection, brought an action against New English Teas for unauthorized copying of its iconic "Red Bus" image. The Design Data Bank was used as part of a design audit to back up Temple Island's ownership claims in the design. ACID provided the Court with a written statement confirming that the image had been recorded in the Design Data Bank on a given date.

ACID-accredited law firms have recovered over £3 million in costs and damages in over 450 settlements for its members. These are communicated in the sector trade press (www.acid.eu.com/news) as part of an ongoing public education campaign.

The ACID IP Tracker offers designers a simple, cost-effective method for tracking delivery of confidential, IP-related information sent via e-mail to third parties. All too often, design ideas are vulnerable to theft at this stage. Designer Sebastian Convran notes, "an unintended consequence of digital technology is the dissemination and theft of identities, ideas and designs... Proving ownership of IP is the foundation of protecting it, and the ACID IP Tracker provides unequivocal evidence for files in digital transit – simply, efficiently and effectively."

Design professionals can take advantage of the one-to-one specialist IP advice available through ACID's IP clinics. Corporate members can benefit from IP strategy reviews along with advice on improving IP communication throughout the supply chain.

Recognizing that exhibitions are one of the most valuable, yet vulnerable, venues for new product launches, some 15 years ago the organization launched its Accredited Exhibition Organiser initiative. To date, over 2,500 mediations have been successfully concluded. When a knock-off is identified, ACID intervenes with an effective mediation protocol. Over 70 percent of disputes are settled on the spot and, of the remaining 30 percent, many are settled in writing before commencing any legal proceedings. This is clear proof that there are effective alternatives to costly court actions.



Photo: Temple Island Collection

Temple Island Collection won a court action against English Teas to protect their famous red bus design with the help of ACID's Design Data Bank.

THE FUTURE OF DESIGN

Continued erosion of industrial design markets through illicit copying will have a devastating impact on economies worldwide unless we act now. While governments increasingly recognize the economic importance of IP, much remains to be done to ensure designers around the world are able to do what they do best – design and innovate – and receive a return on their investment so their work can continue, generating growth and development.

ACID believes that, in addition to ensuring favorable development of the IP legal framework, there is much to be gained from developing a more practical, hands-on approach to addressing the problems facing small, creative businesses. For example, this year it is re-launching its “Commission it, Don't copy it” campaign to encourage retail buying departments to support UK design by commissioning work directly from designers. In this “win-win” scenario, the designer receives a royalty; the retailer uses its purchasing power to produce the commissioned product cost-effectively while creating a unique UK design signature range; and consumers get an excellent deal knowing they are buying an original design and supporting British designers.

Improved IP education and outreach as well as communications campaigns to encourage companies to strengthen CSR strategies and expand IP awareness are areas ripe for action. After all, a broader understanding of IP rights is a key element in deterring design theft.

Innovation through effective design and creativity happens at an amazingly rapid pace. If we are to harness the full economic and employment potential of the creative sector, we must emphasize the role of creativity in innovation, business and commercialization. This translates design into tradable IP. To achieve this, designers need access to a user-friendly IP framework; damages must be set at levels that dissuade repeat offenders; and IP intermediaries need to be trained to support small businesses in implementing proactive IP strategies. These three steps alone would go a long way in encouraging growth and making jobs more secure. While design remains an unsung hero within the dynamic creative industries sector, ACID continues to use every opportunity to highlight the vital economic contribution designers make – both in the UK and beyond. ♦

THE CHANGING FACE OF INNOVATION

Innovation is a central driver of economic growth and development and generator of better jobs. It enables firms to compete in the global marketplace and to find solutions to technological and economic challenges. Following the launch of the *World Intellectual Property Report* by WIPO in November 2011, WIPO Magazine is launching a new series to explore emerging innovation trends from an economic perspective. This first article explores the changing face of innovation and the evolving use of intellectual property (IP) in navigating the innovation landscape.

SHIFTING GEOGRAPHY OF INNOVATION

Throughout history, the face of innovation – the “who”, the “how” and the “what for” – has continuously changed. Understanding these changes is important to ensure a favorable policy environment.

Studies estimate that in high-income countries, innovation – the act of creating new products or processes – accounts for as much as 80 percent of economy-wide growth in productivity. At the firm level, those that innovate outperform their non-innovating peers and drive economic growth.

Data relating to research and development (R&D) and investment patterns offer some interesting insights into emerging innovation trends. Although high-income countries continue to dominate global spending on R&D, the technological gap between richer and poorer countries is narrowing and innovation is becoming increasingly international.

Between 1993 and 2009, global R&D expenditure almost doubled in real terms. Since this same period also saw marked growth of the global economy, the share of global gross domestic product (GDP) devoted to R&D increased more modestly – from 1.7 percent in 1993 to 1.9 percent in 2009.

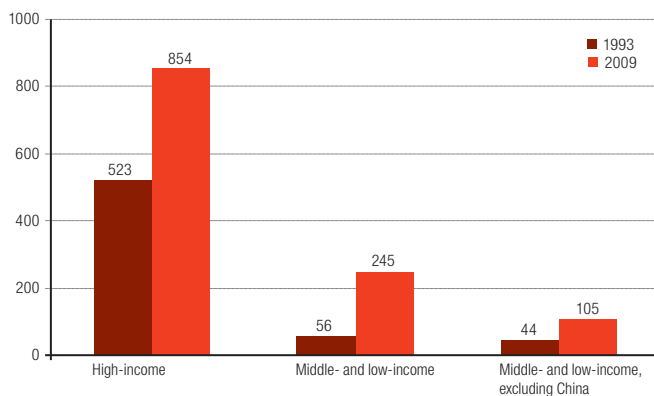
R&D data also reveal that the ratio of GDP spending on R&D in high-income countries – around 2.5 percent – is more than double that of middle-income economies and accounts for some 70 percent of global R&D spending. It also shows that low- and middle-income economies increased their share of global R&D expenditure by 13 percent between 1993 and 2009. China accounts for more than 10 percent of this increase, making it the world’s second largest R&D spender in 2009, overtaking Japan for the first time.

R&D spending, however, is only part of the story. The innovation performance of economies depends on broader investment in knowledge, beyond formal R&D spending, including, in particular, investment in education and the introduction of new equipment.

COMPLEMENTARY RESEARCH-BASED MARKET VALUATIONS OF FIRMS IN STANDARD & POOR'S 500 INDEX INDICATE THAT INTANGIBLE ASSETS ACCOUNT FOR AROUND 80 PERCENT OF THE AVERAGE FIRM'S VALUE.

Figure 1: R&D expenditure still comes mainly from high-income countries

Worldwide R&D expenditure, by income group, in 2005 PPP Dollars, 1993 and 2009



Note: R&D data refer to gross domestic expenditure on R&D (GERD). The high-income group includes 39 countries, and the middle- and low-income group includes 40 countries. PPP (purchasing power parity) are currency conversion rates that convert to a common currency and equalize the purchasing power of different currencies.

Source: WIPO estimates, based on data from UNESCO Institute for Statistics, Eurostat and OECD, September 2011.

Non-technological innovation – including organizational, marketing, design and logistical innovation – is also an important enhancer of productivity. The growing importance of knowledge as a source of value – and IP as a means of harnessing that value – is reflected by the rapid growth in investment by firms in intangible assets which in some countries is outpacing investment in tangible assets. Complementary research-based market valuations of firms in Standard & Poor's 500 Index indicate that intangible assets account for around 80 percent of the average firm's value.

INNOVATION BECOMES INCREASINGLY INTERNATIONAL

Greater mobility of students, highly-skilled workers and scientists has spurred the international exchange of knowledge. A sharp increase in the share of peer-reviewed science and engineering articles with international co-authorship, and a rising share of patents listing inventors from more than one country offer further evidence of this.

An increasing number of multinational enterprises (MNEs) are setting up R&D facilities in a variety of countries – with certain middle-income economies seeing particularly fast growth. Among the top 1,000 global R&D spenders a modest number of MNEs from middle-income economies, notably from China and India, now conduct R&D on a par with their counterparts in high-income countries. The growing economic clout of these countries is giving rise to so-called “frugal”, “reverse” or “trickle-up” innovation which emphasizes the development of products that meet the needs of consumers in these markets. While the economic ramifications of this emerging trend are as yet unclear, it is already influencing the IP management strategies of companies (see article on page p-8).

IS INNOVATION BECOMING MORE COLLABORATIVE AND OPEN?

A much-discussed element of the new innovation paradigm is the increasingly collaborative nature of the innovation process. While some have emphasized that innovation is becoming increasingly “open”, assessing the true scale and importance of open innovation is challenging. For one, it is difficult to draw a clear distinction between open innovation strategies and long-standing collaborative partnerships. It is also difficult to trace the implementation of “open” innovation strategies within firms.

While there is some evidence of greater collaboration, including a growing tendency to co-patent internationally, and upward trends in R&D alliances in some sectors, it is clear that formalized collaboration is far from the norm.

Anecdotal examples of new approaches abound – notably, crowd-sourcing initiatives, prizes and competitions, and Internet platforms on which firms can post challenges. IP and open innovation are often complementary in these contexts in that open innovation platforms typically share similar rules on the assignment of IP and ownership of ideas generated. The IP is either taken over by the initiating firm as part of the prize money, or is subject to a licensing or other contractual arrangement.

IP OWNERSHIP AT THE HEART OF BUSINESS STRATEGIES

In recent years, as IP ownership has become more central to the strategies of innovating firms, IP policy has moved to the forefront of innovation policy.

New IP statistics released by WIPO in December 2011 point to a growing demand for patents, rising from 800,000 applications worldwide in the early 1980s to an estimation close to 2 million in 2010. Occurring in different waves, the increase was driven by Japan in the 1980s, joined by the United States (US), Europe and the Republic of Korea in the 1990s and, more recently, by China.

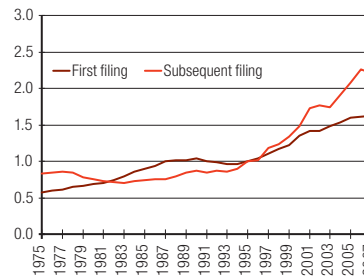
While there are many explanations for this rapid increase, some of which are country and industry-specific, two key trends stand out, namely:

- Growing economic integration and a tendency for applicants to seek patent protection abroad. An analysis of worldwide patenting according to so-called first filings (the first time a patent is filed anywhere in the world) and subsequent filings of the same invention in additional countries shows that the latter account for slightly more than one-half of that growth over the last 15 years; and
- Growth in underlying knowledge investment. A comparison of growth in the number of first filings with increases in real R&D expenditure shows that, for the world as a whole, the latter has grown faster than the former. This suggests that growth in patenting is rooted in underlying investment in knowledge. That said, patenting and R&D trends do vary markedly across countries and industries, with important implications for how firms innovate.

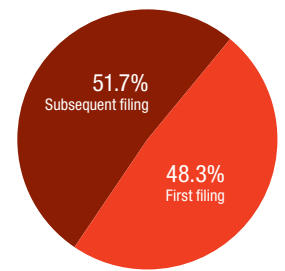
Demand for other IP rights has also seen marked growth. Trademark applications worldwide rose from 1 million per year in the mid-1980s to close to 3.7 million in 2010. Similarly, industrial design applications worldwide more than doubled from about 290,000 in 2000 to 650,000 in 2010.

Figure 2: Patenting abroad is the main driver of worldwide patenting growth

Patent applications by type of application, indexed 1995=1



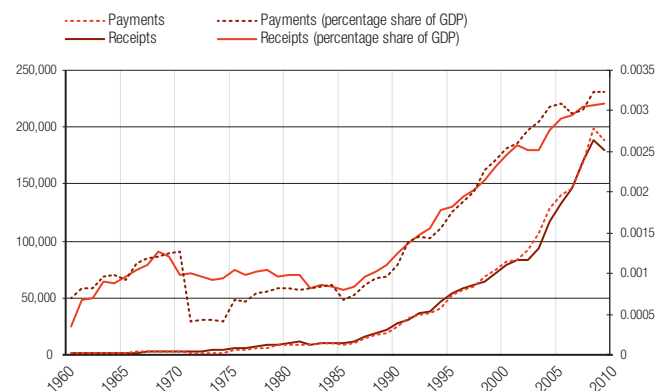
Contribution of first and subsequent applications to total growth, in percent, 1995-2007



Source: WIPO (2011). The Surge in Worldwide Patent Applications, PCT/WG/4/4. Study prepared for the Patent Cooperation Treaty (PCT) Working Group. Geneva: World Intellectual Property Organization.

Figure 3: International royalty and licensing payments and receipts are growing

RLF payments and receipts, in US\$ millions (left) and as a percentage share of GDP (right), 1960-2009



Note: GDP data are from the World Bank.

Source: WIPO based on data in Athreye, S. & Yang, Y. (2011). Disembodied Knowledge Flows in the World Economy. Working Paper Series of the Economics and Statistics Division. Geneva: World Intellectual Property Organization

IP-BASED KNOWLEDGE MARKETS ON THE RISE

More frequent licensing of IP rights and the emergence of new technology market intermediaries point to the rise of IP-based knowledge markets and an increase in IP trading in recent decades. In nominal terms, international royalty and licensing fee (RLF) receipts increased from US\$2.8 billion in 1970 to US\$27 billion in 1990, and to approximately US\$180 billion in 2009 – outpacing growth in global GDP.

Technology market intermediaries have existed for many years, but new “market makers” such as IP clearinghouses, exchanges, auctions and brokerages are on the rise. Universities and public research organizations are also increasingly setting up technology transfer offices to leverage their IP.

The size and scope of IP-based trading, however, remains embryonic. Available data show that in most countries firms typically license less than 10 percent of their patents, with RLF receipts ranging from 1 to 3 percent of total revenue. While technology markets are small relative to company revenue or overall economic output, they increasingly shape how innovation takes place and therefore deserve careful attention.

NEW IP POLICIES AND PRACTICES

The changing innovation landscape is challenging long-standing business practices. Firms need to adapt to remain competitive. Beyond the increased use of knowledge markets and new IP intermediaries, firms and other organizations are also experimenting with new IP policies and practices. These include:

- Publication without patenting: Some firms opt to publish details about inventions they do not plan to patent. Defensive publishing of technical disclosures lifts the veil of secrecy on potentially important technologies and also prevents others from seeking patents on them (see for example IP.com’s Prior Art Database (<http://priorartdatabase.com>)).
- IP donations: Companies release a portion of their IP portfolio to the public, companies or innovators. This can happen when the IP is not considered economically valuable to the donating company or if the invention requires further development that it is not willing to undertake. Such donations may also aim at triggering broader social benefits. In the WIPO Re.Search initiative, for instance, firms decided to make selected IP assets available to researchers to accelerate the development of therapies for neglected tropical diseases, malaria, and tuberculosis (see www.wipo.int/wipo_magazine/en/2011/06/article_0001.html).

- Collaboration with universities: When dealing with universities, companies are increasingly creative in developing and applying their IP policies, seeking both to foster cooperation and ensure control (consider, for example, Philips’ partnerships with various university hospitals to develop health solutions (see www.healthcare.philips.com/main/about/Company/partners/university_hospitals/index.wpd)).
- Patent pools: A recent new wave of patent pools to tackle health, environmental and other social challenges is also proving beneficial to patent holders and society as a whole. Such arrangements enable the introduction of new technologies and promote the interoperability of different technologies. The Eco-Patent Commons, for instance, was set up by information technology firms to make environment-related patents available to the public.

While some innovation trends are well understood, others merit additional research. The face of innovation will surely continue to evolve in the coming years. Some trends are likely to continue, and others will come as a surprise. Continuous monitoring of the shifting sands of innovation, therefore, is a must for policymakers, entrepreneurs and researchers alike to ensure the ongoing evolution of a favorable policy framework and the implementation of effective IP management strategies. ♦

PUBLISHER REIGNED IN ON RACING DATA Copyright Claim

*by Dr. Stanley Lai, SC,
of Allen & Gledhill LLP,
Singapore*





In a landmark decision last summer, Singapore's highest court, the three-judge Court of Appeal, ruled that an author's copyright can only vest in a person and not an incorporated body. The decision followed a lengthy legal battle between the publishers of Singapore's two horse-racing magazines – *Racing Guide* published by Asia Pacific Publishing (the appellant) and *Punters' Way*, published by Pioneers and Leaders (the respondent).

BACKGROUND

Pioneers and Leaders (P&L) brought an action against Asia Pacific Publishing (APP) for copyright infringement and passing off in 2007 and 2008. In July 2010 the High Court found that APP had infringed copyright in respect of the selection and arrangement of certain tables that were found in *Punters' Way*. Both magazines obtained their race information from the Singapore Turf Club. For around one year from June 2007, they each reproduced racing information in the same way – i.e. in four tables, one each for the race card, race results, track work and past performance. While *Racing Guide* initially rejected a cease-and-desist letter from *Punters' Way*, 2 months later it modified its tables. The High Court, however, held that APP was liable for passing off in that it had adopted a color code and get up for their *Racing Guide* similar to that used by their competitor. It supported P&L's claim that these similarities had confused and misled the public and that *Racing Guide* was trying to pass itself off as *Punters' Way*. Perhaps most controversially, the High Court held that a company could be the author of an original copyrightable work. APP successfully appealed the High Court's decision.

COURT OF APPEAL OVERTURNS RULING

In August 2011, the Court of Appeal reversed the High Court's decision. In its deliberations, it assessed whether P&L was the author of the tables featured in *Punters' Way* and whether it was entitled to claim copyright protection. P&L had not pleaded that the racing tables were a work of joint authorship by its employees, but that the company itself was the author of the work. It had claimed to be the sole author of the tables not the owner of the copyright in the tables.

The Court of Appeal drew a distinction between authorship and ownership. It held that these were not synonymous in that authorship refers to the act of creation whereas ownership refers to the possession of proprietary rights. An author is not necessarily the owner and the owner is not necessarily the author. The Court of Appeal said, definitively, that for the purposes of the Copyright Act, authors had to be living persons. To hold otherwise would run counter to other sections of the Copyright Act, notably the duration of works. The Court held that companies could not claim a perpetual monopoly of copyright ownership based on an assertion of authorship. This, it noted, was reinforced by the Australian Federal Court of Appeal's decision in *Telstra Corporation Limited v Phone Directories Company Pty Ltd [2010] FCAFC 149* at [100], [134], in which two members of the quorum stated unequivocally that, under Australian law, an author had to be a human author.



Photo: courtesy Asia Pacific Publishing

Singapore's Court of Appeal found that the publishers of *Racing Guide* were not guilty of copyright infringement or passing off.



Photo: iStock © Charles Mann

IS THERE AN IDENTIFIABLE AUTHOR?

The Court considered whether, according to the facts presented, a natural author could be identified. It was apparent that the collection of horse-racing data – the names of horses and jockeys, their track work records, – and its organization and selection were either computerized or compiled by separate individuals. Each person’s responsibility and contribution (which had not been outlined in this case) were insufficient to render the said individual an author of the tables. Such contributions had facilitated the production of the data but could not be deemed a creative collaboration.

The Court also said that, in cases involving a high degree of automation, no original work can be said to have been produced for the simple reason that there are no identifiable human authors. The fundamental proposition was clear: the respondent had been unable to identify an author or authors, and copyright cannot subsist without a human author. The Court went on to say that were it to assume, for the sake of argument, that the respondent’s employees had an authorship role in the compilations, the evidence did not satisfactorily establish the point at which copyright protection arose.

DISPLACEMENT OF A PRESUMPTION

The Court of Appeal also considered the operation of the statutory presumption in section 132 of the Singapore Copyright Act, which provides as follows:

“Presumptions in relation to publisher of work

- 132 Where, in an action brought by virtue of this Part in relation to a literary, dramatic, musical or artistic work, section 131 does not apply, but it is established –
- (a) that the work was first published in Singapore and was so published during the period of 70 years that ended immediately before the commencement of the calendar year in which the action was brought; and

- (b) that a name purporting to be that of the publisher appeared on copies of the work as first published.

Then, unless the contrary is established, copyright shall be presumed to subsist in the work and the person whose name so appeared shall be presumed to have been the owner of that copyright at the time of the publication.”

P&L argued that since it was identified as the publisher of *Punters’ Way*, it should be presumed that it was the owner of the copyright that subsisted in the tables. The Court took a different view. It held that the presumption was only a guide to enable a court to reach an appropriate conclusion in the absence of evidence to the contrary. If an opponent offers evidence in rebuttal, the presumption could be displaced. As authorship was in dispute in this case, and the appellant had adduced evidence that copyright did not subsist in the tables and there was no identifiable author, the statutory presumption was displaced.

COPYRIGHT IN COMPILATIONS IN SINGAPORE

The Court considered section 7A of the Copyright Act, which provides, *inter alia*, that any copyright subsisting in a compilation is limited to the selection or arrangement of its contents which constitutes an “intellectual creation”. The information in *Punters’ Way*’s tables clearly constituted a compilation. According to the Court, the notion of “intellectual creation” ties in with the basic copyright principle that only “original” compilations are protected by copyright. The Court affirmed that the test for compilations remained the same as the general test for a literary work, namely that of originality, i.e., whether a sufficient amount of skill, labor and judgment is involved in the creative process.

The Court observed that the Anglo-Australian requirement of originality, while taking the intellectual effort of the author into account, had traditionally placed greater emphasis on the time, labor and effort involved. It noted that in several past decisions, copyright had been granted in respect of seemingly mundane compilations (such as street directories and football fixture lists). These had been decided predominantly prior to the digital era. With the proliferation of computers and software, the Court held that the law of copyright should evolve to take into account the ease and convenience that computers bring to the process of compiling data in the 21st century. The Court submitted that, “older decisions that had focussed on the gathering of information as the touchstone rather than the productive effort involved in expression may therefore require reconsideration one day”. (at [35]). The Court also said that the expression of data, such as through an alphabetical listing, involves little ingenuity or skill beyond mechanical labor or routine programming. In such matters, it may be difficult to argue that copyright protection is called for. This suggests that copyright protection for compilations in Singapore is likely to evolve such that a narrower scope of copyright protection or none at all will be afforded to fact-based compilations created by the “sweat of the brow” or involving a very mechanical or mundane operation.

This is further supported by the Court’s additional observation that, in assessing copyright, the four key principles summarized in *Feist Publications Inc v Rural Telephone Service Company Inc* 499 US 340 (1991) should be considered. First, facts are not copyrightable. Second, compilations of facts are generally copyrightable. Third, the *sine qua non* of copyright is originality. Fourth, originality simply means that the work was independently created by the author and possesses some minimal degree of creativity, the required level of which is extremely low.

PASSING OFF

The Court also allowed the appeal on the basis that P&L’s case failed in relation to misrepresentation or passing off holding that the test for damages had been wrongly applied by the High Court. As the alleged period of infringement (June 30, 2007, to June 5, 2008) had passed, “actual damage” was the right test to apply and not “likelihood of damage”. Moreover, it held that the respondents had failed to adduce any evidence of damage in terms of a decline in the sale of its publication. The Court placed little reliance on the respondent’s market survey evidence, due to a lack of objectivity in the way in which it had been conducted. For example, the Court found that the question “How likely would it be for you to confuse these two magazines if you were in a hurry and you were selecting one of them?” could lead to an inaccurate finding of misrepresentation. The Judge also described as flawed the scenario according to which race-goers who were “less educated or who were late and/or were in a hurry to get into the grounds of the racetrack” could be confused and might think they were buying the *Punters’ Way* when they had actually chosen the *Racing Guide*. The correct test to apply, he submitted, was that of imperfect recollection. This should take into account the fact that the “confusion which may occur will take place when the customer has in his mind his recollection of the plaintiff’s mark, which may well be only an idea of the whole or actual mark”. The Court held that there was no misrepresentation that could have led to confusion on the part of the public, because the cover pages of the two publications were sufficiently distinct and were unlikely to be confused by the relevant sector of the public.

The Court of Appeal’s decision reaffirms the basic norms and fundamental principles of copyright protection in Singapore, in line with its historical rationale and underpinnings. The decision affirms that it must be shown that a work is the original creation of a human author for it to be entitled to copyright protection and in the event a company claims copyright ownership, it must be able to point to a human author or authors to claim such protection. Beyond this, it also offers some insight into how copyright cases involving compilations of data are likely to be addressed in the future by Singapore’s courts. ♦



CELEBRATING CULTURE IP & Arts Festivals

by **Brigitte Vézina**, Legal Officer,
*Traditional Creativity, Cultural Expressions
and Cultural Heritage Section, WIPO*

Arts festivals are a cultural highlight in many towns, cities and countries worldwide. Celebrations of the richness and diversity of culture and creativity, they often encompass a variety of contemporary and traditional art forms – dance, music, theatre, arts and crafts. Culturally, they offer a unique snapshot of a community’s identity, both providing an opportunity to revitalize and preserve cultural practices, and often serving as a creative laboratory for contemporary performers. Socially, they are a means of strengthening intercultural dialogue, promoting deeper understanding through shared experience; and economically, they can generate sizeable, long-term financial benefits and significant business and employment opportunities. For example, the Edinburgh Festival, the world’s largest arts festival, injects annually some US\$269 million into Scotland’s economy. Effective intellectual property (IP) management is an important aspect of the planning process that organizers need to address to safeguard and promote the event’s interests and those of festival participants.

WIPO works with organizers of events, such as the Festival of Pacific Arts to be held in the Solomon Islands in July 2012, to help them develop appropriate IP management strategies and tools to deal with the IP issues that can arise before, during and after such events. This article identifies the main IP challenges organizers face and outlines some practical ways of dealing with them.

NO IP STRATEGY – A RISKY BUSINESS

The unique cultural performances and displays of participating artists, performers and artisans draw public interest and build the reputation of a cultural event. Without appropriate safeguards, these works are vulnerable to unauthorized exploitation by outsiders. With digital cameras at hand, for example, audiences can easily capture high-quality recordings of these performances. Many performers, unaware of their IP rights, often learn that unauthorized copies of their works – many of which contain culturally-sensitive material – have been used by third parties without their consent and in an inappropriate manner.

Neglecting to implement a comprehensive IP strategy also exposes festival audiences to the risk of being duped into purchasing fake arts and crafts. Such opportunistic business practices damage the continuing interests, reputation and popularity of the event itself.



Photo: Secretariat of the Pacific Community

Performers at the Festival of Pacific Arts.
These events are celebrations of the richness
and diversity of culture and creativity.



Photo: Secretariat of the Pacific Community

HANDS-ON IP MANAGEMENT

Used strategically, IP can help generate significant revenue, for example from the sale of broadcasting rights, and the conclusion of sponsorship and merchandizing deals. A positive, forward-looking IP strategy enables organizers to exercise greater control over a festival's IP and cultural interests. A mix of IP tools, particularly copyright and trademark rights – used in association with contracts, protocols, guidelines, notices, accreditation and access conditions – can provide a comprehensive framework for protecting IP and guarding against the misuse of traditional knowledge (TK) and traditional cultural expressions (TCEs).

KEY IP CONCERNS COPYRIGHT

The unauthorized recording and distribution of cultural expressions such as sound recordings, film or video clips and photographs are major concerns. Generally speaking, copyright law offers a degree of protection for creators of “original” artistic works. However, festival organizers may need to take complementary steps to protect the cultural interests of participants whose works do not qualify for copyright protection because of their traditional character. For example, traditional crafts and designs are unlikely to qualify for IP protection in many jurisdictions. Moreover, while copyright confers the right to authorize or prevent the adaption of a protected work, it does not stop other creators from being inspired by it. Drawing a line between copying and inspiration is a tough challenge.

Measures to control unauthorized recording and distribution of cultural expressions include the use of:

- Cautionary notices, such as “no filming, photography or recording devices allowed”. Usually placed at points of sale, onsite or printed on the festival's tickets, website and official program, these notices can help protect the IP, TK and TCE interests of performers as well as restrict unauthorized recordings. Oral warnings may also be given prior to a performance;
- Guidelines and protocols outlining the terms of use of official festival recordings and advising members of the media and the general public about the need to respect the TK and TCEs of festival participants;
- A media accreditation system to ensure that journalists provide details of the proposed use of festival recordings;
- Measures to monitor use of media broadcasts and to clamp down on infringing content. Broadcasters pay large amounts for exclusive coverage of an event. If organizers are to fully leverage the sale of broadcast rights they need to guarantee this exclusivity;
- Protocols can be used to ensure proper attribution to custodians of TK and TCEs, or to promote respect for the sacred character of particular performances.

WIPO is working with organizers of the Festival of Pacific Arts to help them develop appropriate IP management strategies and tools to deal with the IP issues that can arise before, during and after such events.

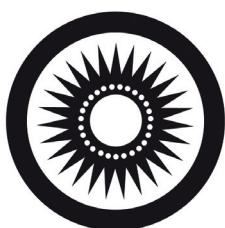
TRADEMARKS

Abusive use of a festival's artwork or logo and the sale of fake arts and crafts are a serious threat to its reputation and financial viability. These problems can be tackled, in large part, by registering a trademark for the festival. Trademark protection generally confers the exclusive right to prevent others from marketing identical or similar products under the same or a confusingly similar mark. Trademarks associated with arts festivals can be registered in a variety of classes of goods (see www.wipo.int/classifications/nice/en/classifications.html), including festivals, recordings, publications and merchandise (such as visual arts, crafts, books and other products) in each country in which the festival is held. Trademark registration opens the way to developing an effective marketing strategy and to concluding potentially profitable sponsorship and merchandizing deals.

As a registered trademark holder, organizers are better placed to promote the sale of authentic products, thus generating revenue for artists and the festival alike, both onsite and in the online market. They are also better equipped to defend themselves against cybersquatting (the abusive registration of their mark as a domain name), thereby safeguarding their web presence which is a key marketing tool.

MEASURES TO SAFEGUARD THE FESTIVAL'S BRANDING:

- registering a trademark;
- securing a domain name;
- developing a merchandizing program that defines the festival's product portfolio;
- establishing a sponsorship program defining levels of sponsorship and associated rights;
- establishing official retail outlets onsite and online; and
- monitoring the online market for infringing products.



Council of Pacific Arts and Culture

Examples of unauthorized use of performance recordings include:

- use of a photograph of a performance to illustrate a compilation of so-called "indigenous" music completely unrelated to the performers or their community and for sale on the Internet;
- the sale in tourist retail outlets of postcards reproducing images of a sacred dance show;
- a local art gallery selling miniature reproductions of a background set painting;
- use of a video clip of a performance for a television advertisement and on an Internet video sharing site to promote tourism;
- a CD of contemporary and original songs inspired by the traditional music of a community, recorded illegally during a performance, on sale at other festivals and in record stores;
- replicas of intricate, traditionally-designed dance costumes made using ancestral weaving methods for sale in a fashion designer's boutique;
- the elaborate face painting of festival performers used by contemporary dancers out of context and in an inappropriate way.

Festival of Pacific Arts

WIPO supports the Secretariat of the Pacific Community, the Council of Pacific Arts and the Solomon Islands in developing an effective IP strategy for the Festival of Pacific Arts. Held every four years in one of the 27 countries that make up the region, the festival seeks to combat the erosion of cultural practices and is a celebration of the rich diversity of Pacific arts, culture and knowledge.

WIPO's broad-spectrum support includes advice on the use and application of conventional IP law, as well as other practical measures to safeguard TK and TCE interests in line with the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture (2002) and the work of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) (see: www.wipo.int/tk/en/).



Photo: Secretariat of the Pacific Community

MAKING IT HAPPEN

To ensure that an event's IP policy and its associated guidelines, protocols and notices are effectively enforced, organizers are best advised to establish a written contract with all parties concerned, including members of the public, the media (photographers and print, TV and radio journalists) and performers and exhibitors. Organizers typically do this through licenses, performer's release forms and accreditation agreements, the terms of which are made widely available. Such arrangements can cover matters relating to:

- IP rights, including trademarks, copyright and related rights;
- TK-related interests (recognition, protection and safeguarding of the interests of TK and TCE holders); and
- compensation – monetary or in kind (for example, sharing benefits derived from exploitation of recordings with the community or for charity; use of a commercial photograph on a poster to promote the festival; donation of copies of recordings to the festival archive for cultural maintenance purposes, etc.).

Organizing an arts festival is a complex undertaking encompassing many marketing and managerial elements. An effective strategy designed to uphold the IP and cultural interests of all parties is central to an event's long-term success. While conventional IP tools offer some degree of protection, other complementary measures, such as contracts, protocols, guidelines, notices, accreditation systems and access conditions are also required, particularly where displays of TK and TCEs are concerned. A strategy that aims to protect the IP and cultural interests of all parties helps foster cultural respect, and generates economic opportunities for continued celebration of the uniqueness and diversity of cultures around the world. ♦

In ancient Polynesian society, tribal tattoos were a means of expressing identity and personality. Growing interest and pride in their cultural heritage has fuelled a renaissance in the art of tattooing among Polynesians.

REINVENTING THE PASSENGER EXPERIENCE

Goodbye backseat boredom! General Motors (GM) recently announced its work on a new concept that promises to re-invent the backseat passenger experience. Under a project called Windows of Opportunity, GM Research and Development is working with students from the Future Lab at the prestigious Bezalel Academy of Art and Design in Israel to turn car windows into interactive displays “capable of stimulating awareness, nurturing curiosity and encouraging a stronger connection with the world outside the vehicle.”

“Traditionally, the use of interactive displays in cars has been limited to the driver and front passenger, but we see an opportunity to provide a technology interface designed specifically for rear seat passengers,” Tom Seder, GM R&D Lab Group Manager for Human-Machine Interface, said in a company press release. “Advanced windows that are capable of responding to vehicle speed and location could augment real world views with interactive enhancements to provide entertainment and educational value,” he added.

The apps include:

- Otto, an animated character projected over passing scenery that responds in real-time to car performance, weather and landscape. It offers passengers a playful way to learn about the environment they are travelling through;
- Spindow offers passengers a peek into other users’ windows around the globe in real time; and
- Pond allows passengers to stream and share music and messages with other cars and passengers on the road.

GM has no immediate plans to put these interactive display windows into production.



Photo: istock © Maxwell Attenborough

EU PROTECTS DARJEELING

Darjeeling, the black tea originating from India’s West Bengal region, became the first Indian product to acquire Protected Geographical Indication (PGI) status within Europe. It is the 7th non-EU product to be recognized as such, after Colombian coffee and five Chinese products.

Some 10 million kilos of Darjeeling tea are produced on 86 tea estates (covering over 17,500 acres) each year according to the Darjeeling Tea Association (DTA). Industry officials estimate, however, that significantly more Darjeeling tea is sold as such on international markets as many packets of tea contain blends from many other origins.

In the EU, existing blends that mix Darjeeling with non-Darjeeling tea can continue to use the term for a five-year transitional period but will, thereafter, have to change their name. The EU accounts for 60 percent of Darjeeling tea exports.

Some 10 million kilos of Darjeeling are produced each year in an area covering over 17,500 acres in the hills of India’s West Bengal region.

YOUTUBE SEEKS WORLD'S BEST STORYTELLERS

In a global search for the world's best storytellers, video-sharing site YouTube is launching an international online film competition on February 2, 2012. The main prize is a US\$500,000 grant to make a film with British film director Sir Ridley Scott. The closing date for submissions is March 31, 2012. Fifty semi-finalists will then be selected by Mr. Scott's production company. Films can be of any genre but should be no longer than 15 minutes and must not have been distributed before January 1, 2010. Audiences around the world will select the 10 final films in June. These will then be screened at the Venice Film Festival in late August.

PERU TO BOOST DEVELOPMENT OF SCIENCE AND TECHNOLOGY

In line with the plans of Peru's recently elected President Ollanta Humala Tasso to boost science, the Peruvian government recently unveiled its Innovation for Competitiveness project. It will provide US\$100 million to finance and promote the development of science and technology (S&T) links between the private sector, universities and public and private research centers. A further US\$36 million will be provided by the Inter-American Development Bank, according to an article from SciDev.Net. The project will run for seven years. The government also announced 1,000 new S&T postgraduate fellowships for study in Peru and another 1,500 at foreign universities by 2016.

JORDAN EVOLVES INTO A REGIONAL HUB FOR S&T RESEARCH

In late 2011, the Economic and Social Commission for West Asia (ESCWA) announced the establishment in Jordan of a center to monitor and support technology research and innovation opportunities in its 14 member countries. The role of the Center, according to its Executive Director, Mr. Fouad Mrad, cited in a SciDev.Net article, is "to contribute to strengthening national science, technology and innovation systems in ESCWA countries and help to develop problem-solving and policy formulation capabilities in the region." The Center will also help to identify and develop the best technologies for local conditions in the fields of construction, industrial technology, energy, agriculture, water and telecommunications, according to the report. Its other roles will include facilitating networking between local and international scientific researchers, forming links with industry and promoting successful technology transfer to the region.

Jordan is also to become the hub for new regional science collaborations following the launch of an initiative to integrate existing Arab e-infrastructures.

The platform will link up all existing National Research and Education Networks (NRENs) in Arab countries. Not only will this make it easier for scientists in the region to collaborate, it also promises to reduce research costs by sharing resources and reducing duplication. The development was announced at the first annual meeting of the Arab States Research Network (ASREN) in Amman in December 2011.

WORLD INTELLECTUAL PROPERTY DAY 2012

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