

International Intellectual Property

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I. Patents**

A. UNITED STATES

The U.S. Supreme Court issued three rulings during 2011 affecting U.S. patent law.

First, in *Microsoft Corp. v. i4i Ltd.*,¹ the Supreme Court reaffirmed the clear and convincing evidentiary standard by which a patent may be invalidated. The opinion reviewed pre- and post-1952 case law and determined that the Patent Act of 1952 codified the common law standard of proof for patent invalidity.² That standard had been established by over a century of case law and was best summarized by Justice Cardozo in *Radio Corp. of America v. Radio Engineering Laboratories*,³ as a “presumption not to be overthrown except by clear and cogent evidence”⁴ that “reflected the universal understanding that a preponderance standard of proof was too ‘dubious’ a basis to deem a patent invalid.”⁵

* Melvyn J. Simburg, of the law firm Simburg, Ketter, Sheppard & Purdy, LLP, Seattle, Washington, served as the committee editor for this review of developments during the year 2011 in the field of intellectual property law. Other editors and authors are identified in each section. For developments during 2010, see Susan Brushaber et al., *International Intellectual Property Law*, 45 INT’L LAW. 205 (2011). For developments during 2009, see Suong Nguyen et al., *International Intellectual Property Law*, 44 INT’L LAW. 245 (2010).

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1. *Microsoft Corp. v. i4i Ltd.*, 131 S. Ct. 2238, 2252 (2011).

2. *Id.* at 2242.

3. See generally *Radio Corp. of Am. v. Radio Eng’g Labs.*, 293 U.S. 1 (1934).

4. *Id.* at 2.

5. *Microsoft Corp.*, 131 S. Ct. at 2246.

Second, in the *Board of Trustees of the Stanford Junior University v. Roche Molecular Systems, Inc.* case,⁶ the Supreme Court held that the University and Small Business Patent Procedures Act of 1980 (the Bayh-Dole Act) does not automatically vest title to federally funded inventions in federal contractors absent an effective assignment from the contractor's employee-inventor.

And third, in *Global-Tech Appliances v. SEB S.A.*,⁷ the Supreme Court construed 35 U.S.C. § 271(b), which provides: "Whoever actively induces infringement of a patent shall be liable as an infringer."⁸ The Court held that willful blindness to the high probability a patent exists—along with taking deliberate steps to avoid knowing that fact—constitutes the required knowledge that the alleged inducer must have known the induced acts constituted patent infringement.⁹

In addition to the cases it decided, the U.S. Supreme Court granted certiorari for three important patent cases in the 2011–12 term.¹⁰

At the circuit court level in 2011, the U.S. Court of Appeals for the Federal Circuit articulated new standards for proving materiality and intent when alleging inequitable conduct by a patent applicant, eliminated the sliding scale, and affirmed that, to render a patent unenforceable for inequitable conduct, an accused infringer must prove by clear and convincing evidence that an applicant misrepresented or omitted material information with specific intent to deceive the Patent and Trademark Office (PTO).¹¹

In the legislative arena, the United States switched to a first-to-file system and now has post-grant opposition proceedings as of September 16, 2011.¹²

B. EUROPE

1. *European Union*

On March 8, 2011 the Court of Justice of the European Union rendered its opinion 1/09 in which it held that the Council of the European Union's draft agreement aimed at creating a 'unified patent litigation system' (a 'European and Community Patents Court' made up of trial and appeal level courts and a central registry) to hear cases regarding European patents and future community patents, "is not compatible with the provisions of European Union law," as it would give exclusive jurisdiction on certain matters to an international court which is "outside the institutional and judicial framework of the European union," would deprive courts of member states of certain powers, and would affect the court of justice's power to reply to preliminary judgment requests by courts of mem-

6. *Bd. of Trs. of the Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 131 S. Ct. 2188, 2196-97 (2011).

7. *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2065 (2011).

8. 35 U.S.C. 271(b) (2010).

9. *Global-Tech Appliances*, 131 S. Ct. at 2070–71.

10. See generally *Mayo Collaborative Servs. v. Prometheus Labs, Inc.*, 628 F.3d 1347 (Fed. Cir. 2010); *Hyatt v. Kappos*, 625 F.3d 1320 (Fed. Cir. 2010); *Novo Nordisk A/S v. Caraco Pharm. Labs, Ltd.*, 601 F.3d 1359 (Fed. Cir. 2010).

11. *Therasense, Inc. v. Becton, Dickinson & Co.*, 649 F.3d 1276, 1296 (Fed. Cir. 2011) (en banc).

12. 35 U.S.C. § 321 (2011).

ber states.¹³ On a different but related subject, the European Commission later proposed a regulation intended to create a true unitary European Union patent, with uniform protection in all participating member states.¹⁴

2. Switzerland

The Swiss Federal Council resolved to bring the Patent Attorney Act and the Patent Attorney Ordinance into force as of July 1, 2011.¹⁵ The Federal Patent Court is expected to take up its activities on January 1, 2012 (subject to a different decision by the Federal Council).¹⁶ The new Federal Patent Court will act as court-of-first-instance for patent litigation, instead of the twenty-six cantonal courts currently in charge.¹⁷

In *Merck & Co., Inc. v. Mepha Pharma*,¹⁸ the Swiss Federal Court held that in contrast to the EPC 1973, article 54(5), EPC 2000 expressly allows patent protection for substances or compositions already known as medicines.

C. CHINA

On December 29, 2010, the State Intellectual Property Office (SIPO) released measures to govern enforcement work conducted by SIPO.¹⁹ There are some fifty articles in six chapters.

For a patent infringement dispute to qualify for handling by SIPO, article 8 requires the petitioner be a patentee or a materially interested party; there must be a defined respondent; the claims must be supported by specific facts and grounds; it must be within the jurisdiction of the accepting department; and no party shall have already instituted a court action.²⁰ Chapter three governs mediations; chapter four addresses passing-off of patents; chapter five covers investigation and evidence gathering, and chapter six deals with penalties and orders.

13. European Court of Justice, Opinion 1/09 of the Court (Full Court) (8 Mar. 2011), ¶ 89, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=80233&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1153776>.

14. Commission, Proposal for a Regulation of the European Parliament and of the Council implementing enhanced cooperation in the area of the creation of unitary patent protection, COM(2011) 215 final (Apr. 13, 2011).

15. Bundesgesetz über die Patentanwältinnen und Patentanwälte [Federal Act on Patent Attorneys] Mar. 20, 2009, SR 935.62, art. 2 (Switz.), available at http://www.admin.ch/ch/e/rs/935_62/a2.html.

16. Press Release, The Federal Council, Entry Into Force of the Patent Attorney Act and Opening of the Federal Patent Court (Nov. 5, 2011), available at <http://www.bfm.admin.ch/content/ejpd/en/home/dokumentation/mi/2011/2011-05-11.html>.

17. Bundesgesetz über das Bundespatentgericht [Federal Act on the Federal Patent Court] Mar. 20, 2009, SR 173.41, art. 1 (Switz.), available at <http://www.admin.ch/ch/e/rs/1/173.41.en.pdf>.

18. BGer, Mar. 4, 2011, docket no. 4A_435/2010 (Switz.), available at http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=04.03.2011_4A_435/2010.

19. See John V. Grobowski et al., *Measures for the Administrative Enforcement of Patents*, FAEGRE BAKER DANIELS (May 1, 2011), <http://www.faegrebd.com/13213>.

20. Measures for the Administration Enforcement of Patents (promulgated by State Intellectual Property Office, Dec. 2, 2010, effective Feb. 1, 2011) at art. 8 (China).

On June 27, 2011, SIPO issued Measures for the Record Filing of Patent Licensing Contracts.²¹ Patent licensing contracts no longer need to be recorded with SIPO as a precondition for remitting royalty fees out of China or recording the patent with customs.

On October 24, 2011, the State Council Legislative Affairs Office released trial measures regarding patent marking for consultation.²²

The two leading telecom firms in China are suing each other for patent infringement. In late April, it was announced that Huawei Technologies Company filed lawsuits against ZTE Corporation for patent infringement relating to wireless modems and high-speed fourth generation technology called Long Term Evolution (LTE).²³ The lawsuits were filed in Germany, France, and Hungary.²⁴ Shortly afterwards, ZTE Corporation filed a lawsuit against Huawei in China over LTE patents.²⁵

II. Trademarks*

A. UNITED STATES

In *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, the Ninth Circuit addressed the issue of “whether, to establish dilution by blurring under the [Trademark Dilution Revision Act], the junior mark must be ‘identical or nearly identical’ to the senior mark.”²⁶ The court noted that the prior standards of identical, nearly identical, or substantially similar were absent in the Trademark Dilution Revision Act (TDRA), which defines dilution by blurring as the “association arising from the *similarity* between a mark or a trade name and a famous mark that impairs the distinctiveness of the famous mark.”²⁷ The Ninth Circuit held the district court erred as a matter of law in applying the identical or nearly identical standard to deny Levi Strauss’s federal dilution claim.²⁸

Additionally, the Federal Circuit weighed on the likelihood of confusion doctrine by finding there was no likelihood of confusion between Citibank and Capital City Banks. The Federal Circuit affirmed the Trademark Trial and Appeal Board’s denial of Citigroup’s opposition to the registration of four standard character service mark applica-

21. *Measures for the Record Filing of Patent Licensing Contracts* (专利实施许可合同备案办法), JUDICIAL PROTECTION OF IPR IN CHINA (July 1, 2011, 8:20 AM), <http://www.chinaiprlaw.cn/file/2011070120103.html>.

22. *Measures Regarding Patent Marking for Consultation* (专利标识标注方式的规定公开征求意见), JUDICIAL PROTECTION OF IPR IN CHINA (Oct. 21, 2011, 1:51 AM), <http://www.chinaiprlaw.cn/file/2011102421516.html>.

23. See Loretta Chao, *Huawei Sues Chinese Rival Over Patents*, WALL ST. J. ONLINE (Apr. 29, 2011), <http://online.wsj.com/article/SB10001424052748703643104576290941033518036.html>.

24. See Chen Limin, *Huawei, ZTE Trade Lawsuits*, CHINADAILY.COM (May 3, 2011, 9:50 AM), http://usa.chinadaily.com.cn/business/2011-05/03/content_12434587.htm.

25. *Id.*

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26. *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 633 F.3d 1158, 1167 (9th Cir. 2011).

27. *Id.* at 1166 (quoting 15 U.S.C. § 1125(c)(2)(B)(i)) (emphasis added).

28. *Id.* at 1159.

tions filed by Capital City Bank Group.²⁹ The Federal Circuit focused on the distinctive spelling of CITI, noting “the ‘I’ misspelling [used across Citigroup’s family of marks] is the foundation of the CITI marks’ distinctiveness and the basis of Citigroup’s trademark protection policy.”³⁰

Also, the Trademark Trial and Appeal Board (TTAB) reversed the examining attorney’s refusal to register THUMBDRIVE on the grounds that it was generic, noting that (i) the absence of competitor use tended to indicate that THUMBDRIVE had not entered the public domain, and (ii) the evidence provided by the examiner did not “demonstrate a competitive need for others to use” the mark.³¹ When a coined term used as a trademark is adopted by the public but not by competitors, the “full ‘eradication’ of an applicant’s ‘commercial rights’” is at stake, the evidentiary burden is heavy, and the USPTO must establish by clear evidence that THUMBDRIVE is generic.³²

In *Network Automation, Inc. v. Advanced Systems Concepts, Inc.*,³³ the Ninth Circuit held that the trial court abused its discretion in rigidly applying the “Internet Troika” to find a likelihood of initial interest confusion in the use of a competitor’s trademarks as keywords. Although the Ninth Circuit acknowledged that the “Internet Troika”—namely: (i) the similarity of the marks; (ii) the relatedness of the goods and services offered; and (iii) the simultaneous use of the Internet as a marketing channel was “highly illuminating” in the context of domain names—it “fails to discern whether there is a likelihood of confusion in a keywords case.”³⁴ Instead, the most relevant factors in a keywords case are: (i) the strength of the mark; (ii) evidence of actual confusion; (iii) the type of goods and degree of care likely to be exercised by the purchaser; and (iv) the surrounding context, labeling, and appearance of the advertisements within the sponsored links.³⁵

B. EUROPE

1. *European Union*

In *L’Oréal SA v. eBay International AG*,³⁶ the European Court of Justice (ECJ) held that eBay infringed upon the trademark rights of the owner insofar as eBay promotes products identical to those of a registered trademark owner by displaying third party trademarks on its website, and because it is difficult to clearly ascertain whether the goods and services advertised are those of the trademark owner.³⁷ eBay cannot rely on the “hosting” services exemption³⁸ when it provides services to customers such as optimization and promotion of

29. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 1347 (Fed. Cir. 2011).

30. *Id.* at 1350 (citing *Citigroup Inc. v. City Holding Co.*, 171 F. Supp. 2d 333, 347 (S.D.N.Y. 2003)).

31. *In re Trek 2000 Int’l Ltd.*, 97 U.S.P.Q. 2d (BNA) 1106, 1113 (T.T.A.B. 2010) (quoting *In re Hotels.com LP*, 573 F.3d 1300, 1304 (Fed. Cir. 2009)).

32. *Id.* at 1114.

33. *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1154 (9th Cir. 2011).

34. *Id.*

35. *Id.*

36. Case C-324/09, *L’Oréal SA v. eBay Int’l AG*, 2011 EUR-Lex CELEX LEXIS (Dec. 9, 2010), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=LEX:62009CC0324:EN:HTML>.

37. *Id.* ¶ 183(2)–(4).

38. Council Directive 2000/31, art. 14, 2000 O.J. (L 178) 1 (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:178:0001:0001:EN:PDF>.

its advertisements; the exemption is limited to “hosting” services that merely enable customers to display offers on the eBay website.³⁹

In *Interflora Inc. v. Marks & Spencer*,⁴⁰ the ECJ addressed the use of Google Adwords. Marks & Spencer used INTERFLORA as a keyword in connection with its own floral delivery service. In addition to source confusion and loss of goodwill, the Court noted that the use could gradually persuade Internet users that INTERFLORA is not a trademark for the Interflora network, but is a generic term for flower-delivery services.⁴¹

In *Viking Gas A/S v. Kosan Gas A/S*,⁴² the ECJ held that a supplier of bottled gas could not rely on its trademark rights in its refillable bottle (both as to shape and to affixed-word and figurative trademarks) to prevent those bottles from being refilled with gas of a competitor. Kosan’s initial sale of gas included the refillable bottle.⁴³ It was standard practice for consumers to exchange their empty bottle for a full one, paying only for the cost of the gas.⁴⁴ Relying on this standard practice in the industry to offer gas refills due to the expensive cost of the bottles, the court ruled it was unlikely consumers would assume a connection existed between Viking Gas and Kosan.⁴⁵ The Court further noted that Kosan’s bottle labeling remained intact and that consumer’s property rights in the bottles would be unfairly restricted if they could only have them refilled by Kosan.⁴⁶

2. Switzerland

Pfizer Pharmaceuticals requested injunctive relief and cancellation of the mark VIAGURA, registered for use with vodka, based on the likelihood of confusion with its well-known mark VIAGRA.⁴⁷ Noting the similarities between VIAGRA and VIAGURA, the Commercial Court of Berne relied on several foreign decisions and an earlier decision by the Swiss Federal Court (ATF 129 V 32) to support its holding that VIAGRA is a famous trademark and entitled to protection under article 15(1) of the Federal Act on Trademarks and Appellations of Origin, which allows the owner of a famous trademark to prohibit third parties from using its trademark for unrelated goods or services if such use would jeopardize the distinctiveness of the trademark or exploit or impair its reputation.

The Swiss Federal Administrative Court (FAC) affirmed the Swiss Federal Institute of Intellectual Property’s refusal to register PARIS RE on mere descriptiveness grounds, noting that the applicant had failed to meet the administrative requirements for proving ac-

39. *L’Oreal*, C-324/09 at ¶¶ 144, 151.

40. See generally Case C-323/09, *Interflora Inc. v. Marks & Spencer*, 2011 EUR-Lex CELEX LEXIS (Sept. 22, 2011), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CJ0323:EN:HTML>.

41. *Id.* ¶ 86.

42. See generally Case C-46/10, *Viking Gas A/S v. Kosan Gas A/S*, 2011 Eur-Lex CELEX LEXIS (July 14, 2011), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0046:EN:HTML>.

43. See *id.* ¶ 10.

44. See *id.*

45. See *id.* ¶ 40.

46. See *id.* ¶ 33.

47. Mark Schweizer, *Switzerland: ViaGuara Vodka Infringes on Famous VIAGRA Brand*, MARQUES.ORG CLASS 46 (May 18, 2011, 5:27 PM), http://www.marques.org/Class46/Article.asp?D_A=20110518&XID=BHA2383 (discussing the *Viagra v. ViaGuara* decision by the Commercial Court of Berne, Switzerland).

quired distinctiveness.⁴⁸ The FAC noted that, unlike Swiss registrations where such proof can be postponed, proof of acquired distinctiveness must be provided at the time of filing an international registration.

In the *Red Suitcase* [3D MARK] case,⁴⁹ the FAC agreed with the holding of the Swiss Federal Institute of Intellectual Property that the three-dimensional shape of the subject suitcase lacked the requisite distinctive character for registration as a three-dimensional character. In affirming the decision, the FAC noted that the decisive question is whether relevant consumers would interpret the three dimensional design as an indication of business origin or merely a design element that is indistinguishable from the design of similar products.

C. CHINA

The most significant event in Chinese trademark law was the State Council Legislative Affairs Office's release for consultation of its version of the proposed amendments to the PRC Trademark Law.⁵⁰ The ABA Sections of International Law and Intellectual Property Law submitted a combined brief to the PRC Legislative Affairs Office.

Significant additions to the revised draft include: (1) added protection for sound marks and color marks; (2) a proposal that visibility no longer be a requirement for trademark protection; and (3) the ability to file multi-class applications, which is important to many foreign applicants. Other amendments include additional protections for famous trademarks that do not yet qualify as "well-known" under PRC law, the power of the Trademark Office to cancel marks registered through fraudulent or improper means, and an increase in the amount of statutory compensation and heavier penalties for repeat infringers.

The requirement that an application for registration be filed in good faith remains the subject of debate. This requirement had been inserted by the State Administration for Industry and Commerce (SAIC) in article nine of the proposed amendments and was removed by the Legislative Affairs Office. It did, however, amend article thirty-four to say that if the applicant is fully aware that the trademark has been used in China on identical or similar goods or services at the date of the application, the application should be rejected. But the ABA submission indicated that, based on international practices, this and other provisions were insufficient to make up for the removal from article nine.

Further, on December 16, 2010, the SAIC announced that the backlog of applications had been cleared as of the end of October 2010.⁵¹ In 2010, for the first time, the number of applications reviewed exceeded the number of new applications received, thus shortening the average review period for an application from three years to one year.

48. TAF, Feb. 3, 2011, docket no. B-279/2010 (Switz.), available at <http://www.bvger.ch/publiws/pub/cache.jsf>.

49. TAF, Apr. 2, 2011, docket no. B-2828/2010 (Switz.), available at <http://www.bvger.ch/publiws/pub/cache.jsf>.

50. Zhonghua Rénmín Gònghéguó Shangbiao Fa (Xiuding Cao'an Zhengqiu Yijian Gao) (中华人民共和国商标法 (修订草案征求意见稿)) [Republic of China Revised Trademark Law (Revised Draft)] (promulgated by State Council Legislative Affairs Office, Sept. 1, 2011, effective Oct. 8, 2011), CHINA PAT. & TRADEMARKS, http://www.gov.cn/gzdt/2011-09/02/content_1939013.htm.

51. SAIC: *China Has Completely Resolved the Backlog of Trademark Examination*, JUDICIAL PROTECTION OF IPR IN CHINA (Dec. 16, 2010, 11:01 PM), <http://www.chinaiprlaw.cn/file/2010121618171.html>.

D. LATIN AMERICA

With last July's approval by the Colombian Congress of the adoption of the Madrid Protocol by Law No. 1455/2011,⁵² Colombia is en route to becoming the first South American country to accede to the Madrid Protocol. Approximately three months after the deposit of the instrument of accession with the World Intellectual Property Organization, the Madrid Protocol will become available in Colombia.

To harmonize its regulations concerning trademark oppositions with those of the Andean Community, the Ecuadorian Patents and Trademarks Office (IEPI) eliminated term extensions to file oppositions against pending applications.⁵³

An opposition against the registration of GANDHI⁵⁴ for use in connection with rice is currently pending with the Ecuadorian Patent and Trademark Office. The opposer, Indian lawyer Sh. Lalit Bhasin, asserted that Indian legislation prohibits use of the name and image of Mahatma Gandhi as a trademark and that registration should be refused based on regulations preventing the registration of international public symbols, emblems and the like enacted locally in Ecuador, regionally in the Andean Community, and internationally under the Paris Convention. The applicant did not file a response to the opposition within the statutory period, a decision for which is still pending.

E. DOMAIN NAMES

In a landmark decision in June 2011, Internet Corporation for Assigned Names and Numbers (ICANN)—the body that governs Internet domain names—agreed to open the Internet domain name system to allow entities to register at the top level. Any organization will be able to submit an application to ICANN for any generic top-level domains (gTLD), subject to certain limitations.⁵⁵

The new program will cause an unprecedented shake-up to the domain name system. There are roughly two dozen gTLDs at present, but soon there will be hundreds and possibly thousands, including domain names in non-Latin characters such as Arabic or Greek.

The new gTLD application process will cost a minimum of \$185,000 per application⁵⁶ and many organizations will spend between \$500,000 and \$1 million on the application

52. L. 1455/2011, Junio 30, 2011, 48, DIARIO OFICIAL [D.O.] (Colom.), available at http://www.secretariassenado.gov.co/senado/basedoc/ley/2011/ley_1455_2011.html.

53. Resolución No.11-029 P-IEPI, June 29, 2011, Aplicación directa a la Norma Comunitaria con respecto a las peticiones de prórroga para presentar oposiciones a las solicitudes de registro de signos distintivos que prevé la ley nacional, [Granting Direct Application to the Andean Community Decision with regard to Requests for Extension to file Opposition against the Application for Registration of Distinctive Signs] (Ecuador), available at <http://www.wipo.int/wipolex/en/details.jsp?id=10468>.

54. Instituto Ecuatoriano de la Propiedad Intelectual [Ecuadorian Institute of Intellectual Property], 551 GACETA DE PROPIEDAD INTELECTUAL [GAZETTE OF INTELL. PROP.] (Dec. 2010).

55. *Approved Board Resolutions, Singapore*, Int'l Corp. for Assigned Names & Nos. (June 20, 2011), <http://www.icann.org/en/minutes/resolutions-20jun11-en.htm> (ICANN minutes detailing the vote by the GNSO Committee on the Introduction of New gTLDs, resolutions No. 2011.06.20.01-2011.06.20.03).

56. INT'L CORP. FOR ASSIGNED NAMES & NUMBERS (ICANN), gTLD APPLICANT GUIDEBOOK: VERSION 2011-09-19 1-40 (2011), available at <http://www.icann.org/en/topics/new-gtds/rfp-clean-19sep11-en.pdf> [hereinafter gTLD GUIDEBOOK].

process.⁵⁷ The application window will be open from January 12, 2012, to April 12, 2012.⁵⁸

Businesses and brand owners will likely face increased costs to protect their brands across an enlarged domain name space and a significant shift in strategy, as well as a unique marketing opportunity to own their own brand. Competition for certain gTLDs, such as BEER or BANK is likely to be fierce and may lead to significant disputes.

III. Copyright*

A. UNITED STATES

In *UMG Recordings, Inc. v. Augusto*,⁵⁹ the Ninth Circuit held that a record company's practice of unsolicited distribution of promotional CDs to music critics, DJs, and other tastemakers constituted a transfer of title, making the discs subject to the first-sale doctrine. It rejected claims that the CDs remained the property of the producer and were only licensed to the recipients by statements such as "Promotional Use Only – Not for Sale."⁶⁰ The court considered the Unordered Merchandise Statute, 39 U.S.C. § 3009, and the fact that the language printed on the CDs could not rise to the level of a license because it was never agreed to by the recipients. The court concluded that the transfers effected a gift or sale within the meaning of the first sale doctrine.

After several years of negotiations, a U.S. District Court rejected a proposed settlement between Google and a coalition of authors and publishers related to Google's plan to scan millions of books and make them available online.⁶¹ Applying the several factors from *City of Detroit v. Grinnell Corp.*, Judge Chin found that most of the factors—such as the adequacy of class notice and the adequacy of class representation—favored approval of the settlement.⁶² But a few considerations raised such grave concerns that he could not conclude that approval would be proper. Specifically, Judge Chin pointed to international concerns, the preference for such issues to be dealt with by Congress, the fact that the settlement would release claims far beyond the scope of the pleadings (*i.e.*, the use of "snippets" of books as opposed to whole works), the lack of adequate representation for the interests of certain class members such as academic authors, and the settlement's unique opt-out provision that would allow Google to use works in its database unless the author came forward to remove his work from it. The case appears headed toward trial in 2012, but the issues have been complicated by related lawsuits involving libraries and a push to establish some sort of national digital library.

57. David Taylor, *ICANN Domain Name Decision Set to Change the Face of the Internet Forever*, ECTA (Nov. 2011), available at http://www.ecta.org/IMG/pdf/516-taylor_2_.pdf.

58. cTLD GUIDEBOOK, *supra* note 56, at 1-1, 1-2.

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59. *UMG Recordings, Inc. v. Augusto*, 628 F.3d 1175, 1179–81 (9th Cir. 2011).

60. *Id.* at 1182.

61. *See generally* Authors Guild v. Google, Inc., 770 F. Supp. 2d 666 (S.D.N.Y. 2011).

62. *See id.* at 674–75 (citing *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974)).

The Second Circuit clarified the extent to which the Copyright Act preempts state-law claims for misappropriation of “hot news.” In *Barclay’s Capital, Inc. v. Theflyonthewall.com, Inc.*,⁶³ the plaintiffs were financial firms that issue reports containing securities recommendations before the start of each trading day on the New York Stock Exchange. Theflyonthewall.com is a news aggregator that obtained the information from these reports and republished their recommendations to its subscribers, also before the start of each trading day, thereby undermining the usefulness and marketability of the financial firms’ reports. The firms brought copyright claims, which were successful, but also brought state-law claims for misappropriation of their “hot news.” The court held that “because the plaintiffs’ claim falls within the ‘general scope’ of copyright, and involves the type of works protected by the Copyright Act, and because the defendants’ acts at issue do not meet the exceptions for a ‘hot news’ misappropriation claim as recognized by NBA, the claim is preempted.”⁶⁴ This decision will pave the way for similar news aggregators to transmit the information as long as they do not copy the copyrightable expression published by the original source.

In *Perfect 10 v. Google, Inc.*,⁶⁵ the Ninth Circuit joined the Second Circuit in holding that a motion for a preliminary injunction in a copyright case should not receive any particular deference. Rather, such motions are subject to the four factors in *eBay, Inc. v. MercExchange, LLC*.⁶⁶ Perfect 10, a pornography studio, as part of its longstanding lawsuit against Internet giant Google, sought a preliminary injunction against Google and its practices of caching Perfect 10’s web pages and forwarding Perfect 10’s take-down notices to chillingeffects.org, where the URLs containing Perfect 10’s images were made public. Perfect 10 argued that it was entitled to a presumption of irreparable harm based on a strong showing of likely success on the merits, citing a 1984 Ninth Circuit case, *Apple Computer, Inc. v. Formula International, Inc.*,⁶⁷ which established just such a presumption. The court rejected that argument and held that, in the wake of the Supreme Court’s *eBay* case, the holding of *Apple* was no longer tenable. The *eBay* case required the traditional factors for a preliminary injunction to apply, with no thumb on the scale, in a patent action unless there is clear congressional intent to depart from traditional equity principles. *Apple*, therefore, was deemed to be overruled.

In *Disney Enterprises, Inc. v. Hotfile, Corp.*,⁶⁸ Hotfile allowed users to upload video files to its servers and then created five distinct locator links for each video file. When these links were distributed around the Internet, a user could follow the links and download a copy of the video. Hotfile earned its revenues by increasing download speeds for paying members and by selling “hotlinks,” which allowed instantaneous downloads. Disney and other film studios alleged both direct and secondary infringement. Although it refused to dismiss the secondary liability claims, the court applied the volitional act doctrine of *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*⁶⁹ to dismiss the direct liability

63. *Barclay’s Capital, Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 878 (2d Cir. 2011).

64. *Id.*

65. *See generally* *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976 (9th Cir. 2011).

66. *Id.* at 979 (citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006)).

67. *Id.* at 979–80 (overruling *Apple Computer, Inc. v. Formula Int’l, Inc.*, 725 F.2d 521 (9th Cir. 1984)).

68. *See* *Disney Enters., Inc. v. Hotfile Corp.*, No. 11–20427–CIV–Jordan, 2011 WL 2899374, at *1 (S.D. Fla. July 8, 2011).

69. *Id.* at *3 (citing *Religious Tech. Center v. Netcom On-Line Comm’n Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995)).

claims. Hotfile was no more than a system that allowed its users to upload and download files on the Internet, and it was not alleged that Hotfile had taken any direct volitional action that directly infringed copyrights. Direct infringement requires more than just automated computer activity. This ruling should provide some measure of comfort to media storage services that allow others to upload and download content through the use of an automated system.

In another case involving media storage, *Capitol Records, Inc. v. MP3Tunes, LLC*,⁷⁰ MP3Tunes set up a music locker service where users could store music files and play them back from the cloud. It also operated Sideload.com, essentially an MP3 search engine that allowed users to search for music content on the web and automatically “sideload” it to their lockers. Record companies sued for infringement. As a threshold matter, the court clarified that active-playback music lockers can still be eligible for the safe-harbor protections of the Digital Millennium Copyright Act (DMCA). The court also resolved an issue of first impression under U.S. copyright law, holding that the DMCA safe harbors apply to pre-1972 sound recordings, which are only protected by state common-law copyright.

The court ruled, however, that when a copyright owner gave MP3Tunes notice that a particular link on Sideload.com was infringing, MP3Tunes was obligated to take the files down from every user’s locker that it could trace to the infringing link. Thus, the take-down responsibility extended beyond the four corners of the notice received from the copyright owner. The court also held that MP3Tunes’s single-instancing procedure (whereby it did not store a separate copy of the same song for each user, but rather stored one copy for many users) was merely a form of data de-duplication and did not infringe the public performance right.

B. EUROPE

1. *European Union*

The European Commission set out its “blueprint” for future actions to revamp the legal framework for intellectual property rights (IPRs).⁷¹ In addition to the proposal of legislation enabling multi-territorial and pan-European licensing,⁷² future actions include the issuance of a Green Paper on the online distribution of audiovisual works in the EU.⁷³ It was noted that, unlike television, satellite, and cable media, there is no current legal instrument for the clearing of copyright and related rights for on-line cross-border audiovisual media services.⁷⁴

Other future actions include the appointment of a high-level mediator to help reach agreement on harmonizing private copying levies methodology and administration,⁷⁵ and

70. *Capital Records, Inc. v. MP3tunes, LLC*, No. 07 Civ. 9931(WHP), 2011 WL 5104616, at *1 (S.D.N.Y. Oct. 25, 2011).

71. See generally *Commission Proposal for a Single Market for Intellectual Property Rights*, COM (2011) 287 final (May 24, 2011), available at http://ec.europa.eu/internal_market/copyright/docs/ipr_strategy/COM_2011_287_en.pdf [hereinafter COM (2011) 287 final].

72. *Id.* ¶ 3.3.1 at 10–11.

73. *Commission, Green Paper on the Online Distribution of Audiovisual Works in the European Union: Opportunities and Challenges Towards a Digital Single Market*, COM (2011) 427 final (July 13, 2011).

74. *Id.* at 6.

75. COM (2011) 287 final, *supra* note 71, ¶ 3.3.4 at 12–13.

the study of the creation of a European Copyright Code and an optional “unitary” copyright title.⁷⁶

The Commission also issued a proposal for a Directive⁷⁷ that sets out requirements for a diligent search in the Member State of first publication, which would enable a work to be treated as an orphan work throughout the EU, thereby allowing it to be made available to the public online by certain institutions without prior authorization.⁷⁸

In *Stichting de ThuisKopie v. Opus Supplies Deutschland GmbH*,⁷⁹ the ECJ held that the final user who reproduces a protected work on a private basis is, in principle, the person responsible for paying the fair compensation for private use under the Copyright in the Information Society Directive.⁸⁰ It was left open to the Member States to establish the amount of the levy chargeable to “persons who make reproduction equipment, devices, and media available to the final user”—parties who would be easier to identify than consumers and also able to pass the levy amount on to the final user in the price of their services.⁸¹

A Directive for Term Extension⁸² was adopted that will bring the term of protection for performers in line with that for authors and thus amend the Directive on the Term of Copyright Protection.⁸³ The Directive provides that protection for a performer, if the performance is fixed in a phonogram, will be increased to seventy years from the earlier of the date of the first publication or first communication to the public and that the date for expiry of rights of producers of phonograms will be increased from fifty to seventy years.⁸⁴

In *Flos SpA v. Semeraro Casa e Famiglia SpA*, the ECJ held the Directive on the Legal Protection of Designs⁸⁵ precludes Member State legislation excluding copyright protection for designs that, although “eligible for copyright protection, entered the public domain before” such Directive’s entry into force.⁸⁶ Thus, design and copyright rights may apply concurrently, and copyright, which arises upon the creation of a work, may be triggered retroactively by reference to the registration of a design right.

76. *Id.* ¶ 3.3.1 at 11.

77. *Commission Proposal for a Directive of the European Parliament and of the Council on Certain Permitted Uses of Orphan Works*, COM (2011) 289 final (May 24, 2011).

78. *Id.* at 1.

79. See generally Case C-462/09, *Stichting de ThuisKopie v. Opus Supplies Deutschland GmbH*, 2011 EUR-Lex CELEX LEXIS (June 16, 2011), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009J0462:EN:HTML> [hereinafter Case C-462/09].

80. Directive 2001/29/EC, of the European Parliament and Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, art. 5(2)(b) 2001, O.J. (L 167), 10–19.

81. Case C-462/09, *supra* note 79, ¶ 29.

82. Directive 2011/77/EU, of the European Parliament and of the Council of 27 Sept. 2011 amending Directive 2006/116/EC on the Term of Protection of Copyright and Certain Related Rights, ¶ 7 O.J. (L 265) 1 [hereinafter Directive 2011/77/EU].

83. Directive 2006/116/EC, of the European Parliament and of the Council of 12 Dec. 2006 on the Term of Protection of Copyright and Certain Related Rights, ¶ 7 O.J. (L 372), 12–18.

84. Directive 2011/77/EU, *supra* note 82, art. 1(2)(a)–(b), at 11.

85. Directive 98/71/EC, of the European Parliament and of the Council of 13 Oct. 1998 on the Legal Protection of Designs, O.J. (L 289), 28–35.

86. Case C-168/09, *Flos SpA v. Semeraro Casa e Famiglia SpA*, 2011 EUR-Lex CELEX LEXIS (Jan. 27, 2011) ¶ 65, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CJ0168:EN:HTML>.

2. Switzerland

A company that distributes computer programs for recording, processing, and internet dissemination of courses of studies requested a preliminary injunction against three former employees, alleging that they wrongfully used source code of the applicant's program "Switchcast" in their program called "V. Video MS." The Commercial Court of the Canton Zurich (CCZ) partially granted a preliminary injunction.⁸⁷ The court noted computer programs are protected by the Federal Act on Copyright and Neighboring Rights if they are neither trivial nor ordinary. Parts of a computer program are copyright protected, provided that they are intellectual creations with an individual character. The court looks to the qualitative and quantitative proportion of such parts to the complete computer program. In this case, 5.1% and 2.8%, respectively, of the source code had been integrated in "V. Video MS." But if a third-person integrates a copyright-protected part of a computer program in his own computer program, the copyright protection is limited to the integrated portion.

As long as experts can clearly identify the integrated part as a reproduction and adaptation of a preexisting computer program and the copyright-protected part does not completely disappear within the context of the complete computer program, the unauthorized integration infringes the reproduction right and the adaptation right of the copyright holder. Although the respondent had integrated only minor parts of the source code in his own computer program, the CCZ assumed that the integrated parts were recognizable for experts. The preliminary injunction prohibited reproduction and adaptation of the integrated parts of the computer program as well as the distribution of "V. Video MS."

In another case,⁸⁸ a computer scientist made available to third-parties on his website so-called hash links to peer-to-peer file sharing networks (like "eDonkey," "eMule," "Overnet," or "mldonkey"). Clicking on a hash link would open the relevant file-sharing program, directly connecting users to the relevant peer-to-peer file-sharing network, and download the relevant copyright-protected movie. In other words, the website enabled its visitors to download copyrighted movies with only one click.

According to the Swiss Federal Supreme Court (FSC), by making available links to peer-to-peer file sharing networks through which one can download copyright protected movies, one is liable as a criminal abettor to a copyright infringement. In addition, the FSC held that it is not necessary to produce evidence showing copyright-protected movies were available and downloaded by peer-to-peer network users located in Switzerland. This fact may also be established by several indications, as was the case in the present decision.

Additionally, an Italian company producing and distributing *Le Corbusier* furniture under a worldwide exclusive license sued another Italian company that produced imitations, including the LC 1 armchair (LC1), which it sold via Internet to Swiss customers, who then arranged their own transport to Switzerland. The CCZ approved the claim with respect to some of the alleged 'selling actions,' but denied the LC1 claim. On appeal

87. X. v. Y., Case: LL090002/U, Judgment, (Oct. 11, 2010). Partly published in *Zeitschrift für Immaterialgüter-, Informations- und Wettbewerbsrecht* 2011 / 5, 313 f.

88. Bger, Feb. 7, 2011, docket no. 6B_757/2010, ¶¶ 1, 2.4, 3.4, 4.4 (Switz.), available at <http://www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm>.

of the LC1 denial, the FSC affirmed,⁸⁹ holding the acquisition of rights in rem to movable property are governed by the law of the country where the property was located at the time the acquisition was derived, i.e. Italian law. The Swiss customers became the legal owners of the furniture before it was transported to Switzerland and, as a result, the transport must be regarded as an import of the customers' property into Switzerland. Because Italian law did not protect any furniture by copyright law during the relevant period, the acquisition of the furniture by Swiss customers did not constitute an infringement of Italian copyright law.

C. CHINA

According to press reports in February, the Deputy Director of the National Copyright Administration said that the proposed amendments to the People's Republic of China Copyright Law have been included in the State Council's legislative plan for the next five years.⁹⁰ Examples of some of the areas of concern are implementation of statutory license fees, textbooks, remuneration of creators, performance rights, and broadcasting rights. At this stage the National Copyright Administration is still working on preparing a first draft for consultation.

More than forty authors published an open letter of complaint that Baidu,⁹¹ a Chinese search engine, provided Internet users through Baidu Wenku (Library) a way to read and download their copyrighted works for free and without the authors' permission.⁹² Baidu Wenku is an open platform for online resource sharing. Users can read or download information for free, and all documents are provided via user uploads. The website has a disclaimer that shifts the responsibility for illegal postings to those who upload the documents. But the writers claimed that Baidu should bear responsibility for the illegal documents because it benefited from the popularity of the website.

Baidu relied on the safe-harbor provisions of the 2006 Regulation on Protection of the Right to Network Dissemination of Information.⁹³ Article 15 provides a notice-and-take-down system, but article 22 provides network service providers with a safe haven from liability if it meets several conditions, including that the service: (i) posted contact information; (ii) did not alter the work; and (iii) did not obtain direct economic benefit.

Negotiations between Baidu and the writers broke down over the issue of compensation to the writers, and the matter has caused the Supreme People's Court to consider issuing a judicial interpretation on the use of safe havens. The Deputy Director of the National Copyright Administration described the Baidu Wenku model as "not a good business

89. Bger, May 2, 2011, docket no. 4A_78/2011, ¶ 3.4 (Switz.), available at <http://www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm>.

90. "Copyright Law" Amendments Have Been Included in the "Second Five" Legislative Program (《著作权法》修订已列入“十二五”立法计划), JUDICIAL PROTECTION OF IPR IN CHINA (Feb. 27, 2011, 9:05 PM), <http://www.chinaiprlaw.cn/file/2011022718681.html>.

91. See BAIDU (百度) (Jan. 21, 2012), <http://www.baidu.com>.

92. See Mùróng Xuécun (慕容雪村), *This is Our Right* (这是我们的权利), SINABLOG.COM (Mar. 15, 2011, 12:19 PM), http://blog.sina.com.cn/s/blog_467a3a7f0100pqvs.html.

93. Xìnxì Wǎngluò Chuánbò Quán Bǎohù Tiáolì (信息网络传播权保护条例) [Information Network Transmission Right Protection Order] (promulgated by State Council, May 18, 2006, effective May 18, 2006), P.R.C. LAWS, Order No. 268 (China), available at http://law.pharmnet.com.cn/laws/detail_1544.html.

model.⁹⁴ The Office is concerned about the use of the safe haven in this manner and the issue has become a national issue of general interest. This issue will likely be considered when drafting amendments to the Copyright Law.

On May 10, Shanghai Luwan District People's Court found that Baidu had infringed the copyright of Shanda Literature, a subsidiary of Shanda Interactive Entertainment Limited.⁹⁵ The court ruled that Baidu knew of the existence of the infringement and thus could not rely on the safe-harbor exemption. Baidu did not remove the infringing works after being informed by Shanda. The court awarded damages of \$75,500 USD. The China Written Works Copyright Society stated this was "the first major victory for the publishing industry against Baidu."⁹⁶

D. RUSSIA

Russia completed the legislative commitments that it made in a 2006 bilateral agreement with the United States on protection and enforcement of IPRs by enacting:

amendments to Part IV of the Civil Code (governing intellectual property generally); (2) the Federal Law on Customs Regulation granting *ex officio* authority to customs officials; (3) amendments to the Law on Activity Licensing, which ensures that infringers cannot renew optical media production licenses; and (4) amendments to the Law on Circulation of Medicines to protect undisclosed test or other undisclosed data generated to obtain marketing approval.⁹⁷

In addition to these legislative reforms, Russia saw a decrease in copyright piracy in 2011.⁹⁸ The software industry reported a reduction in the number of pirated optical discs available in twenty-six markets, including large ones such as the Gorbushka market and the Rubin Trade Center in Moscow.⁹⁹ Among other developments with respect to copyright enforcement, authorities closed "down the operations of all optical disc plants engaging in production of pirated media located on" the sites of Russian state-owned restricted access regime enterprises (RARE).¹⁰⁰

Nevertheless, Russia remains on the annual Priority Watch List of the U.S. Trade Representative, due in large part to continuing concerns about piracy in the motion picture, television, and entertainment software industries.¹⁰¹ Enforcement varies greatly among regions; "numerous pay-per-download websites as well as cyberlockers, BitTorrent sites,

94. Tián Xianghua (田香花) & Xú Qiàn (徐倩), *National Copyright Administration: "Baidu Library" is Not a Good Model*, Guójiā Banquán Jú: "Baidu Wénkù" Shì Bùshì Yigè Hén Hao De Móshì (国家版权局: "百度文库" 是不是一个很好的模式), BEIJING YOUTH FIRST FINANCIAL DAILY (Apr. 22, 2011), available at <http://www.fclaw.com.cn/Details.asp?id=17532>.

95. Shèngdà Wénxué Sù Baidù Wénkù Qinquán àn Yìshèn Shèngsù (盛大文学诉百度文库侵权案一审胜诉) [Shanda Literature Library v. Baidu Infringement Case in Favor of First Instance], CAIXIN ONLINE, May 11, 2011, available at <http://business.caing.com/2011-05-11/100258112.html>.

96. Li Mao & Liu Linlin, *Baidu Beaten in Landmark Copyright Case*, GLOBAL TIMES, May 12, 2011, available at <http://business.globaltimes.cn/industries/2011-05/654167.html>.

97. U.S. TRADE REPRESENTATIVE, 2011 SPECIAL 301 REPORT, 6, 25 (Apr. 2011), available at www.ustr.gov/webfm_send/2841.

98. *Id.* at 25.

99. *Id.* at 26.

100. *Id.*

101. *Id.* at 2, 25.

and unauthorized music services, including services affiliated with social networking sites such as vKontakte, [continue to] reside in Russia,"¹⁰² and warehouses storing pirated CDs and DVDs remain on some government-controlled military-industrial sites. On the Internet, significant gaps remain between Russian law and enforcement efforts, leading to calls for legislation to address all forms of piracy over the Internet and to provide for the rapid removal of infringing content.¹⁰³

The need for copyright reform in Russia, according to the U.S. Trade Representative, lies principally in criminal enforcement actions with penalties to deter against infringing websites and the assignment of specially trained personnel to a specialized law enforcement unit within Department K of the Ministry of Internal Affairs (MVD).¹⁰⁴ In addition, concerns have been raised about Russia's accreditation process for collecting societies. Litigation involving the single organization accredited to collect royalties on behalf of all performers and record companies—"the All-Russia Organization for Intellectual Property (VOIS)—has introduced uncertainty regarding VOIS's status and the status of the accreditation process."¹⁰⁵

102. *Id.* at 26.

103. *Id.* at 25.

104. *Id.* at 26.

105. *Id.*