

## Canada's Trademark Changes

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141st Annual Meeting, Boston



# daily news

Sunday May 19, 2019

## A Beautiful Friendship: Bringing Marketing and Legal Together

Learning to communicate more effectively with one another can help marketers and lawyers better manage risk and reach their end goals faster. Saman Javed reports.

A lawyer and a marketing professional discussed ways that both parties can avoid pitfalls and challenges that can stem from divergent perspectives, in yesterday's Session **CSA21 Marketers Are from Mars, Lawyers Are from Venus: A Guide to Better Understanding and Improved Business Outcomes.**

David H. McDonald, Chief Trademark Counsel at Johnson & Johnson (USA), said that lawyers are often stereotyped by marketing teams as being too risk-averse, and so are

left out of the conversation until later stages in the development of a new idea or product.

"I think everyone in the room would agree we are our best selves as lawyers when we are brought in early and not seen as an approval gate or checkpoint," Mr. McDonald said.

James McCarthy, Partner at Norvell IP (USA), who moderated the session, said "lawyers and marketers communicate differently", but if they learn to communicate effectively, they will be more successful.



(L. to R.) James McCarthy, David H. McDonald, and Jennifer Faris Severns

Mr. McDonald said that for effective communication, the legal team should be invited to join the process from the "concept phase" of a product, rather than after creative development has progressed.

Jennifer Faris Severns, Chief Experience Officer of the American Marketing Association (USA), noted that in order to work together effectively, both marketers and lawyers must recognize that they are working toward the same goals.

"It's about knowing and respecting

that everyone is bringing their own expertise to the table," Ms. Severns said.

"I think what is important to remember is this is a process; it's goal alignment. We don't just simply say what the marketing goals are. The lawyer and marketer need to have a discussion and communicate what the overall goals are with their expertise," she said.

Ms. Severns suggested that marketers and lawyers adopt an "agile" way of working, where the legal and marketing risks associated

with a new product or

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## New Amendments to China's Trademark Law Crack Down on Bad-Faith Filing

China has adopted a Fourth Amendment to its Trademark Law, intensifying restrictions on bad-faith trademark filings.

China's legislature approved amendments to its Trademark Law on April 23, 2019, signifying that the Chinese trademark authority is taking a more serious view on the pernicious problem of bad-faith registration and stockpiling.

In all, the Standing Committee of the National People's Congress (PRC) approved amendments to eight laws, including the Trademark Law and the Anti-Unfair Competition Law (AUCF). The amendments became effective immediately upon announcement,

with the exception of the amendment to the Trademark Law, which will take effect on November 1, 2019.

The amended Trademark Law targets counterfeiting by allowing civil courts to award increased levels of punitive damages.

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## A Beautiful Friendship: Bringing Marketing and Legal Together (continued)

← 1 service are assessed at various points throughout the process, rather than at the end as a finished product.

“It’s understanding that this is an organic process that will constantly be changing with business needs,” she said.

Trademark filings are one of the key areas in which lawyers and marketers must work closely together.

According to Mr. McDonald, lawyers typically tend to push brands towards non-descriptive, arbitrary trademarks, which are more likely to secure protection. In contrast, marketers tend to prefer more descriptive marks, since their priority is to communicate what the product is to the consumer.

“I used to talk about this as a tension, but I don’t think that’s appropriate,” he said, noting that both parties should come together to decide what would be the best for the brand. “Pushing for a distinctive trademark doesn’t always make sense,” he added.”

Another area where lawyers and marketers must collaborate is in setting guidelines for protecting a brand.

For example, when creating a new domain name, a marketer may use search tools in the public domain, such as WHOIS, to check if a name is available.

Rather, Mr. McDonald said he encourages the in-house marketing teams at Johnson & Johnson to use private search tools. This is because some public tools sell search data; if a particular domain is searched by many



David H. McDonald

“Pushing for a distinctive trademark doesn’t always make sense.”

people and its popularity soars, it will likely be harder to acquire.

In general, it’s also important for both marketers and lawyers to let go of some traits that may hinder teamwork.

“Marketers and lawyers should work

in partnership,” he said.

“Lawyers have the ability to take in a lot of information, analyze it, and then give logical advice,” he said. However, he noted that this approach may sometimes convey a sense of “superiority or lack of empathy.”

“If our goal is to be seen as a partner, creating feelings of seniority defeats that purpose,” Mr. McDonald said.

He added that this issue also exists for marketers, who are just as much experts in their field as lawyers are in theirs.

Ms. Severn said that creatives in marketing teams “are very passionate about what they do,” and as a result “can come across as very protective or defensive of that.”

“Much of my day is putting out emotional fires where someone feels they were misheard,” she said.

The advice she gives to both marketers and lawyers is to always “assume positive intention.”

“People aren’t out to take away your expertise. Come to the table open and willing, and with a curiosity for understanding where the other person is coming from,” she said. ●

## Inside the INTA Political Action Committee

Attention INTA U.S. non-corporate members: Did you know that INTA has a PAC?

Everyone hears about INTA’s extensive advocacy efforts, but how does the Association’s voice actually get heard in a place like Washington, D.C. (USA)? Part of the answer is the **INTA Political Action Committee** (PAC). It’s a critical part of INTA’s U.S. government relations strategy.

Every political action committee in the U.S. exists to raise money and donate that money to candidates, but the INTA PAC puts a unique twist on the process. It raises money solely from contributions from eligible INTA members—members who are non-corporate and U.S. citizens; then, the

funds are used to support policy makers not based on their party affiliation, but on their interest in and ability to affect legislation that’s important to trademark owners and users.

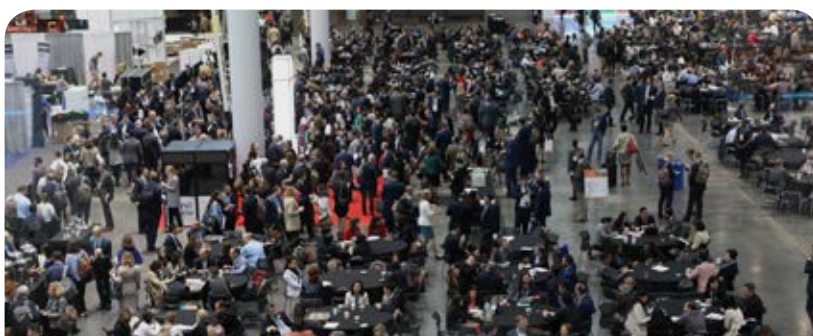
Therefore, the PAC contributions are an indispensable tool for INTA’s government relations staff to make key policy makers aware of the Association’s views on trademark and other issues related to intellectual property. ●

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# New Amendments to China's Trademark Law

## Crack Down on Bad-Faith Filing (continued)

1 The changes also tighten restrictions on trademark misconduct in several key ways, including allowing authorities to impose fines and penalties not only on bad-faith filers, but also on trademark agents.

The new policy of holding trademark agents responsible is in line with INTA's recommendation that the Chinese trademark authority introduce "a clear duty for trademark agents to confirm that, to the best of their knowledge, applications filed through the agency have not been filed in bad faith."

Under the new amendment, "bad faith" now constitutes practical grounds for use in examination, opposition, and invalidation proceedings. And for the first time, bad-faith actors—whether applying for trademarks or bringing up malicious lawsuits—will now be subject to administrative and judicial punishment.

The amended law also adds disincentives against trademark infringement by expanding the scope of destruction of infringing goods to include the tools and materials used to make such articles.

The approved changes will help to ensure a more consistent application of the law by formalizing what was already common practice in the courts in cases relating to bad-faith issues. This codification will equip brand owners with legal recourse, rather than providing mere guidance.

Previously, the Trademark Law required that "the principle of good faith" be upheld, and that

administrative departments "put an end to any practice that deceives consumers." But these constraints were not effectively applied in practice.

### Background to the Current Amendment

The last time the Chinese government approved an amendment to its Trademark Law was in 2013 (with the law becoming effective in 2014).

By 2018, the number of applications filed in China increased four-fold, from 1.8 million in 2013 to nearly 7.4 million, according to data published by the China National Intellectual Property Administration (CNIPA). This is nearly twice the number of trademark applications filed in all other intellectual property offices combined that same year.

Contributing to this rapid growth, the China Trademark Office (CTMO) had halved its official filing fees in 2017. In addition, the introduction of electronic filing made it significantly easier to file applications, particularly for local entities.

The CTMO on April 2, 2018, announced plans for the fourth revision of the Trademark Law, and invited public comments.

INTA submitted a written response on July 31, 2018, and also participated in discussions with other organizations and Chinese government agencies. On March 14, 2019, INTA submitted comments on the Draft Certain Provisions for Regulating Application for Trademark Registration

### The Bad-Faith Problem

In its comments to the proposed revision, INTA highlighted that "a growing concern for brand owners in China is the issue of bad-faith trademark registration."

One Chinese practitioner estimates that bad-faith applications may account for as many as one in three trademark applications filed in China

"We have seen squatters with 500 trademarks registered under one name. Often they are filed as soon as new brands are launched at London Fashion Week or Paris Fashion Week," says Gloria Wu, Partner at Kangxin Partners, P.C. (China). "The squatters are getting smarter and more sophisticated now, for example by filing applications for promising marks and then waiting to offer them to the brand owner."

Questionable behavior by some bad actors in China over the past few years has exacerbated the bad-faith problem. The low cost of applications enabled opportunistic filers to apply for hundreds or even thousands of

trademarks, and to file tactically using China's sub-class system.

The growth of social media and overseas travel has encouraged small Chinese entities to file trademark applications for overseas brands as soon as they are launched. "They often follow influencers on social media, and we have seen trademark applications filed literally a day after an influencer has posted," says Mirjam de Werd, Trademark Attorney at Abcor merkenbureau (the Netherlands), formerly trademark manager Asia-Pacific for Danone's Baby and Medical Nutrition Division.

Speculators have also become smarter. For example, says Elliot Papageorgiou, Head of Clyde & Co's China IP Group (China): "We increasingly see pirates offering to license the bad-faith trademark, rather than offering to sell it to the brand owner. Not only does this guarantee them a steady income stream, but it also enables them to control access to the market, and last but not least, the legitimate brand owner helps grow the 'valuation' of that mark by their continuing licence fees. Another tactic is to file an application for a trademark that is well-known for a product, such as 'tires,' for related services, such as 'garage or repair services.'"

### What Else Can Be Done?

While the newly approved revisions to the Trademark Law address some of the challenges posed by increased trademark applications, other issues may require practical changes, such as the following:

Clarify the definition of bad faith and the relevant terms in the Law, so examiners may be better able to

“ We have seen trademark applications filed literally a day after a [social media] influencer has posted. ”

Mirjam de Werd

recognize cases where there are clear bad-faith applications or squatting.

Require applicants to show intent to use. In one of its recommendations, INTA "supports the idea of strengthening use requirements in the trademark law and preventing 'deadwood' on the registry." Some practitioners have expressed concerns that this requirement would increase the workload of examiners and could lead to prolonged disputes over the authenticity, extent, and value of evidence submitted.

What remains to be seen is the examination criteria of "intention to use" and how to ensure that legitimate defensive filings by brand owners will not become collateral damage. On the same note, the question remains: how should trademark attorneys advise their clients to ensure the compliance with the Law without doing harm to themselves? ●

## A Short History of Trademark Law in China

- Trademark Law adopted August 23, 1982
- First Amendment February 22, 1993
- Second Amendment October 27, 2001
- Third Amendment August 30, 2013
- Fourth Amendment Approved April 23, 2019
- Fourth Amendment Effective as of November 1, 2019

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Gloria Wu

“ The squatters are getting smarter and more sophisticated now. ”



Elliot Papageorgiou

“ We increasingly see pirates offering to license the bad-faith trademark, rather than offering to sell it to the brand owner. ”

# Canada Prepares to Implement Its New Trademark Regime

Mesmin Pierre, Director General, Trademarks Branch at the Canadian Intellectual Property Office, explains how Canada is preparing for its June 17 target date to join three key IP agreements and implement major corresponding amendments to its trademark system.



As part of a push to fully modernize Canada's intellectual property (IP) system, three key IP treaties will enter into force in the country on June 17: the Singapore Treaty on the Law of Trademarks (the Singapore Treaty); the Madrid Protocol; and the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (the Nice Agreement).

Canada's government agreed to accede to these treaties in February 2014, and changes to the country's Trademarks Act that are necessary to facilitate that accession received royal assent on June 19, 2014. Additional amendments to the Patent Act, Trade-marks Act, and Industrial Design Act that will further modernize the IP system received royal assent on June 23, 2015 and will also take effect on June 17.

The goal of these changes is to provide businesses, especially Canadian businesses, with access to the global trademark system and to reduce bureaucracy and administrative burden, says Mesmin Pierre, Director General of the Trademarks Branch at the Canadian Intellectual Property Office (CIPO).

"Making the Canadian trademark system more robust and modern was guided by a commitment to simplify and harmonize and to ensure that the Register of Trademarks accurately reflects the Canadian marketplace," Mr. Pierre says.

CIPO worked hard to ensure that old requirements that unnecessarily delayed applications were struck down and notable amendments include:

- The introduction of new types of trademarks such as sound, scent, texture, and hologram;

“**Making the Canadian trademark system more robust and modern was guided by a commitment to simplify and harmonize.**”

- Greater flexibility in correcting errors on registrations;
- Simplified and streamlined application requirements;
- Reduced evidentiary requirements in certain cases when transferring ownership;
- The ability to divide applications and merge registrations;
- Enhancements to the scope of responsibility for trademark agents;
- The ability to refuse an application for registration on the grounds that it is not inherently distinctive; and
- The possibility to file international applications through the Madrid System.

## Getting Ready for Madrid

One of the biggest changes coming next month will be the country's accession to the Madrid Protocol. Canada engaged in talks with stakeholders on the topic for nearly five years before moving forward.

To ensure there is adequate capacity after Canada joins the Madrid Protocol, CIPO has a plan to gradually hire a total of 40 new examiners, says Mr. Pierre. "This plan entails recruiting examiners with higher credentials and relevant work experience at the outset and nurturing that talent through

continuous learning and development opportunities," he adds.

Mr. Pierre hopes this approach will result in marked improvements in the quality of the examination process and in timeliness. "The turnaround times stakeholders currently experience will gradually decrease," he says.

The Madrid Protocol will allow Canadian businesses to apply for trademark protection in multiple countries via one application, through one office—the World Intellectual Property Organization (WIPO), and for one set fee, paid in one currency. This will lead to filing efficiencies, administrative savings, and reduced compliance costs for businesses, Mr. Pierre says.

Additionally, the Nice Agreement will ensure that applicants and businesses have a consistent classification system, which will make global trademark searching easier. Mr. Pierre is hopeful this will, in turn, "result in increased investment and foreign market access for Canadian firms, greater competitiveness, and reduced entry barriers."

## Educating the Trademark Community

With June 17 not far away, CIPO has been engaging with stakeholders to educate them on the sweeping changes, and to solicit their feedback. "We want to make sure that our tools and information products meet their needs," Mr. Pierre says.

Specifically, once the Regulations were finalized, CIPO drafted practice notices to clarify its position on a variety of topics. The Office held practice notice working group sessions, bringing together CIPO's Trademarks Branch Policy Team and experienced professionals in the

trademark community over full-day sessions in key Canadian cities.

In addition, earlier this year, CIPO hosted in-person full-day information sessions in Calgary, Montreal, Ottawa, Toronto, and Vancouver on the modernized trademarks legislative framework.

CIPO has also created a resource page on its website that provides draft practice notices and guides outlining new processes and procedures that will apply on June 17. This page includes information on topics such as nontraditional marks, describing color, and correcting obvious errors on a registration, as well as material on the Madrid Protocol and a guide to "Demystifying the transition."

## Revised Fees and IT Updates

Some of the changes required to implement the treaties have affected the existing trademark fee structure, Mr. Pierre says. The application and registration fees have been merged "in order to minimize the burden and streamline the application process."

The previous system required applicants to pay one filing fee when submitting their application to CIPO and another at the time the certificate of registration was ready to be issued. This resulted in delays in registration and added administrative burden.

The new system charges a fee for each individual Nice class to prevent overly broad filings and bad faith applications, Mr. Pierre says.

"Currently, the average trademark application contains two or three classes, meaning that, going forward, 67 percent of applicants (i.e., those who file applications with 1 and 2 Nice classes) would pay CA\$330 and

CAS\$430, respectively, when filing online, as opposed to the current fee of CAS\$450," he explains.

Another boon for users will be the necessary updates CIPO has made to its internal IT platforms, a process that has included modernization of many of the Office's online platforms to make them more user-friendly and support streamlined interaction with the Office, Mr. Pierre says.

The IT changes also include adapting to WIPO systems, namely the development of the Madrid Console, which will support the international messaging required for the Madrid Protocol between WIPO and CIPO.

"The main purpose of the Madrid Console is to allow designated users, namely CIPO staff, to interact with the Madrid Workflow Engine hosted by WIPO to view queues of pending tasks, to 'claim' pending tasks, to complete tasks, and to track the status of transactions from WIPO to CIPO and from CIPO to WIPO," Mr. Pierre says.

He adds that the Office will continue to refine and perfect its IT tools after June 17, as it receives additional feedback.

**Bringing Staff Up to Speed**

CIPO has been following a detailed plan from day one that will ensure staff have the necessary knowledge and

understanding of the new legislative framework, according to Mr. Pierre. All staff have received a high-level overview of the legislative changes as they relate to the domestic trademark framework and a high-level overview of the Madrid Protocol.

Examiners have received additional detailed information on topics including how to examine non-traditional trademarks; how to examine applications that have been divided; how to examine for confusion, distinctiveness, and utilitarian function; and the meaning and implication of the transitional provisions.

Operations staff, meanwhile, have received training on the new processes and procedures, such as the changes to the internal IT platforms.

Because the implementation period for the new legislative framework will extend beyond June 17, the Office will develop refresher courses on complex topics, establish working groups to tackle certain operational or process-based questions that may arise, and bolster an online-based information forum so that examiners have relevant and timely information to support their work.

CIPO has also established a Madrid Expert Unit, comprising a small number of individuals who have been trained exclusively on the requirements



Mesmin Pierre

“Our work to modernize not only our trademark legislative framework, but the way we conduct business, is far from over.”

of the Madrid Protocol. "This unit will be responsible for processing all the transactions related to the Madrid Protocol to ensure consistency of approach and will grow in response to the number of designations to Canada," Mr. Pierre says.

**Beyond the Deadline**

"Although June 17 is only a few weeks away, our work to modernize not only our trademark legislative framework, but the way we conduct business, is far from over," Mr. Pierre says. "Our goal is to become a premier IP office."

Key to this larger goal will be close engagement with other IP offices, WIPO, and associations such as INTA, he adds. CIPO's goal is to continue to improve efficiency and communication between examiners and trademark practitioners, for which collaboration is key.

"Collaborating with other offices and associations has helped us address gaps and offer solutions and will help us remain current and relevant in a constantly changing world," Mr. Pierre says.

"We have been fortunate to have such great working relationships with our stakeholders and partners, including INTA. We believe that nurturing those relationships will only prove more fruitful in the years to come." ●



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22/F, Great Eagle Center, 23 Harbor Road, Wanchai, Hong Kong  
Tel: (852) 2828 4688 Fax: (852) 2827 1018  
Website: www.cpahkltd.com  
E-mail: patent@cpahkltd.com  
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# Effective Data Management for Trademark Attorneys

New technologies combined with effective business strategies can help lawyers make the most of their data, as Rory O'Neill finds out.

The transformative potential of rapidly-developing technologies, such as artificial intelligence (AI), to alter the data management landscape was the subject of debate at yesterday's Session **CSA23 Beyond the Trademark Portfolio: 360° Data Management**.

Moderator Chris Kenneally, Director, Copyright Clearance Center, Inc. (USA), framed the discussion in the context of the rapid growth of data in recent years. "Of the world's vast collection of data, 90 percent came into existence in just the last two years," Mr. Kenneally said.

According to Sandra Mau, Vice President at Compumark (USA), "all that technology can really do is try to fuse as much data as possible – to be more of a tool to help users make

decisions rather than making their decisions for them."

Ms. Mau, founder of TrademarkVision, which was acquired by Compumark last year, observed that AI technology (such as that which underpins her company's products) has already made a radical impact on data management in intellectual property (IP), particularly with respect to trademark analysis.

When Ms. Mau first joined the IP industry, it seemed that "trademark attorneys traditionally thought about their portfolio as just word marks, which were traditionally 90 percent of the work that they did."

Now, however, "forty percent of trademarks registered globally contain images," she said, as AI-powered

trademark search engines have made it far easier to process different kinds of marks.

How AI is deployed, however, is crucial in determining whether it is a help or a hindrance. This was the view of Christopher Chaudoir, Senior Counsel at Chevron Corporation (USA), who argued that "unless [the technology] is seamless, and unless it's really easy to use, everyone will fall back" to using what they know.

However, Mr. Chaudoir is keen to embrace technology and its advantages in managing large amounts of data, including sizeable trademark portfolios. Chevron, he said, owns 14,000 trademark registrations in 187 countries, but still relies on a "hybrid system" largely dependent on email communications.

"We're in a transition at the moment to develop systems that will allow us to manage all of this data in a more uniform and more customized manner that doesn't involve simply emailing back and forth," Mr. Chaudoir said.

Babis Marmanis, Vice President and Chief Technology Officer at Copyright

“

Of the world's vast collection of data, 90 percent came into existence in just the last two years.

”

Chris Kenneally

Clearance Center, Inc. (USA), stressed the importance of utilizing technology as part of an "overarching strategy" for managing data and workflow in order to fully realize its potential.

"You can always achieve tactical wins by applying this technology or that technology to a specific function," Mr. Marmanis said. More important is how to go about "integrating all of that in a way that respects all business processes and makes the system work effectively and more efficiently," he suggested.

Ultimately, Mr. Marmanis said, there is no "single blueprint" when it comes to determining how much of a driving role technology should play in data management and problem solving.

"The solution for your organization is unique to your organization," he said. ●



(L. to R.) Babis Marmanis, Christopher Chaudoir, Sandra Mau, and Chris Kenneally



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# Talkin' Bout a Revolution

The rise of 3D printing has been a hot topic in intellectual property circles for years, but the advent of 4D printing could increase the opportunities and threats significantly, as Sarah Morgan finds out.



(L. to R.) Laura Winston, Marc Trachtenberg, Carolyn Knecht, and Dr. Julian Potter

The advent of 4D printing has begun—and it will change manufacturing as we know it, according to Carolyn Knecht, Associate General Counsel, Senior Director - Trademarks, Copyrights and Corporate Marketing at HP Inc. (USA).

Ms. Knecht, who spoke at **CSA26 4D Printing: How Is 4D Printing Revolutionizing the World in Which We Live?** yesterday, called 4D printing the “next industrial revolution.”

But what exactly is 4D printing? It's the next evolutionary step up from 3D printing. This new process uses “programmable materials” to print the 3D object, according to Laura Winston, Principal of Offit Kurman Attorneys At Law (USA) and panel moderator. The material can then be transformed into another structure through the influence of external stimuli, such as heat, water, or pressure.

According to statistics provided by MarketsandMarkets (USA) and cited by Ms. Knecht, the market for 4D printing is expected to reach US\$64.5 million by 2019, and more than US\$537 million by 2025.

Population growth, rapid urbanization, and hyperglobalization are just some of the many factors fueling the growth of the 3D and 4D printing

industries, she added. “Government and technology companies are looking at 3D and 4D printing to help address some of these issues ... It's going to change manufacturing as we know it.”

Marc Trachtenberg, Shareholder at Greenberg Traurig, LLP (USA), said that to understand 4D printing, it's imperative to first understand 3D printing.

“There's been a lot of attention in the media recently but [3D printing] is not new. The technology was first invented in the 1980s,” he said. Since then, technological capabilities have expanded dramatically. This includes printing 3D structures with sugar, chocolate, and living cells, and creating new materials through 3D printing, he added.

3D printing is being used across virtually every industry and its potential is “almost unlimited,” he said, noting that the global market for 3D printing in the medical applications market is expected to reach US\$965.5 million by 2019.

For example, in 2015, the U.S. Food and Drug Administration (FDA) approved the first 3D-printed prescription drug, Spritam, which is used to treat partial onset seizures. The technology “wasn't used for cost

purposes, but to enable [the drug manufacturer] to change the structure of the pill so it tastes better and is easily digestible by the body,” Mr. Trachtenberg said.

However, the 4D printing space is still evolving. “Most commercial printers can only print in one material, which limits design choices, but keep in mind that's where we were 10 years ago with 3D printing,” he said.

Ms. Knecht added, “4D printing is primarily a materials play. You're going to be able to control the chemical qualities [of the printed object].”

3D printer manufacturers such as HP Inc. will begin offering their own lines of materials, she added. Currently, HP Inc. is working with big chemical companies to co-brand or brand materials, to ensure control quality in the supply chain.

### Risks and Benefits

The same attributes that make 3D printing desirable to businesses can also facilitate infringement and make the technology attractive to counterfeiters, Mr. Trachtenberg warned, adding that vulnerabilities stem from the low cost of entry—which keeps getting lower—and the reliance on digital files and Internet connectivity.

“4D printing is primarily a materials play. You're going to be able to control the chemical qualities [of the printed object].”

Carolyn Knecht

At its worst, poisoning of the supply chain (such as where an attacker inserts problematic instructions, potentially creating malformed parts in machinery) could result in physical harm or even loss of life.

However, Ms. Knecht said: “We don't want fear of infringement to necessarily limit the progress of this industry as there are so many possibilities of what might happen.”

Dr. Julian Potter, Owner at WP Thompson and Representative of International Technology Law Association (ITECHLaw) (United Kingdom), cited the music industry as an example of a sector that needed to adapt to new technologies and the potential infringement that came with it.

“The [music and movie industry] both found that when you digitize something, the content can be reliably and accurately reproduced and very easily distributed,” he said. “That shifted the business paradigm, and it really wasn't a happy experience for the creators in that industry.”

With new developments, such as 3D and 4D printing, changes need to take place to avoid a repeat of this situation, including any reluctance to adopt a new business model, said Mr. Potter.

He concluded: “You cannot stop the tide of technological advancement. A safe space is necessary so creators will release their works into this new business paradigm-shifted world. We have to make sure the legal environment to manage and control exploitation doesn't constrain the use of these works.” ●

## 85 AÑOS

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Juan Carlos Suarez	jcsuarez@goodrichriquelme.com	(5255) 5207 9261
Julio Cesar Prieto	jcprieto@goodrichriquelme.com	(5255) 5207 8183

**e-mail: [mailcentral@goodrichriquelme.com](mailto:mailcentral@goodrichriquelme.com) website: [www.goodrichriquelme.com](http://www.goodrichriquelme.com)**

Paseo de la Reforma 265, M2 Col. y Del. Cuauhtemoc 06500. Ciudad de México. Tel. (5255) 5533 0040 Fax. (5255) 5207 3150

# A Snapshot of Legislative Changes from Around the World

The legal framework governing intellectual property has changed in several countries in the past 12 months. Saman Javed reports on some of the important developments.

## Albania

In force since June 7, 2018, Albania's new trademark regulation is part of a wider revision to the country's Industrial Property Law, which has been in effect since March 2017. The trademark regulation introduced several changes, including clarifying the definitions of traditional and nontraditional trademarks and establishing the rules for oppositions and cancellation actions held before Albania's General Directorate of Industrial Property (GDIP).

Elvin Lako, General Director of the GDIP (Albania), calls the law "the most important reform in the history of industrial property protection in the Republic of Albania." It was developed in collaboration with the World Intellectual Property Organization, the European Intellectual Property Office (EUIPO), the European Patent Office, and the European Commission.

Mr. Lako says the changes have



Elvin Lako

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(The law is) the most important reform in the history of industrial property protection in the Republic of Albania.

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improved the application and registration procedures as well as the GDIP's quality of service by increasing the level of technical assistance available to applicants throughout the registration process. Additionally, the reforms establish a legal definition of "well-known trademarks" in the country, provisions for online filing, and determine the *ex officio* competencies of the GDIP.

The changes that have worked best in practice are the opposition and cancellation proceedings, suggests Melina Nika, Trademark and Patent Agent at PETOŠEVIĆ (Albania). They offer a better and faster procedure than that of the courts, where these proceedings were handled previously, she explains. Entities seeking to cancel and/or oppose a trademark can cite grounds such as non-use and bad faith, as well as absolute grounds.

Dragana Lehocki, Attorney at Law at ZMP Zivko Mijatovic and Partners (Serbia), agrees that the changes are making a difference. "The activity and operation of the GDIP has recently improved in quality and efficiency," she says.

However, trademark owners face problems in enforcing their rights, because despite the 2018 trademark regulation governing the Market Surveillance Inspectorate (a government agency which can confiscate intellectual property IP-infringing goods and fine the seller) this body is not fully operational yet since the relevant secondary legal provisions have not been drafted, Ms. Nika explains.

Ms. Nika provides some tips for trademark owners seeking to understand the new regulation. First, since registration of a mark in black and white may not protect the mark if it is used in color, "to avoid potential disputes regarding the proper use of a mark, we recommend registering the mark as used (with a color claim),"

she says. Second, class headings cover only the goods or services under the literal meaning of the respective class headings, and not the entire list of goods/services included in that particular class. Since the specification of goods/services is required and broad terms are not acceptable, Ms. Nika recommends specifying and listing all goods/services of interest.

## Argentina

Argentina's Instituto Nacional de la Propiedad Industrial (INPI) passed legislative changes in July 2018 that established a new trademark opposition system. The revamp was significant largely because opposition proceedings are now handled by INPI rather than by the courts.

Under the new regime, a "cooling off" period comes into effect for up to three months from the date a trademark applicant has been notified of the opposition. The parties are

encouraged to negotiate a settlement during this time. If they don't, the opponent has to file the official fee—PS 8,500 (US \$228)—to formally initiate a case, with both sides given the chance to submit their arguments.

The parties can appeal a decision of INPI to the Federal Courts of Appeals, and the office itself is not bound by any agreement between the parties, whether struck before or after the proceeding has begun.

Jacobo Cohen Imach, Senior Vice President and General Counsel at Mercadolibre.com (Argentina), says the changes to the opposition procedure will "have the strongest impact on practice," but that their efficacy can't be judged "until the first decisions are taken" under the new regime.

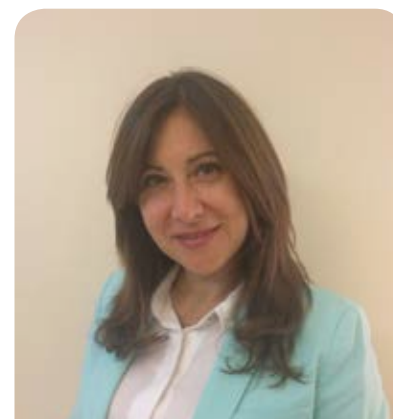
Pablo Armando, Lawyer at Noetinger Armando Abogados (Argentina), says one of the biggest challenges for opponents is when a trademark applicant has "lost interest" in its application, most likely because there is an opposition against it or because the party no longer wants the mark.

"In those cases, the opponents are compelled to submit the opposition to a decision because the applicants cannot be reached or do not want to formally withdraw their applications," Mr. Armando explains. "In these particular cases, the system has generated a new unbalance between the parties as the applicants are not requested to reply to the opposition or pay additional fees."

Despite these circumstances, if an INPI examiner rules against the opposition, the upshot will be that the mark matures to registration.

For applicants, one of the biggest difficulties is the great delay in obtaining the registration of opposed applications, especially those filed in 2016 and 2017, Mr. Armando adds.

On the plus side, Argentina's new opposition system is now very similar to that of many regimes around the world, even if it is still too early to



Alejandra Aoun

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The new system should greatly reduce the time taken to resolve oppositions, to half the approximately five years currently required.

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Momany Yaganagi

**“Criminal offenses related to IP now only need to be intentional to warrant criminal prosecution, whereas previously a commercial purpose was also required.”**

analyze fully how well it is working in practice, he says.

Alejandra Aoun, Director of Estudio Aoun (Argentina), says that the new system should greatly reduce the time taken to resolve oppositions, to half the approximately five years currently required.

She adds that moves to enable online filing and digitalization should “speed up trademark proceedings and make them dynamic,” which will benefit rights holders in the form of speed and legal certainty.

**Laos**

The country’s National Assembly approved new amendments to the Intellectual Property Law in Laos in December 2017, which took effect in June 2018. The amendments cover a range of new provisions, including recognizing 3D images and animations as trademarks, changing the start of the protection term from the date of filing rather than from the date of registration, and allowing oppositions from third parties within 60 days of publication of a trademark.

“These are significant changes that are positive and highly effective” in ensuring the rights of trademark holders and third parties, says Nguyen Hoa Binh, Co-Founding Partner at Daitin & Associates Co. Ltd. (Vietnam).

One of the key benefits is that publication now occurs after preliminary examination rather than at registration, which means brand owners have the opportunity to file oppositions before protection has been granted, he says.

Momany Yaganagi, Managing Director at Lao Interconsult Co. Ltd. (Laos), agrees that the changes give third parties greater scope to protect their marks in opposition proceedings.

She also notes that criminal offenses related to IP now only need to be intentional to warrant criminal prosecution, whereas previously a commercial purpose was also required.

**Malawi**

It took more than 60 years for Malawi to make significant revisions to its trademark law, but in 2016, it did just that. Three years later, the Trademarks Act, 2018 is now in force, offering trademark owners a system that is harmonized with international norms.

Under the new legislation, trademarks can be cancelled after five years of non-use, counterfeiting is a criminal offense, and “non-visual signs” can be protected as long as they are sufficiently described in a clear, precise, intelligible, and objective manner and are capable of being distinctive.

A further notable change confirms that trademarks designating Malawi that are filed through the African Regional Intellectual Property Organization (ARIPO) have legal effect and can be enforced in the country. Although Malawi had been a signatory of the Banjul Protocol, which allows ARIPO to handle trademark applications ultimately destined for individual member states, it had never formally incorporated the treaty into its national law.

Inês Monteiro Alves, Legal Manager at Inventa International (Portugal), which has offices in Africa, says it’s significant that Malawi now has a trademark law that encourages foreign investment.

“It harmonizes the protection of trademarks and provides legal certainty to stakeholders who are interested in investing in Malawi,” she says. “Malawi is, from a strategic point of view, a country of commercial interest,



Inês Monteiro Alves

**“Malawi is, from a strategic point of view, a country of commercial interest, as it borders with Mozambique, Tanzania, and Zambia.”**



Chadd Concepcion

**“My major concern is the transition of the existing trademarks into the new registration system.”**

as it borders with Mozambique, Tanzania, and Zambia, which is why having a law that allows for a more efficient protection of trademarks is so important for foreign investment.”

**Myanmar**

Myanmar ushered in important changes to its trademark regime in January 2019. The new trademark law has introduced a first-to-file system, which replaces the previous regime based on prior use. It also allows oppositions and cancellations for the first time, and provides more detailed guidelines on registrability of marks, among other changes.

According to Chadd Concepcion, Senior Associate at Baker & McKenzie Limited (Myanmar), the reforms on registrability and oppositions and cancellations are the most beneficial.

“The trademark prosecution process is entirely new to Myanmar, so it is novel to have oppositions and cancellation actions dealt with on the administrative level. These can therefore be considered groundbreaking changes never before introduced in Myanmar,” he explains.

However, he admits, the benefits may take time to be realized. “My major concern is the transition of the existing trademarks into the new registration system, and this should be specifically addressed,” he says.

“I firmly believe that not having any transition procedure will be immensely problematic and may potentially make the entire re-registration process unmanageable. Without it, everyone will want to be the first to file, and I struggle to understand how that would work in practice.”

There is a compelling need to educate the public and businesses and provide training for examiners to try to head off these challenges, says Mr. Concepcion.

INTA has been communicating with relevant IP officials, and plans to conduct trainings and awareness with officials in Myanmar on trademark law and practice.

**Romania**

In Romania, revisions to the country’s Trademarks Law passed to the Romanian Senate for review on April 23, 2019. The revisions are designed to transpose the provisions of the EU Trade Mark Directive into local law, including abolishing the requirement for graphical representation of signs, allowing distinctive character acquired after filing to serve as a defense against refusal or cancellation on absolute grounds, and aligning the registration procedures to those practiced by the EUIPO. This last change permits oppositions after the substantive examination is finalized, rather than when oppositions are filed during the examination.

Ana-Maria Baciu, Partner at Nestor Nestor Diculescu Kingston Petersen IP COUNSELING (Romania), notes that because the legislation is still under review it is impossible to comment on their practical effects.

However, to the extent the legislation mirrors the EU Trade Mark Directive, the changes “are welcomed and hoped to have a beneficial impact on the needs of rights holders to protect and enforce a more diverse palette of signs,” she says.

One other major boon for rights holders should come in the form of new administrative powers for the State Office for Inventions and Trademarks (OSIM), which will handle invalidity and cancellation proceedings that are currently dealt with before the Bucharest Court of Law. This should speed up these proceedings, Ms. Baciu adds. ●



Ana-Maria Baciu

**“ (Changes) are welcomed and hoped to have a beneficial impact on the needs of rights holders to protect and enforce a more diverse palette of signs.”**

# A Look at Brand Restrictions After the World Trade Organization Ruling

As brand restrictions emerge in more countries and across industries, including recent developments in Canada, Chile, and South Africa, Paul Kilmer, Partner-Intellectual Property Group at Holland & Knight LLP (USA), and Vice Chair of the Emerging Issues Committee and member of the North America Global Advisory Council, shares how INTA is taking a stand on this issue.

## How did INTA approach the World Trade Organization (WTO) Reports of the Panel ruling in June 2018 that upheld Australia's law on tobacco plain packaging?

We were looking for nuances in the decision that might be useful with regards to plain packaging legislation covering types of products. I think there were some such nuances. For example, the decision found that plain packaging is something that the WTO can review and is not left exclusively to states.

One question the panel had to address was whether plain packaging was an "encumbrance" under Article 20 of GATT/TRIPs—the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs negotiated during the Uruguay Round of the General Agreement on Tariffs and Trade [GATT]). The Australian government felt it was not, but fortunately the WTO agreed with INTA that a government's removal of trademarks and elements of trade dress entirely from packaging was an encumbrance. However, it then put forward a balancing test, and held that the Australian government had given sufficient reasons for implementing the legislation.

In an amicus curiae brief focusing on Article 20, [which INTA submitted to the WTO Appellate Body Secretariat on January 10, 2019], INTA subsequently argued that merely giving reasons for plain packaging restrictions is insufficient, and there should be strong supporting evidence that the restriction actually results in the health benefits claimed. That means quantitative as well as qualitative studies. As a matter of fact, we cannot find evidence that plain packaging has been effective; the

studies available now actually indicate the opposite. There is also evidence that plain packaging increases trade in counterfeiting, which we have already seen in Europe.

One aspect of the ruling that I found particularly troubling was that the WTO panel shifted the burden of proof to the states challenging the legislation, rather than the Australian government. That seems unfair. How is the government of Honduras, for example, supposed to prove that plain packaging is ineffective in Australia?

## When is the appeal expected to be heard?

There are several complicating factors. It is supposed to be done in 90 days after the appeal is filed, but the WTO is notoriously slow in implementing these appeals because of its limited resources. We probably will not see a decision for at least a year, if then.

## What other product types are coming under scrutiny?

The toe in the door was in South Africa where infant nutritional supplements could no longer be marketed with pictures of infants, since the government had concluded that removing the images would make breastfeeding more popular.

We have also seen rules affecting sugary and salty snacks, and breakfast cereals. In Chile, they are looking at a proposal that will compel pharmaceutical companies either to give a license to generics or to use the generic name more prominently once a product goes off-patent. There are all kinds of proposals being made throughout the world to try to influence consumer behavior, but none is supported by a quantitative study.



Paul Kilmer



The WTO panel shifted the burden of proof to the states challenging the legislation, rather than the Australian government.



## What else has INTA been doing on this issue?

We have made submissions to numerous governments that have tried to implement similar brand restrictions, emphasizing the importance of conducting competent regulatory impact assessments and arguing that elements of the WTO decision should be applied while others should be rejected.

There are also arguments based on national law, such as freedom of expression, that indicate that governments don't have an absolute free hand to legislate on what should be on a company's packaging. We're

doing a number of events globally, including panel discussions, seminars, and virtual debates to educate both brand professionals and government officials.

INTA's Emerging Issues Committee has a Brand Restrictions Subcommittee that is reviewing and cataloging governments' proposals for limiting the use of trademarks, as well as scrutinizing relevant case law and other tribunal decisions for "gems" that can assist our efforts in defeating overly restrictive legislation and regulation. The Association is also partnering with other international organizations in order to strengthen its impact with governments that are considering brand restrictions.

## What impact has INTA had?

We have had some impact, and some countries are re-formulating or peeling back their ideas about brand restrictions. Health regulators and IP officials regularly attend INTA brand restriction discussions, which is a positive sign.

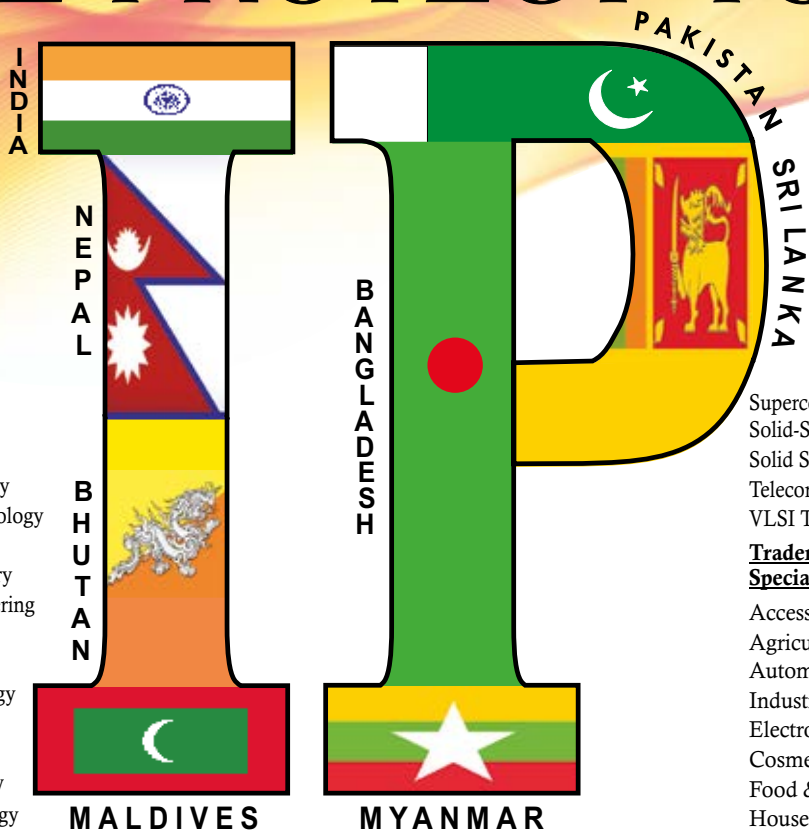
We will continue to contest brand restrictions in order to preserve the ability of brand owners to use symbols to sell their products and distinguish them from those of their competitors. It is important to recognize there is a net public benefit of branding. Branding represents a level of quality, and removing that means taking information away from consumers and limiting their ability to make choices. ●

Session CW21 Advertising and Branding Restrictions takes place on Wednesday (11:45 am—1:00 pm) in 210 AB

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# Brexit: A Complicated Picture

The United Kingdom's withdrawal from the European Union has implications for trademark holders worldwide. Peter Scott reports on the latest developments.

Brexit has dominated the political landscapes in the United Kingdom and the European Union since June 2016, when the UK voted to leave the European Union. If and when the UK does leave the EU, there will be a shakeup of the political status quo and an impact on the legal regime in the UK and the EU, with trademarks being one area subject to change.

The UK intends for the European Union (Withdrawal) Act 2018 to come into force on the date of exit, which will repeal the European Communities Act 1972. UK Parliament has also had the power to create secondary pieces of legislation, called statutory instruments (SIs), to translate the current EU legislation into UK law and address deficiencies.

The current position as of the date of publication is that the European Council (27 EU Heads of states and governments) has agreed to extend the Article 50 withdrawal period until October 31, 2019 at the latest, but the UK may leave earlier if the UK Parliament approves the current version of the Withdrawal Agreement before then.

There are three potential outcomes of the process still available:

- A so-called "deal" Brexit, with the Withdrawal Agreement having been approved by the UK Parliament before October 31 (if no request for extension is made or if one is made but not granted), leading to a transitional (implementation) period until the end of 2020.
- A so-called "no-deal Brexit" in which there would be no deal agreed between the two parties and no transition period, and in which EU primary and secondary legislation would cease to apply in the UK from the date of exit (currently October 31 by automatic operation of law).
- A revocation of Article 50 leading to the UK remaining a member of the EU on its current terms. The Court of Justice of the European Union (CJEU) confirmed in December 2018 that the UK can unilaterally revoke Article 50 at any time before it leaves the EU.

As David Stone, Partner at Allen & Overy (United Kingdom), notes, the UK government's approach has always been to try to provide for "business as usual" the day after Brexit.

"SIs will amend the main pieces of UK legislation (e.g., the UK Trade Marks Act 1994) to ensure that the legislation works correctly outside of the EU system on the day after Brexit," he adds.

If and when the UK leaves the EU without a deal or after the agreed transitional period, all previous rulings by the CJEU will carry the same precedential weight as UK Supreme Court rulings. Parties will therefore need to take cases all the way to the Supreme Court in order to overturn their reasoning, "which currently doesn't happen very often in trademark and design cases," says Mr. Stone.

But British courts will not need to follow CJEU decisions handed down after exit, although they can choose to if they wish. Mr. Stone notes that UK courts already take note of decisions of other foreign courts (e.g., those in the United States and Australia) without their having any binding effect; CJEU rulings will presumably be treated in a similar way.

"I'm sure the UK courts will continue to be aware of how EU law is developing but they will be able to choose whether UK law should follow," he adds.

"There are many areas of IP law where the UK approach aligns with that of the CJEU, but some other areas, such as functions of a trademark and unfair advantage, where the courts have

previously expressed some reluctance to follow the CJEU position."

The UK Intellectual Property Office (UKIPO) has been preparing for all potential Brexit outcomes. "We understand that businesses want certainty at this time," says Simon Haikney, Acting Divisional Director, Tribunal, Trade Marks and Designs at the UKIPO. "When the UK voted to leave the European Union in June 2016, the UKIPO undertook to ensure that rights holders would not lose the protection afforded to them in the UK by any EU registered right, even if we were to leave the EU without a deal."

To that end, he explains that the Withdrawal Agreement contains "important transitional provisions for intellectual property." In addition, the UK government set out a framework for the UK's future relationship with the EU through a White Paper published in July 2018 and the EU-UK joint Political Declaration on the future relationship, which forms part of the agreement that has been negotiated.

"With respect to intellectual property, the Political Declaration sets out the UK and EU's intention to establish a mechanism for cooperation and exchange of information on intellectual property issues of mutual interest, such as respective approaches and processes regarding trademarks," he explains.

To prepare for a potential "no-deal" scenario, Mr. Haikney says that "the government has been implementing a significant program of work to ensure that the UK is prepared to leave the EU."

Specifically regarding trademarks, this has resulted in the introduction

of The Trade Marks (Amendment etc.) (EU Exit) Regulations 2019.

"These regulations will ensure that the property rights in all existing registered EU trademarks will continue to be protected and enforceable in the UK by providing a comparable trademark registered in the UK," Mr. Haikney explains.

These new UK equivalent rights will come into force at the point of the UK's exit from the EU. "The new UK right will be provided with minimal administrative burden and at no cost to the original holder [and] the trademark will then be treated as if it had been applied for and registered under UK law, he says.

Chris McLeod, Partner at Elkington & Fife LLP (United Kingdom), says the UKIPO has "done its best to allay



Simon Haikney

“We understand that businesses want certainty at this time.”

concerns," and that the main challenges for rights owners post-Brexit would be "increased costs due to the need for separate registration and enforcement" as well as the "loss of single market benefits."

Many companies have been mitigating the potential risks of Brexit by filing trademark and design applications both at the EU Intellectual Property Office and in the UK already, according to Mr. McLeod. "I would say that this is not strictly necessary," he suggests, "although the relatively low additional costs are easy to justify in the context of removing uncertainty." ●

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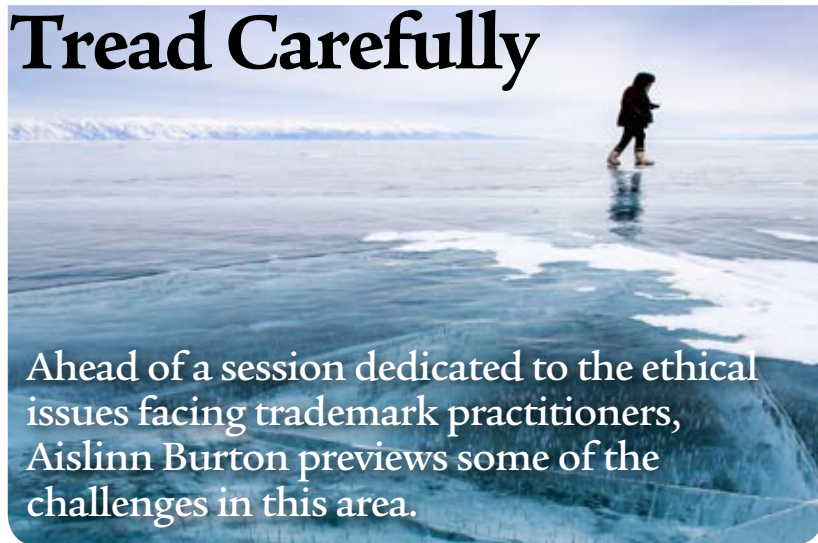
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# Ethics and Trademark Law:

## Tread Carefully



Ahead of a session dedicated to the ethical issues facing trademark practitioners, Aislinn Burton previews some of the challenges in this area.

There's no doubt that lawyers all over the world face ethical conundrums in their day-to-day practice, but for trademark practitioners, the challenges can be unusual, especially because ethical mishaps can cause a major public embarrassment due to the brand-central nature of trademark work.

On Sunday, May 19, 2:30 pm to 3:45 pm, the vast range of ethical issues facing trademark lawyers will be explored in **CSU54 Ethics in the Practice of Trademark Law**, from

confidentiality, to conflicts of interest (both legal and business), to the use of private investigators.

Philip Furgang, Partner at Furgang & Adwar LLP (USA), who will be moderating the session, says: "The panel will opine on ethical issues that arise when representing celebrities; the disqualification of counsel in U.S. litigation arising out of allegations of questionable ethical conduct; and ethical considerations that arise internationally in cross-border representation."

Darryl Cohen, Partner at Cohen, Cooper, Estep & Allen LLC (USA), says that then you're protecting high-profile, well-known personalities, image is everything, so it's important to protect brands "vigorously" and keep them "pristine." However, this should not be at the expense of everything else.

"Be aware: the intersection between protecting your client's brand and losing the war of public opinion is narrow," Mr. Cohen warns. He adds that to protect brands but avoid negative public attention, trademark practitioners must tread carefully.

As well as exploring the range of ethical issues facing trademark practitioners, the session will also cover some of the processes being introduced to minimize ethically undesirable outcomes.

Nick Redfearn, Deputy CEO of Rouse (Indonesia) explains that the panel will discuss "the arrival in the IP world of some of the systems required in other professional sectors," such as anti-money laundering systems and data privacy regulations.

He says that conflicts of interest will be another area discussed, since they are "an increasingly common client concern." For example, the panel will make the distinction between when the

conflict is real and when it is perceived (but not real), and why this may matter to clients.

Mr. Furgang says the panel is uniquely qualified to address these ethical issues and provide session attendees with useful insight into them. ●



Nick Redfearn

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**Conflicts of interest ... are an increasingly common client concern.**

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# Progress on the Enforcement of Judgments in China

Two cases from China provide lessons for companies seeking to enforce favorable judgments, as David Lee of Chang Tsi & Partners (China) explains.

In 2012, the Civil Procedure Law of the People's Republic of China introduced the idea of a "blacklist" of dishonest debtors (officially named the List of Dishonest Enforcees). In the following years, multiple interpretations of these procedures by the Supreme People's Court provided guidance on how enforcement measures could be used against debtors. These measures include a prohibition of extravagant consumption, judicial custody, and criminal punishment.

Once a restriction on extravagant consumption is applied, the judgment debtor, or the legal representative of the judgment debtor, can be prohibited from flying via airplane, traveling via high-speed train, or visiting different types of entertainment venues, etc. Judicial custody of the dishonest judicial debtor or the legal representative of the judicial debtor is apparently a great deterrent.

Criminal punishments for resistance to enforcement actions, including imprisonment of up to seven years and fines, has made the toughest dishonest judgment debtors reconsider their decisions to defy the court order to satisfy a judgment.

## Case Studies

Below are two successful cases that show the strategic application of enforcement measures.

The plaintiff, a company based in the United States, obtained a favorable judgment in which RMB 4 million (approximately US \$600,000) damages was awarded. The judgment was issued by Shenyang Intermediate Court in June 2016. When the judgment became effective, the court found out that the defendant was reluctant to pay the plaintiff the damages.

The plaintiff's attorney took steps to enforce the judgment. The defendant was placed on a list of dishonest debtors (i.e., debtors which have ignored the order of a court to satisfy a judgment), its intellectual property (IP) rights were frozen, and its legal representatives were banned from engaging in extravagant consumption. Online complaints against the defendant were also filed with administrative bureaus, warning the defendant's business partners, customers, and the general public that the defendant had no business integrity.

In December 2016, an important international exhibition in the relevant industry was held in Shanghai. The defendant was reported as having attended the exhibition. The court acted swiftly. An enforcement team attended the exhibition and, in the

company of other international businesses in the same industry, the court seized all samples and equipment of the defendant. Another enforcement team of the court seized dozens of the defendant's machines in a warehouse in the suburbs of Shanghai. These machines were later auctioned for monetary compensation that was paid to the plaintiff.

These enforcement actions at an important exhibition brought about huge negative effects to the debtor's reputation, and thus put the debtor under significant pressure for not satisfying the judgment. This case showed that providing accurate and useful information for the court to take timely enforcement action is the key to satisfying a judgment.

This case is a classic example that a combination of different enforcement measures is of great importance. Such a strategy can effectively secure a favorable outcome in enforcement cases, even against a debtor with poor credit.

In another case, the plaintiff, a transnational hotel group, reached a settlement in a dispute over a trademark infringement claim with a hotel in Zibo of Shan Dong Province (the defendant). The court issued a Bill of Mediation, where the defendant was required to stop infringing the trademark rights of the plaintiff and pay compensation for the plaintiff's loss. However, the defendant refused to satisfy the effective Bill of Mediation, even after being urged by the court.

In 2016, the plaintiff filed an enforcement case before the court. Even so, the defendant resisted the full performance of its obligations, which resulted in the slow progress of enforcement. During this period, the defendant falsified evidence to show that the infringing marks had been removed (when in fact they had not), and this constituted a significant impediment to the enforcement.

In this circumstance, the plaintiff's agent regularly communicated with the court, and conducted a second investigation to acquire the evidence to show that the defendant had not removed the infringing marks and was still making a profit from such business.

These efforts urged the court to include the defendant in the List of Dishonest Enforcees due to its falsification of evidence, interference with court procedures, and resistance to enforcement. Under the significant pressure and extreme inconvenience brought about by the list, the defendant immediately removed all infringing

signs in the hotel and ceased the infringement.

The List of Dishonest Enforcees was officially established by the Supreme People's Court as one of the most important measures to address the frequent and widespread default of judgments by dishonest debtors.

Supported by a series of supplementary measures, such as restrictions on loans, business, and extravagant consumption, these joint punishments against people included in the List of Dishonest Enforcees has achieved a significant and positive effect. In this case in particular, the List of Dishonest Enforcees showed its value.

## Good Practice


We believe that a key reason for the victories in these two difficult enforcement cases was the proficient application of enforcement measures against the judgment debtors. In China, difficulties in the enforcement of court judgments have been an outstanding problem for years, and for this reason Chinese courts have been looking for a way to turn things around.

Due to the Supreme Court's focus on addressing the difficulties in enforcement, the Supreme People's Court, along with other departments at the national level, has issued a series of effective enforcement measures that can be brought against dishonest judgment debtors. Proficient application of such enforcement measures can help IP owners protect their rights and interests in the market and send a strong message to would-be infringers.

Improvements made in the arena of enforcement have clearly been shown and have significantly contributed to the development of the legal environment in China. For multinational companies that have secured favorable judgments in China, such improvements are welcome news. ●


*This article has been independently researched and authored, and does not necessarily reflect the views of INTA.*

*David Lee is a partner at Chang Tsi & Partners (China). He can be contacted at: davidlee@changtsi.com*



**Simon Tsi**

Simon Tsi, managing partner of Chang Tsi & Partners, established the firm with founding partner Spring Chang in 2002. In this year, 2018, he embraces the 15th anniversary of this firm. Simon is specialized in the fields of litigation and arbitration, corporate laws, security and finance, construction and real estate, and intellectual property. He successfully handled quite a few complicated cases due to his familiarity with the working mechanism of the judicial system and the rich experiences accumulated in the related field when he was working at Personnel Mobility and Assignment Department, Ministry of Personnel and State Power Grid Construction Corporation.




**David Lee**

David Lee is a director at the Shenzhen office of Chang Tsi & Partners. He specialized in many aspects of intellectual property rights, including prosecution, enforcement and dispute resolution of trademarks, copyrights, and domain names, and provided senior legal support for patent litigation in US, Europe and China. In his twenty years of practice, David has worked as in-house counsel in a large company and as a professional attorney in Chinese law firms. He has provided professional intellectual property services to Fortune 500 companies, including Tupperware, 3M, Kohler, ITW, Levi's, and many more. David Lee is fluent in English and Chinese.

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# Character Wars: Protecting Fictional Characters

Intellectual property can provide robust protection to fictional characters, but it's important to understand the specific rights available in particular jurisdictions. Rory O'Neill reports.

When it comes to fictional characters, rights owners seeking the most effective form of intellectual property (IP) protection must carefully consider the differences in approach in each jurisdiction.

This was the view of the panelists at Saturday's Session **CSA20 Character Wars: Trademarks vs. Copyright Protection for Fictional Characters**. The panelists focused their discussion on fictional characters featured in creative works such as films and comic books.

They agreed trademarks can be a valuable tool in protecting fictional characters.

In China, as Christopher William Smith, Partner at Baker & McKenzie Hong Kong (Hong Kong SAR), explained, there are particular protection strategies that can be effective in enforcing such marks.

According to Mr. Smith, one of the specific challenges for rights owners in China is that there is no requirement to prove intent to use when filing trademark applications. This can open up the owners of a character to exploitation of their work by entities



(L. to R.) Michael Lovitz, Christopher William Smith, Chantal Koller, and Jeffrey R. Cadwell

seeking to capitalize on a character's fame.

"If you don't file defensive trademark applications, it's very likely that any gaps in your coverage are going to be exploited" by such entities, he warned.

While it may be costly to broaden protection by filing many different trademark applications, it is ultimately economical in the long term, Mr. Smith said.

"In cases where a movie has proven to be very popular in China, it's not been unusual for the producers to have to file upwards of 100 oppositions or more," he said.

In the end, Mr. Smith said, the cost of filing an extensive portfolio of defensive

trademarks is "offset by having to file fewer trademark oppositions down the line."

In the United States, fictional characters are also protectable by copyright, explained Michael Lovitz, Founder of Lovitz IP Law PC (USA). Registration is available for any work of ownership, and that would extend to fictional characters.

"It's not enough to have a character that's a stock character; it needs to be something more important to the work as a whole," pointed out Mr. Lovitz.

According to U.S. law, a key guideline is that a character cannot be "merely a vehicle for telling a story," he said.

Turning to copyrights in the EU,

Chantal Koller, Managing Director, Trademarks at Novagraaf Switzerland SA (Switzerland) said it is possible to protect characters with unregistered copyright, although a rights owner would have to provide evidence of ownership in order to do so.

In addition, Ms. Koller noted it is important to consider the scope of a character's protection beyond only trademarks and copyright. Speaking in the European context, she said that using other tools such as design registration "will allow you to have broader protection."

She cited the example of the Union Des Associations Européennes de Football (UEFA, Switzerland). Its mascot, Super Victor, which was featured in the 2016 UEFA European Championship, was registered using a design mark in different positions and at different angles. "This is what design registrations will allow you to do on top of trademarks," Ms. Koller said, enabling a more adaptable and various set of rights.

Jeffrey R. Cadwell, Partner at Dorsey & Whitney LLP (USA), moderated the session. ●



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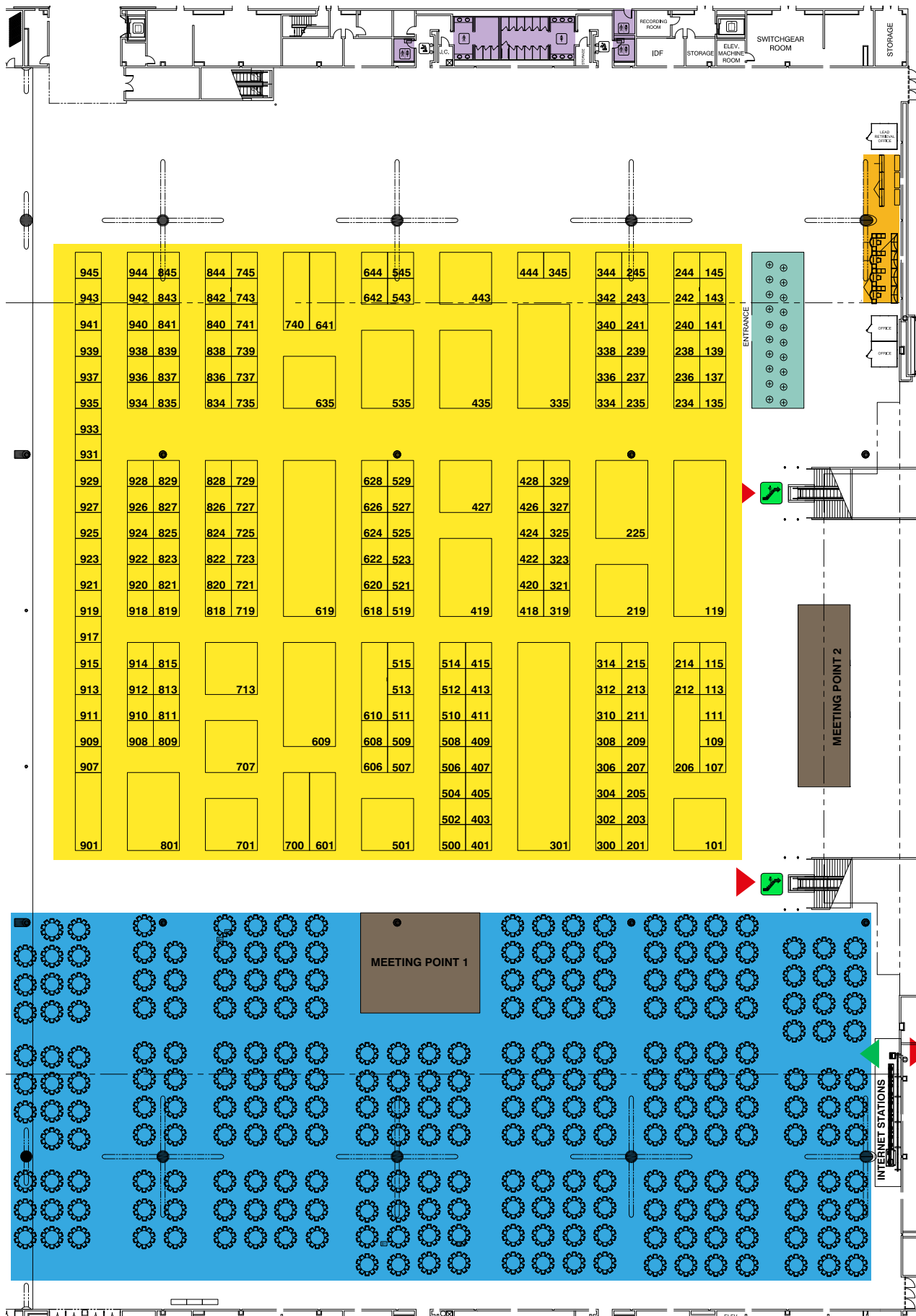
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# GDPR and Beyond: The Intersection of Privacy and Trademark Law

Aislinn Burton reports on how privacy laws impact trademark enforcement ahead of a session that considers the different approaches around the world.

Since the EU General Data Protection Regulation (GDPR) came into force almost a year ago it has become increasingly difficult for intellectual property (IP) owners to investigate infringements online, says Flip J.C. Petillion, Partner at PETILLION (Belgium).

Mr. Petillion shares his views ahead of **CSU52 Global Data Protection—Beyond GDPR: Developments and Best Practices for Trademark Practitioners Dealing with Non-European Privacy Laws**, which will take place today between 1:00 pm and 2:15 pm.

According to Mr. Petillion, privacy laws have restricted access to the resources that IP owners have historically relied on to scrutinize online infringements—from domain name directories like WHOIS, to records held by Internet service providers and social media platforms..

“As a result, IP owners will have to revert to other measures of investigation

and enforcement, such as analyzing website content and substantive evidence, consulting associated websites, and filing disclosure requests with online intermediaries controlling the identification and contact information of the (potential) infringers,” he says.

But privacy laws are not just affecting trademark enforcement online. Mr. Petillion notes that brands all over the world are also feeling the extensive and unprecedented impact of privacy laws in relation to their goodwill, marketing efforts, and customs procedures.

Another speaker on the panel, Laetitia d’Hanens, Partner at Gusmao & Labrunie Intellectual Property (Brazil), suggests that GDPR is just the beginning, and going forward, global data protection will be used to boost brand loyalty and trust.

In Mr. Petillion’s view, “balance” needs to be the keyword. He says that the further development and implementation of national and global privacy laws needs

to be balanced not only with IP rights, but with all fundamental rights and interests such as the right to freedom of expression, access to information, and the protection of consumers.

During today’s session, the panelists will explore the current impact of privacy laws on the enforcement of trademarks in the context of social media platforms, online marketplaces, and country code top-level domain name registries.

“The session will provide trademark practitioners with an important insight into many external effects of the GDPR, both geographically and substantially,” Mr. Petillion says.

For example, Brazil has recently adopted a GDPR-inspired data protection law that takes effect in August of 2020, Ms. D’Hanens points out.

“Historically, the country has not experienced a detailed legal framework on personal data, and now companies are challenged to move from a very permissible scenario to a regulated one,” she says. “The panel will bring together different views on the subject, combining jurisdictions where the possible conflicts have already matured to court examination and jurisdictions where the legal system is about to be tested.”



Letitia d’Hanens

“Historically, [Brazil] has not experienced a detailed legal framework on personal data.”

Smita Rajmohan, Associate at Cooley LLP (USA), who will also be a panelist, notes that the discussion of data privacy laws outside of the EU’s GDPR adds a further element of interest to the session.

“It will be great to learn about how different jurisdictions across the world are balancing the need for data privacy with the ability of brand owners to enforce their trademark rights,” she comments.

Brian King, Director of Internet Policy and Industry Affairs at MarkMonitor (USA), the panel moderator, adds: “While new privacy laws certainly bring challenges, we’ll also share some exciting opportunities for trademark practitioners to counsel clients in today’s privacy-focused world.”

Joining these speakers at the session is Diane Plaut, Global General Counsel and Data Protection and Privacy at Corsearch (USA). ●

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## U.S. Congressional Trademark Caucus Celebrates 5th Anniversary as a Unifying Voice on Capitol Hill

The U.S. Congressional Trademark Caucus (CTC) is an historic bipartisan, bicameral caucus focused on intellectual property education and consumer protection awareness against the harmful impacts of counterfeiting and other important trademark issues.

This year marks the fifth anniversary of the CTC, the first-ever Congressional caucus in the United States Congress dedicated solely to trademark and brand issues in support of economic growth and consumer protection.

Currently, the CTC is co-chaired by U.S. Senator Chuck Grassley (Republican – Iowa), U.S. Senator Chris Coons (Democrat – Delaware), U.S. Representative Ted Deutch (Democrat – Florida), and U.S. Representative Martha Roby (Republican – Alabama).

INTA has worked with the CTC

since its formation in 2014 to hold numerous educational events to raise awareness, including Congressional briefings on Capitol Hill and roundtables within Congressional districts. These events have focused on a wide range of important trademark issues, from anticounterfeiting to the vital role that trademarks, brands, and legitimate Internet domain names play in creating jobs and boosting global economic growth and consumer trust. CTC programming has also focused on small business education around the importance of proper trademark selection, use, and protection.

It is clear that these important trademark issues resonate at the highest levels of the U.S. Congress and U.S. federal agencies, and among private sector and consumer group stakeholders. ●

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# Update on Trademark Protection in Venezuela Under U.S. Sanctions

Current and future trademark owners in Venezuela should be keeping a close watch on the application and maintenance process given U.S. economic sanctions on the country.



Despite U.S. economic sanctions imposed on Venezuela, the Office of Foreign Assets Control (OFAC) of the U.S. Treasury Department advised INTA on May 14, 2019, that fees for filing trademark applications and maintenance of registrations may be paid in U.S. dollars or Euros through the Banco del Tesoro in Venezuela. It is INTA's understanding that many counsel in Venezuela have established accounts with the Banco del Tesoro for this purpose.

However, the Banco del Tesoro facility is not a fully reliable solution; for example, it only accepts cash and will not accept certain large denomination Euro bills. It is also possible that OFAC could place the Banco del Tesoro on its sanctions list at any time.

Other than using this method, it is currently unlawful for U.S. companies to file trademark applications or maintain existing registrations in Venezuela without obtaining Specific Licenses

from OFAC. Specific Licenses are reviewed under an ad hoc process that could take weeks, without any assurance that the license will be granted.

On April 1, 2019, INTA requested that OFAC issue General Licenses to allow for protection of trademark and other intellectual property (IP) rights in Venezuela. If issued, General Licenses would permit IP rights holders to use facilities other than those of Banco Del Tesoro to file applications and maintain registrations in Venezuela, and would eliminate the need to apply for Specific Licenses.

In its request for General Licenses, INTA noted that there are many thousands of trademarks owned by U.S. companies in Venezuela, and even more that have yet to be registered. Therefore, the Specific License process places a substantial burden on U.S. industry, and may result in the loss of IP rights in Venezuela. Likewise,

processing numerous requests for Specific Licenses will place a drain on OFAC's resources.

"It has long been recognized that failure to grant General Licenses for the protection of American IPR in nations that are targets of U.S. sanctions programs does more harm to IPR rights holders than to the foreign government and its domestic industries," INTA wrote. Since trademark rights may endure for a substantial period of time—often spanning several government administrations and sometimes even outlasting changes in political systems—INTA indicated to OFAC that preservation of those rights is in the long-term interest of U.S. companies and the U.S. economy.

INTA also pointed out that OFAC has granted General Licenses for IP protection in similar circumstances in the past, including at least 18 General Licenses for Venezuela. Therefore, a General License for IP protection in Venezuela would not be precedent setting and would align with exceptions the U.S. has previously employed under other sanctioning regimes.

As of this writing, OFAC has indicated that it is reviewing the request for a General License. In addition, all trademark maintenance deadlines in Venezuela have been extended through May 22, 2019. ●

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# Casting a Wide Net to Deal with Phishing

Phishing is a threat to any business, but brands can fight back with a combination of employee education and technological solutions. Sarah Morgan reports.

“Criminals cast a huge net. They’re not just looking for Fortune 500 companies, they’re also looking for mom-and-pop accountants,” said Supervisory Special Agent of the Federal Bureau of Investigation’s Intellectual Property and Criminal/Cyber Integration Unit (USA) yesterday.

Speaking at Session **CSA52 Holy Mackerel! Identifying and Addressing Phishing of Your Employees and Customers**, Mr. Shapiro added that information garnered from smaller companies can be used to catch bigger fish.

Michael Lashlee, Deputy Chief Security Officer at MasterCard (USA), said, “If you’re a criminal and you can send out 10,000 emails at the click of a button and get even a half percent return, that’s still a good day for you. It’s very rudimentary but very effective.”

“Don’t think you can’t be a victim,” warned Mr. Lashlee, noting that even the spouses of MasterCard International Incorporated (USA) employees have fallen victim to scammers who told them their spouses were arrested and they should go to a bitcoin ATM to send money.

MasterCard’s first line of defense is technology, closely followed by employee education, such as mandatory training and phishing test emails.

“For the most part, culture change is what we’re trying to achieve. Culture eats strategy for breakfast. We can put all the policies out but if we don’t change the culture, we’re not going to be successful,” he said.

Employee education takes a carrot and stick approach: the company operates a phishing tournament where the employee who’s been most diligent in reporting phishing emails is rewarded US \$10,000.

“In the grand scheme of what the potential damage to our company could be, it’s a minuscule amount,” said Mr. Lashlee.

On the “stick” aspect, MasterCard employees who click on phishing emails are warned by the security team, with potential disciplinary actions taken down the line.

At first, there was a 30 percent failure rate for these phishing tests. Now, the rate has dropped to between four and seven percent.

But Shawn Henry, President and Chief Security Officer at CrowdStrike Services (USA), warned that while preventative measures are necessary, all it takes is “one adversary” to gain access to a computer within your company’s network.

He added: “It’s absolutely about culture, but there needs to be a culture of hunting for bad behavior.”

According to Mr. Henry, organizations need to become much more proactive in identifying malicious behaviors. “All of the organizations that are successful have changed their philosophy to become proactive.”

He added, “I’ve seen companies hit with destructive malware, shut down for weeks or months, losing hundreds of millions of dollars. They’ve chosen to

not invest in the long-term security of the enterprise and that’s fraught with peril.”

From the trademark perspective, this all ties in with brand value.

“What kind of value can you show with your trademark if you have no security measures?” asked Mr. Raphael Gutierrez, Director, Intellectual Property, at Uber Technologies, Inc. (USA), and moderator of the panel.

Relani Belous, Executive Board Member of the Association of Corporate Counsel (USA), added that the hit can also come indirectly.

She said, “You may be doing all the things right, but your law firm may not be doing what they should be. There have been law firms that have been hit too—it can get you directly or indirectly.” ●



(L. to R.) Raphael Gutierrez, Relani Belous, Steven Shapiro, Michael Lashlee, and Shawn Henry

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P.O. Box: 341774,  
Riyadh 11333,  
Mob: +966 503190075  
Tel.: +966 11 454 4765



**AIPT Intellectual Property Rights Management**  
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START	END	NAME	LOCATION*
7:30AM	7:00PM	Registration	Hall B1
7:30AM	7:00PM	Hospitality	Hall A
8:00AM	10:00AM	Continental Breakfast	Hall A
<b>TRAINING SESSIONS</b>			
8:00AM	4:00PM	Course on International Trademark Law and Practice - Day 2	208
<b>COMMITTEE MEETINGS</b>			
9:00AM	10:00AM	Global Advisory Council - Asia-Pacific	153 C
9:00AM	10:00AM	Global Advisory Council - Middle East	153 B
9:00AM	10:00AM	Madrid Project Team (Legal Resources)	150
<b>SESSIONS</b>			
9:00AM	10:30AM	CSU00 International IP Court Is in Session: Judges from International Jurisdictions Discuss Hot Topics in Trademark Law	260
<b>COMMITTEE MEETINGS</b>			
9:00AM	11:00AM	Energy Industry (Lubes) Anti-Counterfeiting Group	254 A
9:00AM	11:00AM	Global Advisory Council- North America	151 B
9:00AM	11:00AM	<b>BREAKFAST TABLE TOPICS</b>	<b>253 BC</b>
<b>SESSIONS</b>			
9:15AM	11:00AM	The Road to 2025: What's Next for EUIPO?	258 C
9:30AM	2:30PM	In-House Practitioners Workshop and Luncheon: Demonstrating the Value of Your Brand Team (Advance registration required)	259 AB
<b>COMMITTEE MEETINGS</b>			
10:00AM	11:00AM	Enforcement Project Team (Legal Resources)	150
10:00AM	11:00AM	Global Advisory Council - China	153 A
10:00AM	11:00AM	Global Advisory Council - Africa	154
<b>SESSIONS</b>			
10:00AM	11:15AM	CSU01 Anticounterfeiting in China	210 C
10:00AM	11:15AM	CSU02 The Times They Are a Changin': Maximizing the Perspectives Around Us	205 C
10:00AM	11:15AM	CSU03 Who Owns the Rainbow? The Promise and Limits of Color Trademarks	206 AB
10:00PM	4:00PM	Exhibition Hall	Hall A
<b>SESSIONS</b>			
10:15AM	12:00PM	SS03 Madrid System Users Meeting (MSUM) Organized by World Intellectual Property Organization (WIPO)	258 A
10:30AM	3:00PM	Judge's Workshop: A Discussion with IP Judges on Hot Topics in Trademark Law (Exclusive to IP Judges)	260
<b>COMMITTEE MEETINGS</b>			
11:00AM	1:15PM	Internet Committee - Leadership Only	258 B
11:15AM	12:15PM	Trademark Office Practices Committee - Leadership Only	151 A
11:15AM	1:15PM	Anticounterfeiting Committee - Centers of Excellence and Expertise Meeting	256
11:15AM	1:15PM	Indigenous Rights Committee - Leadership Only	152
<b>SESSIONS</b>			
11:30AM	12:45PM	CSU20 Brand Meaning and Valuation in the Age of Millennial Consumerism	206 AB
11:30AM	12:45PM	CSU21 Combating Counterfeits and Piracy on the Internet Highway and in Digital Media <i>Intermediate Level</i>	205 AB
11:30AM	12:45PM	CSU22 The U.S. Copyright Office Speaks: Hot Topics for Practitioners	210 C
11:30AM	1:30PM	Trademark Administrators Brunch: How Technology Is Changing Our Practice (Advance registration required)"	257 AB
12:00PM	2:00PM	<b>LUNCHEON TABLE TOPICS</b>	<b>253 BC</b>
<b>COMMITTEE MEETINGS</b>			
12:15PM	1:15PM	Geographical Indications Project Team (Legal Resources)	150
<b>COMMITTEE MEETINGS</b>			
12:15PM	2:15PM	Managing Attorney -Idea Exchange	153 B
12:30PM	1:30PM	<b>SPEED NETWORKING</b>	<b>Hall A</b>
<b>SESSIONS</b>			
1:00PM	2:15PM	CSU50 Professor vs. Practitioner Debate: "Fan or Felon" or, More Accurately, "Fan or Infringer?"	205 AB

Continued overleaf

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START	END	NAME	LOCATION*
<b>SESSIONS</b>			
1:00PM	2:15PM	CSU51 Overview of and Recent Worldwide Developments in Unfair Competition Law	206 AB
1:00PM	2:15PM	CSU52 Global Data Protection – Beyond GDPR: Developments and Best Practices for Trademark Practitioners Dealing with Non-European Privacy Laws?	210 C
1:00PM	2:15PM	CSU53 Best Practice Sharing on International Enforcement Strategies	210 AB
<b>COMMITTEE MEETINGS</b>			
1:30PM	2:00PM	Indigenous Rights Committee - Full Committee	152
1:30PM	2:30PM	The Trademark Reporter Committee - Leadership Only	151 A
1:30PM	2:30PM	International Amicus Committee - Leadership Only	154
1:30PM	2:30PM	Internet Committee - Full Committee	258 B
1:30PM	2:30PM	Trademark Office Practices Committee - Full Committee	252 AB
<b>SESSIONS</b>			
1:30PM	3:30PM	SS04 TM5 Users' Meeting	258 C
<b>COMMITTEE MEETINGS</b>			
1:30PM	3:00PM	New INTA Associate Members - Peer to Peer Experience	211
1:30PM	3:30PM	Pro Bono Committee	255
1:30PM	3:30PM	Brand Owner's Workshop	261
2:00PM	3:00PM	<b>SPEED NETWORKING</b>	<b>Hall A</b>
<b>COMMITTEE MEETINGS</b>			
2:00PM	3:30PM	Indigenous Rights Committee - Americas and Caribbean Subcommittee	152
2:00PM	3:30PM	Indigenous Rights Committee - Indigenous Rights Trademark Awareness Subcommittee	152
2:00PM	3:30PM	Indigenous Rights Committee - International IR Initiatives and Policy Analysis Subcommittee	152
2:00PM	3:30PM	Indigenous Rights Committee - North of the Equator Subcommittee	152
2:00PM	3:30PM	Indigenous Rights Committee - South of the Equator Subcommittee	152
2:00PM	4:00PM	Government Officials Training Committee	251
<b>COMMITTEE MEETINGS</b>			
2:30PM	3:30PM	Asia Pacific Subcommittee	151 B
2:30PM	3:30PM	EU Observatory Task Force	252 B
2:30PM	3:30PM	Internet Committee - Domain Industry Issues and Metrics Subcommittee	154
2:30PM	3:30PM	Internet Committee - Future of IP on the Internet Subcommittee	153 C
2:30PM	3:30PM	Internet Committee - ICANN Compliance and Accountability Subcommittee	257 AB
2:30PM	3:30PM	Internet Committee - New gTLD Subsequent Rounds and Geographic Terms Subcommittee	153 B
2:30PM	3:30PM	Internet Committee - Rights Protection Mechanisms Review Subcommittee	258 B
2:30PM	3:30PM	Internet Committee - Social Media and Online Use Subcommittee	258 B
2:30PM	3:30PM	Internet Committee - Whois/Registrant Directory Services Subcommittee	258 B
2:30pm	3:30PM	Internet Committee -Legal Resources and Communications Subcommittee	150
2:30PM	3:30PM	The Trademark Reporter Committee - Full Committee	151 A
2:30PM	4:30PM	Trademark Office Practices Committee - European National Trademark Offices Subcommittee	254 A
<b>SESSIONS</b>			
2:30PM	3:45PM	CSU54 Ethics in the Practice of Trademark Law	205 C
2:30PM	3:45PM	CSU55 The Future of IP Law Firms in the Digital Age	205 AB
2:30PM	3:45PM	CSU56 Shades of Gray: Current Issues in Parallel Importation Law—A Global Perspective	206 AB
2:30PM	3:45PM	CSU57 How to Fit the AI in TM: Keeping Up With the Joneses and the Jetsons	210 C
2:45PM	4:00PM	CSU23 Gen Z Insights: Brands and Counterfeit Products	210 AB
<b>COMMITTEE MEETINGS</b>			
3:30PM	4:30PM	Harmonization of Trademark Law and Practice Committee – Leadership Only	256
6:00PM	8:00PM	Welcome Reception UnCommon Boston	Hall B2

\* Conference Center

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