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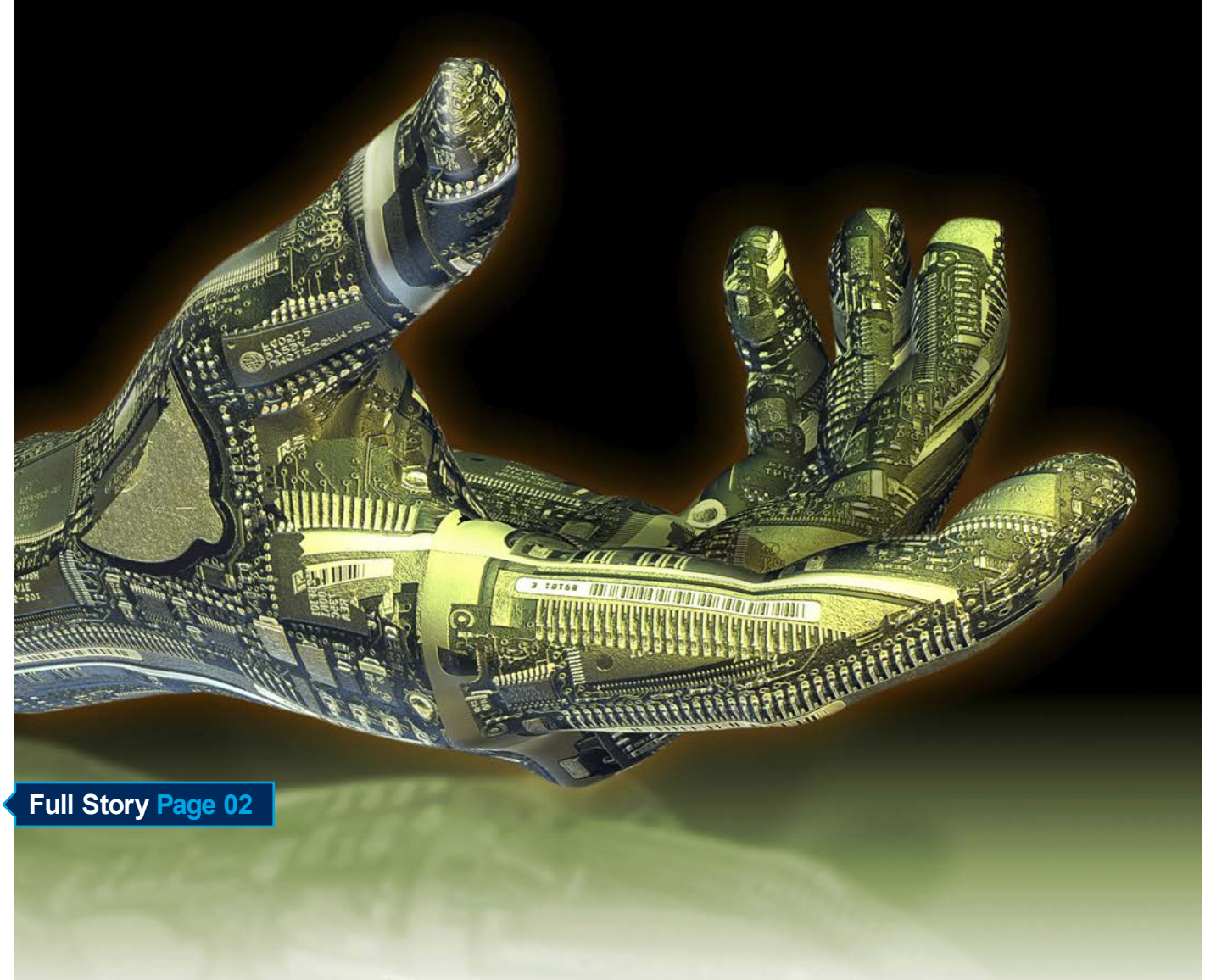

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Editorial

2015 brings a busy and changing scene for European IP. The EPO has announced that 273k new European patent applications were filed in 2014 (a 3% increase).

We report in this issue on wearable technology - a brave new world both legally and technologically. Two European Courts of Appeal have recently decided (differently) on 'skinny labels' and the EU has set out some detail of the hoops that companies will have to jump through to comply with the Nagoya Protocol.

Lots to watch. Read on...

Editor:
Nicholas Malden

Events

25 February 2015
Biotech European patent case law, webinar
Join Simon O'Brien for a biotech case law update.

09-11 March 2015
Global IP Exchange, Munich, Germany
Neil Nachshen and Nicholas Malden will be speaking at this high profile IP event, focusing on IP strategy, monetization, portfolio management, cost control, and emerging markets challenges and opportunities.

10-11 March 2015
Wearable Technology Show, London, UK
D Young & Co's Jonathan Jackson and Jonathan DeVile will be speaking at this cutting edge show. Colleagues will be on hand to give IP advice relating to the wearables, augmented reality and IOT industry.

02 April 2015
Policy forum for London tech sector, seminar
Join Jonathan Jackson at this keynote seminar, which will focus on developing London's tech sector.

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Engineering the embedded body beautiful
IP protection for invasive technology innovation

The expansion of the wearable technology sector has been meteoric. In 2010, the sector was worth around $6 million, whilst it is estimated that by 2018 the sector will be worth over $12 billion. This 2000-fold increase in value over just eight years shows that many technological companies are investing huge resources in this area to secure market share.

Protecting innovation with IP

One of the best ways of securing market share is by monopolising the innovation using IP. Traditionally, electronics companies have focused on protecting how their technology functioned using patents. However, with wearable technology, design is also vitally important; no one will wear technology if it does not look good. The design aspect can of course be separately protected.

For watches, fitness bands and other more traditional wearable technology, the IP system is quite predictable; if the innovation relates to how a product operates, protect it with a patent, if it relates to how the product looks, protect it with a design.

> Companies are looking at ever more disruptive technology. One area of interest to companies is so-called 'invasive' or 'embedded' technology. Will the IP system be as predictable for this future technology?

Medical application

By the end of 2015 it is predicted that more than 13.1 million users will have a wearable health and fitness device in the UK alone. In the future, however, medical applications for invasive technology will increase massively. Even now implants have been developed that sit inside the human body which monitor certain aspects of a patient's well-being. For example, scientists at Boston University are developing a 'bionic pancreas'. This device has a sensor in it which communicates with a smartphone app informing the user of their blood sugar levels. Similarly, so-called 'smart dust' is being developed. Smart dust is an array of microscopic computers with antennas, each smaller than a grain of sand. These computers, controlled by a doctor, arrange themselves inside the body to influence a whole range of complex internal processes. It is envisaged that these nano-devices will attack early-stage cancer or bring pain relief to an open wound. In other words, rather than a surgeon performing traditional surgery on a patient, the doctor will instead control these nano-devices to treat the patient from the inside.

External application

Outside the medical arena implantable technology is also being developed which replaces technology traditionally positioned on the exterior of a user.

> A company called Dangerous Things has developed a near field communication (NFC) chip that can be embedded in a finger through a tattoo-like process. This allows you to unlock devices and pay for goods simply by pointing.

IP rights for invasive technology

Whilst the above sensors, nano-devices and chips should be capable of patent protection in their own right, in Europe there are exclusions in the field of medical diagnosis and surgery which may impact on a company's ability to maximise its IP protection for these new and useful products. According to Article 53(c) EPC, a European patent will not be granted for:

- A method of treatment of the human or animal body by surgery;
- A method of treatment of the human or animal body by therapy; or
- Diagnostic methods practised on the human or animal body.

Whether a method involves treatment by surgery depends on the nature of the

treatment, rather than its purpose. The treatment must involve a substantial physical intervention which requires professional medical expertise to be carried out and which entails a substantial health risk. Other criteria to consider are the degree of invasiveness or the complexity of the intervention performed.

Examples of treatment by surgery include the injection of a contrast agent into the heart, catheterisation and endoscopy. Invasive techniques which are performed on uncritical body parts and which are generally carried out in a non-medical, commercial environment, for example tattooing and piercing, are rarely affected by this exclusion.

A method of implanting or embedding a nano-device (eg smart dust) into a subject is more likely to fall within this exclusion: it is an invasive method which requires professional medical expertise and entails a substantial health risk. In contrast, the method of implanting an NFC chip into a user's finger through a tattoo-like process should be protectable.

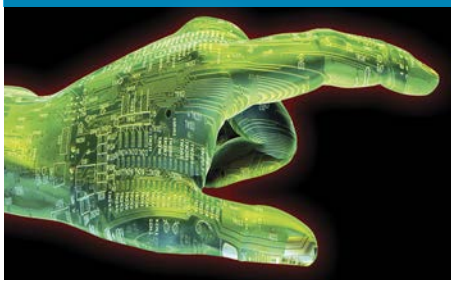
Whether a method involves treatment by therapy depends on if a disease or malfunction of the human or animal body is cured or prevented. This exclusion is therefore most relevant to the use of nano-devices (eg smart dust) for treatment or prevention of a condition in a human or animal body. A method of treating early-stage cancer or providing pain relief to an open wound using nano-devices is likely to fall within this exclusion.

To fall within the diagnostic method exclusion, the claimed method must include the following steps, all of which must be performed on the human or animal body:

1. Collection of data;
2. Comparison of data with standard values;
3. Finding any significant deviation; and
4. Attribution of this deviation to a particular medical or veterinary medical condition.

As a result the exclusion rareley applies to X-ray methods, MRI studies and blood pressure measurements. The example suggests that the use of bionic sensors to monitor certain aspects of a patient's well-being should be protectable.

Is wearable technology outpacing IP law?



Article 53(c) EPC also states, however, that products for use in any of these methods are not excluded. This means that although the medical use of wearable technology such as an implantable nano-device will be decided on a case by case basis, generally the device itself should be protectable.

Conclusion

In order to move wearable technology into the body of the user, companies will be making huge investments in R&D. To maximise protection for this investment, companies need to consider the IP landscape and obtain appropriate IP protection. It may be possible to obtain protection for the use of a device as well as the actual device itself. This clearly is advantageous in maximising patent protection.

However, by moving the technology into the human body, companies face a possible challenge to the breadth of protection by falling under exclusions intended to ensure that medical and veterinary practitioners can practice freely without worrying about patent infringement.

In some instances, such as with smart dust, the surgical method exclusion is likely to be particularly relevant.

This is a complex subject where technology is very likely to evolve faster than the law. We look forward to discussing and advising on the protection of innovations in this area.

Authors:
Jonathan Jackson & Rachel Bateman

Morocco to accept European patents March 2015

Any European patent application filed on or after 01 March 2015 will automatically request validation in Morocco. If the European patent application is to be validated in Morocco a €240 fee must be paid within six months of the date on which the European Patent Bulletin records publication of the European search report. A two-month grace period will be available, during which the fee can still be paid (with a 50% surcharge).

When the application grants, the patent will be eligible for validation in Morocco. However it is unclear what formalities will have to be complied with for the validation process to be completed. There has been no announcement whether or not Morocco will implement the London Agreement (which reduces or eliminates the translation requirements for validation in particular member states). In any event, the subsequently validated patent will have the same legal standing as a patent granted in Morocco itself. For businesses or companies with an interest in pursuing IP in Morocco and in Europe, this promises a more streamlined and centralised route.

Applications filed prior to 01 March 2015 will not be validated in Morocco. Since divisional applications are restricted to the designated states of the earlier application under Article 76(2), it will not possible to obtain a validated patent in Morocco by filing a divisional application of an application filed prior to 01 March 2015.

This marks the first time that a European patent application can lead to the grant of a patent in a non-European state and also the first time that a country that is not signed up to the European Patent Organisation has chosen to recognise patents granted by the European Patent Office (EPO).

Readers may also be aware that the EPO drafted a similar agreement (not yet in force) with Tunisia on 03 July 2014 and that negotiations are ongoing with Moldova.

Author:
Alan Boyd

Signs of divergence in Europe for 'skinny labels' Pain for Pfizer but gain for Novartis

Neil Nachshen contrasts the recent UK and Dutch 'skinny label' judgments

The recent High Court judgment in Warner Lambert v Actavis & others provides a first decision in the UK concerning the infringement of Swiss form second medical use claims. This sentence needs to be well-qualified as Justice Arnold himself did with the judgment, in that his decision is possibly applicable only to Swiss-type second medical use claims and not EPC2000 medical use claims.

The Swiss-type claims involve the terminology *"use of drug X in the manufacture of a medicament in the treatment of disease Y"* found acceptable by the Enlarged Board of Appeal (G5/83 and related cases) to permit patent protection for the second and subsequent uses of known pharmaceutically active compounds. The fiction lay in the *"manufacture of the medicament"* and the purpose of that manufacture in avoiding the prevailing prohibition of patents on methods of treating the human body. The claim related to such manufacture for that purpose.

All practitioners in the field were aware that come the day a question of infringement arose, there might be difficulties. This case, the first of its kind to reach the High Court, was a perfect example of what everyone was waiting for.

Pregabalin is the active ingredient of the Warner Lambert (now Pfizer) product Lyrica® approved for three medical indications: treatment of epilepsy, generalised anxiety disorder (GAD) and neuropathic pain. The first two indications were disclosed and encompassed by the claims of the *"basic patent"* which had expired (patent and supplementary protection certificate (SPC)). Neuropathic pain was an indication covered by the Swiss-type use claims of a later patent extending beyond the expiration of the basic patent, its SPC and any period of data exclusivity.

Actavis prepared to launch a generic version of pregabalin (Lecaent®) using the *"skinny label"* technique whereby the indication still subject of patent protection was deleted. This step was specifically permitted by Articles 10 and 11 of EU Directive 2001/83/EC. In advance of full trial concerning the validity of the later patent, Warner Lambert applied to the court for an interim injunction requiring Actavis to take a series of steps to ensure Lecaent would not be dispensed for neuropathic pain.

There is much detail in the judgment as to the steps both parties had already taken or were prepared to undertake to try and preserve their respective positions. Pfizer itself demonstrated that it had a strategy in place to educate doctors to only prescribe Lyrica for this indication. Ultimately, the judge acknowledged that as meritorious as the efforts from all parties was, in reality, doctors tend to, and are encouraged to prescribe generically and pharmacists were unlikely to know which of the approved indications a patient was being prescribed pregabalin for. The judge even considered the possibility of pharmacists consulting with their customers but the statistics supported a high proportion of prescriptions being dispensed to persons other than that named on the prescription.

Section 60(1)(c) of the UK Patents Act

From a legal perspective however, the fascinating point of the judgment is that Justice Arnold decided that there was no serious issue to be tried under section 60(1)(c) regarding infringement of the claim 1. This section of the Patents Act was applicable as Swiss claims relate to a process of manufacture and not a product, and importantly the manufacturer was Actavis and not anyone else further downstream. This is the area of the decision that may be different when EPC2000 use claims are considered in the future.

Actavis successfully argued that infringement of a Swiss claim required demonstration of a *"subjective intention"* that Warner Lambert failed to demonstrate. Warner Lambert have reserved the right to amend their pleadings in advance of the full trial to make such an allegation. Warner Lambert had additionally pleaded infringement under sections 60(1)(a) and 60(2) which the judge acknowledged as wisely not pressed as section 60(1)(a) relates to products and section 60(2) would require Actavis to be supplying an essential means to prepare the composition, something which clearly would not occur.

For the sake of completion, the judge analysed the balance of convenience if he was wrong on the primary point. Here as in many cases of its kind, the balance was fine. The usual consideration of relative harm to each party and the ease of assessing damage was considered. Interestingly, when considering the harm to Actavis the judge was swayed *"strongly"* by the fact that even if marketing with a label explaining the patent situation and non-use for the pain indication, Actavis may have been prevented from performing acts that were perfectly permissible, ie the sale of pregabalin for epilepsy and GAD.

Again, as is often the case in such generic launch cases, both parties were criticised for not having commenced their respective strategies earlier (preserving the pain market or clearing the way for activities) but ultimately, the judge again ruled that the balance of the risk of injustice would be in Actavis' favour.

Although this judgment provides for the first time some guidance on the infringement of Swiss-type medical use claims, there are aspects of the judgment that are limited to this particular scenario and others that remain to be resolved at full trial when both infringement and validity will be at issue. Swiss-type claims will be with us for a few more years yet, so the ultimate conclusion of this case will set the tone for the coming years in the UK.

The view from The Hague

Hot on the heels of this UK decision, the Court of Appeal in the Hague has reached the opposite

Notes and further information

1. *Under section 60(1)(c) of the Patents Act 1977 it is an infringement to keep, dispose of or offer to dispose of "any product obtained directly by means of [the claimed] process"*

Full decision of Warner Lambert v Activis & others, neutral citation number: [2015] EWHC 72 (Pat): http://dycip.com/warnerlambertvactivis

conclusion regarding Sun Pharmaceutical's skinny label for zolendronic acid.

The patent relates to a Swiss claim for treatment of osteoporosis using a particular dosing schedule. Sun obtained a marketing authorisation for both osteoporosis and Paget's disease and then requested the patented indication to be *"carved out"*. Sun entered the general market including an unconditional tender to supply one of the healthcare insurers. The patent may be remembered for the UK litigation where it was held not to be entitled to priority and therefore lacked novelty. The Dutch court reached a similar conclusion at first instance but this was overturned on appeal leading to consideration of infringement.

On the facts, there was little doubt that the vast majority of zolendronic acid was used to treat osteoporosis and that treatment of Paget's disease only required a single dose. In Novartis' estimation, osteoporosis accounted for 97.3% of the market. Sun had made some efforts to inform pharmacists and the healthcare insurer that supply was only for Paget's disease, but ultimately the court did not consider that they had taken sufficient steps and an injunction with regard indirect infringement was granted.

UK and Dutch court judgments

This will immediately be seen to be in contrast to the UK pregabalin judgment discussed above. However, there are differences. Firstly, the Dutch judgment was reached under Article 73 of the Dutch Patent Act relating to indirect infringement whereas the UK judgment was reached under section 60(1)(c) of the UK Patents Act which governs infringement of process claims. As discussed above, the UK judge did not consider indirect infringement (section 60(2)) to be relevant. Furthermore, the different systems for general prescribing and dispensing in the Netherlands, as well as the exclusive unconditional supply to the insurer, are worthy points of distinction.

The further issues of infringement that may be pursued at full trial in the UK are likely to result in further development of the law in this area.

Author:
Neil Nachshen

CJ clarifies definition of 'human embryo' Lessons from ISCC parthenote case

Related article

"T 2221/10 - EPO confirms extent of G 02/06", 07 April 2014 by Neil Nachshen: www.dyoung.com/article-epo

In continuation of our articles concerning the patenting of stem cells, we report here on the recent ruling by the Court of Justice of the European Union (CJ) (Case C-364/12) regarding whether human parthenotes fall under the definition of a human embryo under the Biotechnology Directive 98/44.

Biotechnology Directive 98/44

Recital 42 of the Directive states that *"human embryos….must be excluded from patentability"* whereas Article 6(2) formally states the "*use of human embryos for industrial or commercial purposes"* as being unpatentable.

International Stem Cell Corporation v Comptroller General of Patents, Designs and Trade Marks

The referral from the UK High Court concerned an appeal brought by International Stem Cell Corporation (ISCC) against a decision made by the UK Intellectual Patent Office (UKIPO) in 2012 to reject two patent applications for a method for inducing pluripotent stem cells from human eggs that have undergone parthenogenesis. The resulting product of this process is referred to as a 'parthenote'.

A parthenote is capable of developing into a blastocyst-like structure but cannot develop into a human being because it lacks paternal DNA. On the evidence before the High Court, human parthenotes were shown to develop to the blastocyst stage over about five days, but after that period the requirement for paternal genes became acute and the oocyte did not develop further, and never to term.

Patenting parthenotes

The legal issue before the CJ was whether parthenotes were excluded from patentability as constituting human embryos as prohibited by Article 6(2)(c) of EU Directive 98/44 and paragraph 3(d) of Schedule A2 to the Patents Act 1977 which implements this Article of the Directive.

The Brüstle ruling involved oocytes that were manipulated by the insertion of a nucleus from a mature human cell. The court's ruling therefore extended the definition of 'human embryo' from an oocyte that had been the subject of fertilisation to one that included instances where fertilisation had not occurred, but by manipulation had been rendered capable of commencing the process of development into a human being just as an embryo created by fertilisation.

ISCO therefore sought to distinguish their case from the previously decided Brüstle ruling in that the patent related to oocytes that had been activated in the absence of sperm, by a variety of chemical and electrical techniques such that the activated oocyte (the parthenote) was capable of dividing and developing, but as presently understood could never develop to term - just to the stage of a five day blastocyst. This technical fact had been supported by all parties who had submitted written observations.

However it was considered that with additional genetic manipulation it could be possible to further develop a parthenote. In acknowledging this possibility the ISCO amended the claims to exclude the use of any further methods being applied to overcome this inability to develop. On this basis the CJ concluded that parthenotes did not fall within the intended scope of 'human embryo'.

Court's further clarification of the term 'human embryo'

The court has therefore used this ruling to further clarify the definition of the term 'human embryo' such that it includes a non-fertilised ovum that has the inherent capacity of developing into a human being but excludes a non-fertilised ovum that does not possess such potential.

Given the understanding of the parthenotes subject of the patent application, the court has left it to the national referring court to reach a final decision as to whether Art 6(2)(c) of Directive 98/44 would not prohibit the UKIPO from granting the patent, ie to reach a decision on the technical facts as to whether a parthenote has "*the inherent capacity of developing into a human being*".

Author:
Neil Nachshen

Nagoya Protocol
Implementation in the European Union

The Nagoya Protocol entered into force on 12 October 2014 and aims to implement the third objective of the Convention on Biological Diversity (CBD), namely the fair and equitable sharing of benefits arising out of the utilisation of genetic resources, thereby contributing to the conservation and sustainable use of biodiversity.

It is a requirement of the Nagoya Protocol that if a researcher is to perform R&D (whether commercial or non-commercial) on a non-human genetic resource or derivative thereof (this extends to protein, RNA, metabolites of micro-organisms, etc) or the use of traditional knowledge associated with genetic resources, then it must be shown that the genetic resource has been accessed in accordance with the provisions of the Nagoya Protocol. The burden will be on the researcher to perform due diligence to establish this fact, in the absence of which all work must be halted. The protocol criteria are that:

1. Prior informed consent has been obtained from the provider country (ie the place where the genetic resource exists in situ); and
2. Mutually agreed terms for the sharing of any benefit arising form the utilisation of the resource have been set up.

Benefits can be either commercial or non-commercial and can include inter alia sharing data, or IP rights.

> The Nagoya Protocol makes it illegal to perform R&D on a genetic resource that has not been accessed in accordance with the Nagoya Protocol.

Implementation of the Nagoya Protocol in the European Union

The EU Regulation implementing the Nagoya Protocol was published on 20 May 2014 and requires member states to provide guidance on due diligence and specify penalties associated with non-compliance.

Importantly, enforcement will be dependent on a member state's interpretation of the regulation. For example Brazil are considering implementing retroactive provisions, meaning that all genetic resources accessed even before 12 October 2014 must have the appropriate mutually agreed terms / benefit sharing agreement associated with them. However, even if a user in a EU member state has not complied with the Nagoya Protocol to Brazil's standard the individual will not be penalised, as the EU Regulation does not recognise retroactive enforcement of the Nagoya Protocol. Notably though, such a scenario could be problematic where a company has vested interests in Brazil and in any regard could be difficult from a PR perspective.

Scope of the Nagoya Protocol

There have been discussions whether the terms 'research' and 'development' are to be construed as being cumulative, however it would appear from the comments of the EU Commission's representative that performing either research or development on a genetic resource is enough to bring a researcher's activities within the scope of the regulation.

One implication of this is that performing research on a genetic resource solely in a non-Nagoya country (eg US) and then putting a product onto the market in the EU could fall within the scope of the regulation. This was purely the Commission's opinion, however arguably this takes a very broad view of the term 'development' and does not comply with the regulation which specifically refers to 'research and development'. We await further definition as to how to interpret 'research' and 'development'.

The scope of the Nagoya Protocol and regulation are such that at present they would appear to apply to the use of genetic resources ancillary to a main product. As an example, if a plant breeder is working to produce a new variety of potato that is resistant to a particular fungus and that fungus has been accessed after October 2014 from, eg Brazil, the fungus having been merely used to screen potato variants produced, mutually agreed terms will still need to be negotiated with Brazil even though the fungus is not the primary product or object of research.

Enforcement

In the UK the Department for Environment, Food and Rural Affairs (DEFRA) is responsible for implementing the regulation and the National Measurements Office will be performing checks and monitoring compliance.

> DEFRA indicates that fines of up to £250,000 and a maximum of two years in prison will be appropriate penalties for the most severe cases of wilful non-compliance.

Other member states such as Denmark and France are also planning to introduce hefty fines and criminal sentences.

Compliance with the provisions will be assessed at two key points:

1. Receipt of research funding; and
2. Commercialisation of a product (including applying for market approval in the EU).

The regulation indicates that the provisions will not be retroactive and will only apply to genetic resources accessed after 12 October 2014.

A question arises however with regard to the burden of proof that a genetic resource was accessed prior to the Nagoya Protocol coming into force. At present the safest thing to do would be for researchers to ensure that they keep detailed records concerning the date of access of a resource and documentary proof confirming this, if available. Difficulties are envisaged to arise in the case of companies having internal collections of genetic resources.

Compliance

An international body known as the Access and Benefits Sharing (ABS) Clearing House is to be set up to act as an intermediary to co-ordinate the implementation of the Nagoya Protocol. In principle the system should work as follows:

1. A provider country informs the clearing house of its national access and benefits

Further information

This article details new developments regarding the implementation of the Nagoya Protocol since our last report in our August 2014 patent newsletter: "The Nagoya Protocol - Actions for genetic researchers" by David Hobson: www.dyoung.com/article-nagoyaprotocol

Researchers must ensure R&D on genetic resources complies with the Nagoya Protocol

sharing (ABS) information which the clearing house will keep up-to-date.

2. If a user wishes to access a genetic resource from provider country A, the user contacts the clearing house for details of how to agree mutually agreed terms with country A.

3. The user contacts the relevant government department in country A and obtains permission for either non-commercial or commercial use (the terms can be re-negotiated later if commercialisation appears likely).

4. Country A issues to the user a national permit and additionally country A files this at the clearing house.

5. The clearing house issues an internationally recognised certificate of compliance (IRCC) which is proof that the resource has been accessed in accordance with the Nagoya Protocol.

6. When a checkpoint is triggered (eg upon commercialisation) the IRCC will need to be presented.

7. The user communicates details back to the clearing house which in turn contacts provider country A to report on the progress in the R&D on their genetic resources. If necessary country A can use this as an opportunity to negotiate new terms (eg pertaining to a commercialisation agreement).

For point 3, it would appear that details of the use will need to be provided to the provider country. However, when submitting documentation to the ABS Clearing House it is planned that specific details can be made confidential and thus not open to inspection by third parties.

Consequently there are serious concerns about the confidentiality of information shared with government bodies of the provider countries and much care will need to be taken to determine the minimum level of disclosure required to comply with a provider country's requirements without giving away valuable commercial information.

Best practice

The regulation for implementing the Nagoya Protocol allows for the setting of 'best practices' to serve as a 'gold standard' for compliance. The intention is that if a researcher can show that they have carried out their due diligence as required by the best practice, any investigation as to their compliance when putting a product onto the market, for example in the EU, will be superficial.

Open issues

- There is no detailed guidance as to the scope of the legislation.
- There are still no specific details as to what constitutes an appropriate level of due diligence.
- An Implementing Act will be published by the EU Commission (final draft expected October 2015 – the first month in which compliance with the Nagoya Protocol will be checked).

Author:
David Hobson

Patent statistics

Worldwide patent data analysis IP5 statistics report 2013

You may not be aware of the IP5 offices, but given the context of this newsletter you will not be surprised that the *"IP"* indicates *"intellectual property"*. The *"5"* offices were originally three in 1983: Europe, Japan and the US, then four in 2008 with the inclusion of Korea, and China took the total to five in 2011. These are the world's five largest intellectual property offices. With input from the World Intellectual Property Office (WIPO), they cooperate to improve the efficiency of patent examination worldwide, following a vision of "*the elimination of unnecessary duplication of work among the offices, enhancement of patent examination efficiency and quality, and guarantee of the stability of patent right*". A product of this effort is the annual publication of a statistical report on patent-related data from the five offices and the rest of the world.

The IP5 Statistics Report 2013

This report provides a wealth of information on patenting around the world, broken up by topics such as region, subject matter and patent prosecution stages.

Headline facts

- 8.5 million patents were in force worldwide at the end of 2012, the IP5 offices being responsible for 90% of these.
- In 2013, the IP5 accepted 2.1 million patent applications for filing (up 11%) and granted 956,644 patents (up 4%). China saw the greatest annual increase in filings (26.4%) and Korea in grants (12.2%).
- Considering broad definitions of technology areas, and excepting China where chemistry is most common, electrical engineering dominates patent filings in all the offices: almost 50% of US applications.
- In the US almost 50% of all patents are still in force at the end of the 20 year term, compared to less than 5% in Korea.

You can find the full report at www.fiveipoffices.org/statistics.html

Author:
Cathrine McGowan

And finally…

Registered Community designs / litigation

Controversial Trunki case is wheeled off to the UK Supreme Court

Magmatic v PMS

Registered design litigation rarely reaches the UK Supreme Court, but Magmatic, the manufacturer of the famous *"Trunki"* ride-on suitcase, has been granted permission to take its litigation all the way to the Supreme Court in order to resolve a legal issue relating to the scope of protection in the UK conferred by a registered Community design (RCD).

The suitcase illustrated in the RCD is shown using 3D rendered views, and the only 2D surface decoration (ornamentation) results from the tonal contrast in the rendered views between the dark wheels and carrying strap of the suitcase and the light body of the suitcase. Significantly, the suitcase body is shown as being plain and un-ornamented. *"Kiddee Case"*, the competing product from PMS International, differs:

1. By having no tonal contrast between the carrying strap and the suitcase body; and
2. By having extensive surface decoration on the sides and nose of the suitcase body in the form of stripes and whiskers.

The UK Court of Appeal used these two differences in its February 2014 decision that the *"Kiddee Case"* produced a different overall visual impression compared with the suitcase shown in the RCD, and so did not infringe the RCD.

This decision received wide and unfavourable comment, and a campaign was launched to have it appealed to the Supreme Court and overturned and Magmatic granted an injunction to stop further sales of competing product from PMS International, who admit that their suitcase is inspired by the original Trunki suitcases.

Magmatic's wish for an appeal has been granted, and the case will now be heard by the Supreme Court, albeit apparently only in relation to the legal significance of the second difference mentioned above relating to surface decoration.

Author:
Paul Price

Useful link
"Trunki Skids to a Halt - Magmatic v PMS International" by Verity Ellis, 06 March 2014:

www.dyoung.com/article-trunki0314

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