

## INTELLECTUAL PROPERTY UPDATE

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## Editor's Corner

Is patent protection a means of wealth and growth for business? In this issue we analyze statistical information to explain how the US patent system provides large corporations and individual inventors an economic edge, and discuss how patents generate wealth and business growth. We also look at whether the scope of a patent claim is indefinite. We explore the standard defined by the USPTO Board of Patent Appeals and Interferences in *Ex Parte Miyazaki* to determine whether the scope of claims in a pending application are definite or not, and options available to traverse an indefinite rejection. And are obviousness rejections difficult to apply to unpredictable technology? *KSR International Co. v. Teleflex, Inc.* outlines general circumstances that may invite obviousness rejections. (See Squire Sanders [Intellectual Property Alert May 2007](#) and Squire Sanders [Intellectual Property Update Summer 2007](#) for a discussion of *KSR*.) However, as discussed in this issue, the obviousness standard of *KSR* is not so easily applied to invalidate a patent in unpredictable technology fields, such as chemistry.

And who has not heard of *Grand Theft Auto* and *Guitar Hero*? Such video games provide hours of entertainment, but are they creating too much trouble for trademark holders? This issue delves into conflicts that may arise between trademark law and the First Amendment. We explore how courts are determining whether the use of a mark in a video game is misleading, thereby in violation of the Lanham Act, or a mere exercise of First Amendment rights.

For a global perspective, we look at China and Russia. Are recent amendments to China's patent laws moving in the right direction? We explore these recent amendments, which are a clear reflection of China's efforts to offer better IP protection to applicants. We look at novelty requirements, locations of first filings, co-ownership, double patenting and prior art defenses, and increased damage awards. And in Russia new Registration Rules regarding the transfer of IP rights have been implemented, which is indicative of a step forward as it raises IP legislation to the level of Civil Code.

Alicia M. Choi, editor

## Generating Wealth Through Innovation<sup>1</sup>



Much has been made of the demise of US manufacturing. Once the United States was a manufacturing powerhouse, but much of its industry has now moved overseas or south of the border to low-cost countries such as China, India and Mexico. Eighty percent of the US economy is now service based. But, despite the loss of manufacturing jobs,

the United States still has the world's largest gross domestic product (GDP) at about US\$14 trillion.<sup>2</sup> That is three times larger than Japan's GDP (which ranks second) and four times larger than either Germany's or China's.<sup>3</sup>

How does the United States maintain its economic edge? One way is through innovation, and protecting that innovation using legal mechanisms, particularly patents. The United States grants more patents than any other country and an estimated 75 percent of the value of publicly-traded US businesses is now in intangible assets.<sup>4</sup> The total value of US intellectual property is estimated at more than US\$5 trillion, which exceeds the entire GDP of any other nation.<sup>5</sup> According to the United States Patent and Trademark Office (USPTO), intellectual property-based businesses and entrepreneurs drive more economic growth in the United States than any other sector.

In some industries it is simply no longer important to be a manufacturing source because manufacturing is a commodity input provided at a commodity price. Instead, it is important to be the source of, and control, the

*innovation.* By controlling the innovation you can control the product pipeline, from manufacturing to distribution to sales. This is the new business model for nations with mature economies, and the control of innovation through patents is critical for businesses that can not realistically compete, or that do not wish to compete, in commodity manufacturing.

### How Patents Generate Wealth

A patent creates a legal barrier preventing entry into the market segment it defines.<sup>6</sup> The patent owner has the right to operate exclusively within that segment and to stop any trespass (i.e., an infringement) into the segment, which means the patent owner can exclude others from making, using, selling, offering to sell or importing the products or services covered by the patent *regardless* of whether the

***Without patent protection there is no legal barrier to entry and others are free to copy your innovation.***

patent owner ever provides the products or services. That is the power of a patent – its mere existence monopolizes a market segment.<sup>7</sup> You need not provide products or services, or deal with vendors, customers, governmental regulations or employees.

A patent's barrier to entry provides many benefits:

1. If you choose to manufacture your innovation, or have it manufactured, the patent gives you time to establish manufacturing and marketing channels;
2. You can potentially charge premium prices within the market segment protected by the patent;
3. A patent is a tangible asset to attract business partners, investors and potential buyers to your product/service or company; and/or
4. You can simply license or sell the patent, and hence your barrier to entry, to another.

Without patent protection there is no legal barrier to entry and others are free to copy your innovation.<sup>8</sup>

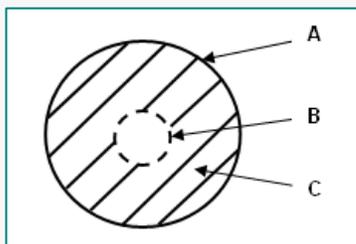
### Broad Scope Is Critical to Patent Value, Especially for Small and Medium-Sized Businesses

A patent is a document that uses words, usually accompanied by drawings, to define a piece of "intellectual property." Like a parcel of land, the value of this intellectual property is based largely on its location and size. A patent's "location" is the inherent value of the concept protected by the patent. For example, a new broom handle likely would not have the same inherent value as an integrated circuit that enables computers to run faster.

A patent's "size" is often referred to as its "scope." Patent scope is ultimately determined by the words used to prepare and prosecute the application that matures into the patent, and depends as much on the skill of the attorney charged with those tasks as on the actual breadth of the innovation. The inclusion or exclusion of just a few words can sometimes mean the difference between a patent worth millions and a worthless piece of paper. Patent scope is particularly important for small or medium-sized businesses. Because these businesses usually have constrained resources and relatively few patents, they must depend on broad patent scope for meaningful protection and value. Large businesses, in contrast, often have large budgets and obtain numerous patents covering incremental technological improvements. Using this procedure, they capture broad overall patent scope through the sheer number of patents obtained, and the scope of any single patent may not be important to the overall breadth or value of the entire patent portfolio.

Patent scope is sometimes too narrow because inventors and attorneys patent just a single example of the innovation conceived by the inventor, rather than brainstorming to determine and then patent the entire

inventive concept. This is illustrated in the following diagram:



- A. Scope of the innovation that could have been protected by the original inventor's patent, which is the entire inventive concept.
- B. Scope of the innovation often protected by a patent, which is just a specific example conceived by the inventor.
- C. The scope of the innovation left for others to practice and/or potentially patent, but that could have been protected by the original inventor's patent.

If your patent fails to capture the entire scope of your inventive concept, competitors will be free to practice, and potentially even patent, the scope not protected. The result for the original inventor is a patent worth significantly less than it could have been and perhaps lost profits, investments or licensing opportunities.

#### Conclusion: Innovation Is the Wave of the Future

The generation of wealth through innovation requires an inherently valuable innovation and a strong barrier to entry, which can be provided by sound patent protection. In today's marketplace, a strategy not founded on innovation and consisting solely of, for example, getting to market first and developing brand recognition may be unrealistic and suboptimal, particularly for a start-up company or any business in a highly-competitive market. Product information is often easy to obtain, consumers are sophisticated and competitors nimble. Assume that without

meaningful innovation and protection, competitors can and will copy every valuable aspect of your product or service. You will be left to compete mainly on price, delivery time and service, and potentially not have the opportunity or resources to develop market penetration or brand awareness. Not only will profit opportunities be lost, but so will the ability to attract investors and buyers to your business. Any business not already generating wealth through innovation should realize that it may be missing significant opportunities and should move forward with an innovation plan.

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1. This article is based on topics from the recently published *Business Success Through Innovation*, authored by David E. Rogers and Amy L. Hartzler.
2. Central Intelligence Agency World Factbook (2007); International Monetary Fund (in current prices, US dollars.), *World Economic Database* (October, 2008).
3. *Id.*
4. United States Patent and Trademark Office Press Release, "USPTO Introduces New Intellectual Property Curriculum" (April 14, 2008); "A Market For Ideas," *The Economist* (October 2005).
5. *Id.*
6. Some businesses, such as utilities or heavy equipment manufacturers, with extensive infrastructure, have non-legal barriers to entry.
7. Subject to efforts that may be required to enforce the patent.
8. Innovation can also be protected through contractual means or trade secret laws, but such protection is often inapplicable or impractical, particularly if you have no contractual relationship to enforce or your products or methods are publicly available and can be reverse engineered.

## **Miyazaki: USPTO Holds a Pending Claim Indefinite Under 35 USC §112 If Amenable to Two or More Plausible Claim Constructions**



In a precedential decision, *Ex parte Miyazaki*<sup>1</sup>, the Board of Patent Appeals and Interferences (BPAI) of the United States Patent and Trademark Office (USPTO) introduced a new indefiniteness standard for pending patent claims during prosecution. Specifically, the

BPAI held that a pending claim is indefinite under 35 USC §112, second paragraph<sup>2</sup>, if the claim is amendable to two or more plausible claim constructions. This article explains how *Miyazaki* changes US patent law and identifies patent prosecution strategies in light of the new indefiniteness standard of *Miyazaki*.

In *Miyazaki*, the claims were directed to a printer.<sup>3</sup> The Examiner rejected the claims under 35 USC §112, second paragraph, because the limitations regarding the “height” of the “paper feeding unit” and “sheet feeding area” were unclear. The applicant appealed this rejection, arguing that the claims were definite.

After considering the scope of the claims, the BPAI affirmed the Examiner’s rejection, holding that the claims were indefinite because they failed to recite any positional relationship between the user and the printer, thus, failing to impose any restriction on the height of the “paper feeding unit” and “sheet feeding area.” The BPAI considered an indefiniteness standard set forth by the Court of Appeals for the Federal Circuit (Federal Circuit) in which a claim is indefinite only if it is not amenable to construction or insolubly ambiguous.<sup>4</sup> However, the BPAI noted that while this indefiniteness standard is based on a presumption of validity of claims in issued patents, claims

in pending applications cannot benefit from such a presumption. Thus, the BPAI concluded that it was inappropriate to apply the indefiniteness standard to claims in pending applications and a lower indefiniteness standard was needed. The BPAI held that, for pending applications, if a claim is amenable to two or more plausible claim constructions that claim is indefinite under 35 USC §112, second paragraph.

Applying the lower indefiniteness standard, the BPAI concluded that the claims failed to specify a positional relationship between the user and the printer. Thus, the claims failed to impose a limitation on the height of the paper feeding unit because the claimed height depended on the position of the user and the printer. The BPAI also concluded that the specification did not clearly define the height of the paper feeding unit, because the specification failed to describe a positional relationship between the user and the printer. However, the BPAI concluded that claim 13 was not indefinite because the recitation “when the user is standing erect in front of the printer and standing substantially at ground level,” provided a positional relationship between the printer and the user.

The BPAI also entered a new ground of rejection for some of the claims, including claims 13, 15 and 26, for indefiniteness under 35 USC §112, second paragraph, determining that the limitation “sheet feeding area” was unclear. Applying the new standard, the BPAI determined that the specification defined “sheet feeding area” as two printer areas: (A) the accommodation space where the paper roll is loaded and (B) the cover member above the accommodation space where the carton and paper sheets rested for feeding into the printer. Furthermore, the BPAI determined that, based on the ordinary meaning, “sheet feeding area” referred to the printer area used for feeding paper sheets into the printer, which, according to the specification, was the cover member.

However, the BPAI concluded that the claims were not consistent with either the specification or the ordinary meaning. Specifically, claim 15 claimed a large printer comprising a sheet feeding area *and* a cover member. The BPAI surmised that if “sheet feeding area” included both the accommodation space and the cover member, then the recitation of a cover member in claim 15 would be redundant. Furthermore, claims 15 and 26 each claimed that the sheet feeding area was “operable to feed” sheets

definition of *insolubly ambiguous*. A claim is insolubly ambiguous when all reasonable efforts at claim construction prove futile because normal claim construction tools lead to *inconsistent* results. Thus, although purporting to apply the new USPTO indefiniteness standard to “sheet feeding area,” the BPAI actually applied the old Federal Circuit standard, thus confusing the issue of how to apply the new indefiniteness standard.

***A claim with any degree of breadth is likely to be amenable to two or more reasonable claim constructions.***

of paper, yet the BPAI concluded from the specification that the cover member was not operable to feed the paper rolls. The BPAI concluded that the specification, claims and ordinary meaning of the term lead to inconsistent claim constructions. Therefore, the BPAI held that the phrase “sheet feeding area” was amenable to two or more plausible claim constructions and thus the claims were indefinite.

That being said, there are options available to combat an indefiniteness rejection under the new standard. If the specification discloses two or more embodiments, the broad claim can be split into two or more narrower claims, with each claim covering a single embodiment. However, this option is not always available, as the applicant may not wish to add new claims for various reasons, such as excess claim fees.

The BPAI’s decision represents a substantial change in patent law. A claim with any degree of breadth is likely to be amenable to two or more reasonable claim constructions. Therefore, the BPAI’s holding penalizes an applicant for merely drafting a broad claim, which contradicts Federal Circuit precedent that breadth of a claim is not to be equated with indefiniteness.<sup>5</sup> Another problem with the decision is that, while purporting to establish a new indefiniteness standard, the BPAI actually imposed the old indefiniteness standard. Specifically, the BPAI concluded that “sheet feeding area” was indefinite because it was unclear whether the recitation referred to the accommodation space or the cover member, due to the fact that the specification, claims and ordinary meaning of the language were inconsistent. Thus, even though the BPAI claimed that the limitation was amenable to two possible definitions, its actual objection was that the two possible definitions were *inconsistent*. This is the very

Another option is to traverse the rejection by distinguishing *Miyazaki* and arguing that the features in the claim, while broad, clearly define the metes and bounds of the invention, so that one of ordinary skill in the art would understand how to avoid infringement of the claim.<sup>6</sup> In *Miyazaki*, the BPAI’s true objection to the “height” of the “paper feeding unit” or “sheet feeding area” was that the recitation did not clearly define the metes and bounds of the invention because it did not provide positional information regarding the user and the printer as a whole. Furthermore, the BPAI concluded that “sheet feeding area” did not clearly define the metes and bounds of the invention because, based on the specification and claim language, it was unclear whether the recitation referred to the accommodation space or the cover member of the printer.

In conclusion, while the wide-reaching language of the new USPTO indefiniteness standard for pending claims articulated in *Miyazaki* may lead to a flood of rejections merely based on a claim’s breadth, it appears that one may still traverse an indefiniteness rejection under

*Miyazaki* if one can show that the claim, while broad, clearly defines the metes and bounds of the invention.

*Keith Mullervy, associate, Tysons Corner*

1. 89 USPQ2d 1207 (B.P.A.I. 2008) (precedential decision).
2. 35 USC 112, second paragraph states that “[t]he specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.”
3. Claim 1 recited in part:
  1. A large printer comprising:
    - a paper feeding unit operable to feed at least one roll of paper, at least one substantially flat sheet of paper and at least one stiff carton, the paper feeding unit being located at a height that enables a user, who is approximately 170 cm tall, standing in front of the printer to execute the paper feeding process including replacement of the roll paper and setting at least one of the sheet of paper and the stiff carton...

Claim 13 recited in part:

  13. A large printer comprising:
    - a sheet feeding area positioned at a height at which a user, who is approximately 170 cm tall, can set up a printing medium without having to bend substantially at the waist when the user is standing erect in front of the printer and standing substantially at ground level, wherein the sheet feeding area is positioned at the height when the printer is placed substantially at the ground level.

Claim 15 recited in part:

  15. A large printer comprising:
    - a sheet feeding area operable to feed at least one roll of paper, at least one sheet of paper and at least one stiff carton toward a printing unit at which printing is performed thereon...

Claim 26 recited in part:

  26. A large printer comprising:
    - a sheet feeding area operable to feed a plurality of paper rolls ranging in width from 210 mm to 1120 mm, a substantially flat sheet of paper ranging in length from 420 mm to 1580 mm and at least one stiff carton ranging in length from 420 mm to 730 mm.
4. *Datamize, LLC v. Plumtree Software, Inc.* 417 F.3d 1342 (Fed. Cir. 2005).
5. *In re Miller*, 441 F.2d 689, 169 USPQ 597 (C.C.P.A. 1971).
6. *Morton Int'l, Inc. v. Cardinal Chem. Co.*, 5 F.3d 1464, 1470, 28 USPQ2d 1190, 1195 (Fed. Cir. 1993).

## “Predictability” Informs the Obviousness Inquiry Under *KSR* – But Has This Jurisprudence Significantly Altered the Landscape for Patents in the Unpredictable Arts?



In *KSR Int'l v. Teleflex, Inc.*<sup>1</sup> the Supreme Court emphasized the predictability of an outcome as an important question to answer when deciding whether an invention would have been obvious to an artisan skilled in the area to which the invention pertains. According to the Court, inventions that are nothing more than a combination of things known and assembled in predictable

ways to produce predictable results are not worthy of a patent right.

The facts before the *KSR* Court concerned a patented vehicle control pedal having an adjustable arm. Such technology is often predictable in the sense that one does not need to build the pedal to know how it will perform. The pedal is, therefore, known as a predictable art. Importantly, the Court found that the patent would have been obvious because the components of the claimed pedal were known and easily combined and the benefits of the combination were predictable.

By contrast, the therapeutic benefits, if any, of a novel chemical compound are not predictable. One cannot say for certain how the compound will react in a body until it has been tested. It would seem, therefore, that the obviousness inquiry under *KSR* ought not be easily applied to invalidate a patent on a novel compound used to treat a condition. The Federal Circuit appears to have adopted this view in its post-*KSR* jurisprudence.

One post-*KSR* strategy frequently pursued by a party attempting to invalidate a patent, in both the predictable

and unpredictable arts, is the “obvious to try” test for obviousness. According to the Federal Circuit, *KSR* framed this test under the assumption that there was a finite and,

***A classification of the art as predictable or unpredictable is not a litmus test for obviousness under KSR.***

in the context of the art, small or easily traversed number of options that would have convinced an ordinarily skilled artisan of obviousness. Accordingly, when it is inappropriate to make such an assumption, as is often the case in the unpredictable arts, the reach of *KSR* might appear limited. Two cases from the Federal Circuit illustrate this point.

In *Abbott Labs. v. Sandoz Inc.*<sup>2</sup> the court found that a controlled release composition of erythromycin was not obvious over a controlled release composition of azithromycin because of the specific pharmacodynamic parameters chosen. When there is no predictability in the result, the court reasoned, the case differs from that faced in *KSR*. “The Court in *KSR* did not create a presumption that all experimentation in fields where there is already a background of useful knowledge is ‘obvious to try,’ without considering the nature of the science or technology.”<sup>3</sup>

In *Eisai Co. Ltd. v. Dr. Reddy's Laboratories, Ltd.*<sup>4</sup> the court found that, despite a close structural similarity between the patented compound and the prior art, the gastric acid suppressing compound rabeprazole was not obvious over the anti-ulcer drug lansoprazole. Once again, the court refused to invalidate the patent on the grounds that it would have been “obvious to try.” In support of this holding, the court was quick to point out that the analysis in *KSR* assumed, among other things, that the prior art supplied some reason to narrow the field down to a finite number of identified, predictable solutions. The court pressed this point further. “To the extent an art is unpredictable, as chemical arts often are, *KSR*'s focus on those ‘identified, predictable solutions’ may present a difficult hurdle

because potential solutions are less likely to be genuinely predictable.”<sup>5</sup>

These and other cases<sup>6</sup> suggest a trend towards treating cases that fall within the realm of the unpredictable arts differently from those of the predictable arts. The more recently decided *In re Marek Z. Kubin*,<sup>7</sup> however, reminds us that a classification of the art as predictable or unpredictable is not a litmus test for obviousness under *KSR*. As this court aptly put it, it is inappropriate “in the face of *KSR*” to cling to customized “legal tests for specific scientific fields,” which are susceptible to use “in ways that deem entire classes of prior art teachings irrelevant, or discount the significant abilities of artisans of ordinary skill in an advanced area of art.”<sup>8</sup>

From the surveyed cases, the unpredictability of an outcome or the path that would have led to the patented discovery has been demonstrated in the following ways:

- a compound useful for purpose A led, unexpectedly, to the discovery of a compound useful for purpose B, e.g., a different therapeutic purpose;
- a compound worked through a different mechanism, despite its structural similarity to a known compound;
- conventional wisdom was not followed when the discovery was made, a compound was chosen, etc.

*KSR*'s impact on the availability of a patent for discoveries in fields like chemistry or biotechnology is correctly understood as less profound than discoveries in the so-called predictable arts. Yet, it should be remembered that while it is more likely that a discovery in chemistry or biology could not have been predicted, recognition of this fact alone has not led, and likely will not lead, to any presumption concerning predictability under *KSR*.

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Qun (Helen) Liu, associate, San Francisco*

1. 550 US 398 (2007).
2. 544 F.3d 1341 (Fed. Cir. 2008).
3. *Abbott Labs* at 1352.
4. 533 F.3d 1353 (Fed. Cir. 2008).
5. *Eisai Co. Ltd.* at 1359.
6. See e.g., *Ortho-McNeil Pharmaceutical v. Mylan Laboratories Inc.*, 520 F.3d 1358 (Fed. Cir. 2008); *Takeda Chem. Indus. Ltd. v. Alphapharm Pty. Ltd.*, 492 F.3d 1350 (Fed. Cir. 2007); *Sanofi-Synthelabo v. Apotex*, 550 F.3d 1075 (Fed. Cir. 2008); and *Aventis Pharma Deutschwand GmbH v. Lupin Ltd.*, 499 F.3d 1293 (Fed. Cir. 2007).
7. U.S. App. LEXIS 6914 (Fed. Cir. 2009).
8. *In re Marek Z. Kubin* at \*27.

### Trademarks, Video Games and the First Amendment: Balancing Freedom of Artistic Expression with Trademark Rights



Given the ever increasing cross-referencing of pop culture in entertainment products, video games frequently may portray or reference actual persons, places or things, including trademarks, in their representation of the digitized

worlds they depict. This raises questions of whether such uses, if unauthorized, violate the trademark rights and similar rights of third parties. In such cases, the First Amendment may protect expressive artistic works from trademark infringement actions under the Lanham Act, the federal trademark law. In two recent cases, the United States Court of Appeals for the Ninth Circuit and the United States District Court for the Eastern District of Michigan each held that video game manufacturers were not liable under the Lanham Act for infringement and false endorsement based on First Amendment protections.

#### ***E.S.S. Entertainment 2000, Inc. v. Rock Star Videos, Inc.***

In the first case, the owner of a strip club in Los Angeles called “Play Pen” sued the manufacturer of the video game *Grand Theft Auto: San Andreas* for trade dress infringement, trademark infringement and unfair competition.<sup>1</sup> The video game depicts cartoonish cities modeled after actual American urban cities including “Los Santos,” modeled after Los Angeles. East Los Santos contains variations of actual businesses and architecture including a virtual cartoon-style strip club known as “Pig Pen,” which was designed in part using photographs of the Play Pen.

The club owner claimed that the video game manufacturer had used Play Pen’s logo and trade dress without authorization, and had created a likelihood of confusion among consumers as to whether the club owner had endorsed, or was associated with, the video game. The video game manufacturer argued that the First Amendment protected it against liability.

The Ninth Circuit noted that the issue under consideration involved “the intersection of trademark law and the First Amendment,” and that it had adopted the Second Circuit’s approach from *Rogers v. Grimaldi*,<sup>2</sup> which “requires courts to construe the Lanham Act ‘to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression.’” The court further noted that an artistic work’s use of a trademark that otherwise would constitute trademark infringement under the Lanham Act is not actionable (1) unless the use of the mark has no artistic relevance to the underlying work whatsoever or (2) if it has some artistic relevance, unless it explicitly misleads as to the source or the content of the work. The court stated that although the test traditionally has been applied to the use of a trademark in the *title* of an artistic work, there is no reason why the test should not also apply to the use of a trademark in the *body* of the artistic work.

With respect to the first prong of the test, the court concluded that the use of the modified “Play Pen” mark

and location in the video game had “some artistic relevance,” because recreating businesses in the area is the only way to achieve the artistic goal of developing a cartoon-style parody of East Los Angeles. With respect to the second prong of the test, the court noted that it seems “far-fetched” that someone playing the video game would think that the strip club owner provided any expertise or knowledge to the production of the video game, and determined that a reasonable consumer would not think that a company that owns one strip club in East Los Angeles, which is not well known to the general public, also produces a technologically sophisticated video game. The court concluded that because video games and strip clubs have nothing in common, nothing indicates that the buying public would reasonably have believed that the club owner produced the video game, or that the video game manufacturer operated a strip club. Accordingly, the court held that the video game manufacturer’s use and modification of the club owner’s mark was not explicitly misleading and was protected by the First Amendment.

***The Romantics v. Activision Publishing, Inc.***

In the second case, a video game manufacturer used the musical composition “What I Like About You,” written and recorded by the band The Romantics, in its video game *Guitar Hero Encore: Rock the 80’s*.<sup>3</sup> The manufacturer had obtained a valid synchronization license from the owner of the copyright in the song, EMI Entertainment World, Inc., which permitted the manufacturer to record its own version of the song to use in the video game. If and when a player encounters the song in the game, it is clearly identified by the song title and the words “as made famous by The Romantics,” which the court noted informs players and onlookers that The Romantics are not actually performing the song.

The Romantics’ members sued the video game manufacturer for, among other things, false endorsement and unfair competition under the Lanham Act, claiming that players of the game had been, or were likely to be in the

future, confused, deceived or mistaken about whether the band sponsored or endorsed the game. The manufacturer in this case also argued that the First Amendment protected it against liability

The district court noted that the video game contains numerous creative elements – for example, it allows players to select a character, costumes and model of guitar to be used by the character on screen. When game play begins, a stylized display of a rock concert appears, with an audience, stage, band, lighting and stage effects. One mode of the game allows players to start off playing small venues and to advance to progressively larger venues, much like the progression of an up-and-coming band. Because it allows players to customize their game play and contains large amounts of original artwork, the court concluded that the video game was an expressive artistic work entitled to First Amendment protection.

The court noted that the Sixth Circuit (in which the court is located) applies the *Rogers* test to Lanham Act claims, observing that under this test, “the Lanham Act should be applied to artistic works only where the public interest in avoiding confusion outweighs the public interest in free expression.” The court found that neither the video game nor any of its promotional materials contained any explicit indication that the band members endorsed the game or had any role in producing it. In addition, the court noted that the song is described “as made famous by The Romantics,” which informs consumers that the version of the song in the game is not actually performed by The Romantics. The court concluded that these and other facts illustrated that the manufacturer’s use of the song did not expressly mislead the public as to the song’s source. Accordingly, the court held that the use of the song was protected by the First Amendment.

**Conclusion**

These decisions indicate that in many instances game manufacturers’ unauthorized uses of trademarks or trade dress in their video games may be protected by the First

Amendment. The analysis of whether a particular game is protected, however, and whether third party permissions are necessary in order to use certain content, can be complicated, making a comprehensive legal clearance review a necessary pre-release step when third party trademarks or other content are to be included in a game.

*Philip Zender, partner, San Francisco*  
*Beth Seals, associate, San Francisco*

1. *E.S.S. Entertainment 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095 (9th Cir. 2008).
2. 875 F.2d 994 (2d Cir. 1989).
3. *The Romantics v. Activision Publishing, Inc.*, 574 F. Supp. 2d 758, 762 (E.D. Mich. 2008).

## Overview of China's Third Amended Patent Law



The National People's Congress (NPC) Standing Committee in China recently took another step

toward strengthening China's intellectual property system by amending its Patent Law, originally adopted in 1984, for the third time in just under 25 years. The Third Amended Patent Law is scheduled to take effect on October 1, 2009.

The first two amendments, made in September 1992 and August 2000, mainly consisted of changes enacted to accommodate the requirements of international laws and China's World Trade Organization (WTO) obligations under the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The latest amendments are in line with China's mission to continue advancing its economic development and the National Intellectual Property Strategy issued by the State Council on June 5, 2008, improve IP protection and enforcement, and foster IP innovation. Changes in the new Patent Law include those that relate to novelty of inventions, location of

first filings, co-ownership, double patenting and prior art defense, as well as increased damages awards and a larger role for the State Intellectual Property Office (SIPO) in IP cases. The new law also includes additional provisions for compulsory licensing and a reference to anticompetitive behavior.

### Novelty

The new Patent Law requires that the invention or design for which a patent is being applied be absolutely novel. In other words, the subject matter of a patent application must not have been known, disclosed or used publicly anywhere in the world before the filing date in China. This contrasts with the current People's Republic of China (PRC) Patent Law, under which patents may be granted despite an invention or design having been used in another country prior to the patent application's filing date. This provision of the current PRC Patent Law is the subject of much criticism for providing an opening for the proliferation of "junk patents," and is frequently a source of unpleasant surprise for patent owners outside China.

### First Filings

The bar to first filings abroad for inventions "completed" in China has been removed. After October 1, 2009 an owner of an invention "completed" in China may first file an application abroad to secure a patent for such an invention, provided the applicant first submits the invention to the PRC Patent Office for a confidentiality and security review and receives approval.

This provision, however, neither indicates the criteria for deeming an invention approved for filing abroad nor does it provide guidance on measures for dealing with rejections. Moreover, the absence of a definition of "complete" poses the question of how the PRC government will determine when an invention is "complete."

### Simultaneous Filings for Utility and Invention Patents

An “invention” patent application under PRC Patent Law covers any new technical solution relating to a product, a process or improvement thereof. A “utility model” patent application covers any new technical solution relating a product’s shape, structure, or combination thereof, which is fit for practical use. Utility model patent applications commonly take less time to register compared to invention patent applications. The new Patent Law clarifies that an applicant may file invention and utility model patent applications simultaneously for an invention and allows for the applicant to file a declaration to terminate or abandon the utility model patent as a prerequisite to obtaining the invention patent. This indicates that the Patent Office is comfortable with the practice of inventors filing both types of applications at the same time, using the utility model patent application as a type of insurance policy to protect the invention or design until the more substantive and stronger invention patent is granted.

### Co-Applicants and Co-Owners

Co-applicants and co-owners of a patent will be free to individually exploit the patent or grant a non-exclusive license to a third party in the absence of any agreement or other provisions for exercise of these rights. Actions

*The new Patent Law also vests SIPO with the power to inspect and seize records and products and spells out that courts have the authority to issue preservation orders in cases in which evidence is likely to be lost before a trial or a preliminary injunction.*

regarding other rights will require the consent of all co-applicants or co-owners. This freedom to individually exploit an invention creates a need for entities, especially R&D entities in collaborative relationships, to perform thorough due diligence and include clear language ensuring that any intent to exploit the invention is clearly reflected in any agreements governing a partnership or

joint venture. Although the new Patent Law provides that royalties from individually exploited rights belong to all owners, an owner is required to be vigilant and actively exert control over the invention to prevent loss of competitive edge.

### Compulsory Licensing

Articles of the new Patent Law regarding compulsory licensing include provisions for the government to grant such a license in situations in which exercise of the patent rights has been deemed anticompetitive in accordance with the law. This appears to refer to the PRC Anti-Monopoly Law (including Art. 55 regarding IP abuse), but clear guidance in the article as to implementation and enforcement is missing. Conditions that could warrant a compulsory license include semiconductor technology and public health reasons including distribution of pharmaceuticals to countries in need. It is very likely that implementing regulations will be issued to add clarity to this and other areas of the new Patent Law.

### Other Provisions

Pharmaceutical manufacturers must also contend with the mandate that patent applicants for inventions using genetic resources either establish the origin of the material or explain why its origins are impossible to ascertain. Also, under the new Patent Law, the Patent Office will reject any invention employing genetic material used or obtained illegally. As a result, the new Patent Law heightens the need for thorough due diligence and vigilance to protect inventors’ rights and competitive edge.

The new Patent Law also vests SIPO with the power to inspect and seize records and products and spells out that courts have the authority to issue preservation orders in cases in which evidence is likely to be lost before a trial or a preliminary injunction. Parties who prevail against a patent infringer can also look forward to increased fines for

the infringer and clearer guidance regarding damages determinations. Though PRC courts have been criticized for issuing awards that are typically less than what might be expected in a court outside China, signs of change are appearing. On January 14, 2009 Germany-based bus manufacturer Neoplan received more than RMB40 million when it prevailed against Zhongwei Bus & Coach Group and its parent, Zonda International, in a claim that the design patent for Neoplan's Starliner Bus had been infringed. PRC plaintiffs have also prevailed with large awards recently including an RMB50+ million victory for Holley Communications over Samsung in patent infringement litigation in December 2008; CHINT Group's RMB334+ million patent infringement win over Schneider Electric in 2007; and a patent validity challenge and initial loss by Pfizer Inc. related to sildenafil citrate used in its prescription drug Viagra (the patent rights were subsequently granted to Pfizer by the Beijing court).

These patent infringement challenges, lawsuits and awards provide an indication of how parties in China are asserting their right to innovations. As actions typical of worldwide innovation hubs, they are reflective of the increased importance of IP rights to both global and China-based companies.

*LaRhonda J. Brown-Barrett, associate, Shanghai*

## New Registration Rules Regarding Transfer of Intellectual Property Rights in Russia



Under Russian law certain intellectual property objects<sup>1</sup>, such as inventions, utility models, industrial designs and trademarks, enjoy protection in the Russian Federation (Russia) provided that they are either registered with the Federal

Service on Intellectual Property, Patents and Trademarks (Rospatent) or with the World Intellectual Property Organization (WIPO) in accordance with international treaties to which Russia is a party.<sup>2</sup>

Some IP objects, such as integrated microcircuit topologies, computer programs and data bases may, but are not required to, be registered with Rospatent, which shall enhance their legal protection, in particular, in case of judicial disputes. And in order to be valid in Russia, any transfer of the exclusive right to a registered IP object, either on the basis of an assignment agreement or a license agreement,<sup>3</sup> or without an agreement (a non-contractual transfer),<sup>4</sup> as well as the pledge of such right should be registered with Rospatent as well.<sup>5</sup>

Under the provisions of Part 4 of the Civil Code of the Russian Federation (Civil Code), effective January 1, 2008 (which replaced most of Russian IP laws including those that were enacted during Soviet times), the registration of transfers of the exclusive right to IP objects shall be made according to the procedure and terms established by the Government of the Russian Federation.

The new Rules for the state registration of agreements for transfer of the exclusive right to an invention, utility model, industrial design, registered integrated microcircuit topology, computer program or database, and of a non-contractual transfer of the exclusive right to an invention,

utility model, industrial design, trademark, service mark, name of a commodity's place of origin, registered integrated microcircuit topology, computer program or database were approved by the Decision of the Government of the Russian Federation No. 1020 dated December 24, 2008 (the Registration Rules). At the same time, for transfers of the rights to IP objects that are not

***The Registration Rules do not require that a power of attorney be submitted together with the other documents for state registration if such documents are filed by a patent attorney.***

provided for by the Registration Rules, the former Rules approved by the Order of Rospatent No. 64 dated April 29, 2003 (the Rospatent Rules) remain applicable.

The Rospatent Rules also establish certain specific requirements to be complied with for state registration of the exclusive right transfers which are within the scope of the Registration Rules but are not covered by the latter.

### **The Registration Rules**

The following agreements (and any amendments of the registered agreements or the termination thereof) shall be registered under the Registration Rules (Registerable Agreements):

- an assignment of the exclusive right to an invention, utility model, industrial design, registered integrated microcircuit topology, computer program or database;
- a pledge (or subsequent pledge) of the exclusive right to an invention, utility model, industrial design, registered integrated microcircuit topology or computer program; and
- a license agreement with respect to an invention, utility model, industrial design or registered integrated microcircuit topology.

In order to have registered a Registerable Agreement, amendments to the essential conditions or termination thereof upon agreement of the parties, the following documents should be submitted to Rospatent:

- an application for state registration;<sup>6</sup>
- an original agreement in duplicate;
- a simple copy of the agreement; and
- a document confirming the payment of the duty for the state registration.

For the registration of a unilateral termination of Registerable Agreements or termination thereof under a court's decision and non-contractual transfers the lists of documents differ slightly.

It should be noted that the Registration Rules do not require that a power of attorney be submitted together with the other documents for state registration if such documents are filed by a patent attorney. But if a natural person permanently residing abroad or a non-Russia-based legal entity applies to Rospatent for state registration it can be done only through a patent attorney and the respective power of attorney must be submitted.

Rospatent shall register an agreement or amendments thereto, as well as a non-contractual transfer, under the following conditions:

- A. the respective IP rights object enjoys protection in Russia due to its state registration or in accordance with international treaties of Russia;
- B. the information on the owner of the IP rights object, the subject of the agreement (number of the patent or certificate, scope of legal protection, period of effect of the exclusive right) or the parties to the agreement conform to the information contained in the state registers maintained by Rospatent;

- C. the rights which are the subject of the agreement do not exceed the limits of the rights enjoyed by a party to the agreement;
- D. if onerous, the agreement contains a provision on compensation or on the procedure for determining it;
- E. the agreement does not contain internal contradictions; or
- F. if the agreement provides for a unilateral termination, the procedure of such termination is clearly specified.<sup>7</sup>

### Rospatent Requirements

The Rospatent Requirements provide that within two months of receipt of a proposed registration filing Rospatent shall either register the respective agreement, or amendment made in the registered agreement, or seek additional information.

If an agreement (or amendments thereto) are registered, Rospatent is obliged to send to the parties thereof:

- a notice of state registration;
- a copy of the registered agreement or the amendment thereto; and
- patents or certificates for the respective IP rights with a note regarding the assignment of the exclusive right or the granting of the right to use such object.

Rospatent shall refuse the registration of the agreement or amendments to a registered agreement if required documents have not been presented within the stated term without a valid excuse.

In addition to the requirements provided in the Registration Rules, the Rospatent Rules establish particular requirements for state registration of certain agreements regarding transfer of the exclusive right to IP objects,

described below.

- i. **Agreements for the assignment of the exclusive right (cession of patent) to inventions, utility models, industrial designs, licenses (sublicenses)<sup>8</sup> on the use of patented inventions, utility models or industrial designs.**

In addition to the other documents submitted for the registration of the respective assignment or license (sublicense) agreement, the patent shall be enclosed with the application. For the assignment of the exclusive right for invention (cession of patent), if the applicant (patentee), as author of such invention, was exempted under the law from the payment of all patent duties when submitting a patent application for the invention, a document confirming the payment of such duties must also be enclosed.

- ii. **Agreements assigning the exclusive right to the trademark and license (sublicense)<sup>9</sup> agreements granting the right to use the trademark.**

An additional requirement for the license (sublicense) agreement is that it contain provisions that the quality of goods of the licensee shall not be inferior to the quality of goods of the licensor and that the licensor shall exercise control over compliance with that provision. Rospatent shall refuse registration of the trademark assignment agreement if such assignment may cause the consumer to be misled as to the goods or their manufacturer.

- iii. **Agreements on the absolute or partial assignment of the exclusive right to computer programs and databases, assignment of the exclusive right to integrated circuit topologies**

**and assignment of the right to use integrated circuit topologies.**

Copies of all official registration certificates for the computer programs, databases or integrated circuit topology shall be enclosed in addition to the other documents submitted for the registration of agreements on the assignment of the exclusive right to the registered integrated circuit topology, and agreements on the absolute assignment of the exclusive right to registered computer programs or databases.

iv. **Agreements of commercial concession (subconcession).**

Under Russian law, an agreement of commercial concession is one under which the rights owner grants to the user for consideration the use, in the user's business activity, of exclusive rights, including the right to the trademark and service mark, as well as the rights to other IP objects stipulated in the agreement, in particular the commercial designation and manufacturing secret (know-how).<sup>10</sup> Parties to an agreement of commercial concession may be commercial organizations and individual private entrepreneurs registered in this capacity. An agreement of commercial concession shall be valid if executed in writing and registered by Rospatent.<sup>11</sup>

According to the Rospatent Requirements, in addition to the other documents, the application for the state registration of an agreement of commercial concession shall be included with the patent(s) for the respective IP object(s).

To register an agreement of commercial concession, Rospatent shall verify that the agreement contains:

- a definition of the parties to the agreement;
- the subject-matter of the agreement (e.g., number of patent, certificate for the trademark or number

of international registration in respect of which the agreement was concluded)

- the scope of exclusive rights to be granted; and
- a provision obligating the user to ensure that the quality of the goods produced, work performed or services rendered under the agreement correspond to the quality of similar goods, work or services produced, performed or rendered directly by the rights-owner, and obligating the rights-owner to supervise such compliance.

*Olga M. Bezrukova, European partner, Moscow*  
*Yana A. Dianova, associate, Moscow*

1. "Intellectual property objects" are the results of intellectual activity and means of individualization of legal entities, goods and services.
2. On the condition that Russia is included in the list of countries in the territories of which the registration is granted pursuant to the respective international registration.
3. The difference between an assignment agreement and a license agreement is that while under the former an exclusive right to an object of IP rights is permanently assigned to another person in whole or in part, under the latter the right of use of an object of IP rights is granted for a certain term and within a certain scope.
4. Non-contractual transfers include transfers by virtue of inheritance, the reorganization of a legal entity (merger, affiliation, division or separation) and foreclosure.
5. Article 1232 of the Civil Code of the Russian Federation.
6. Models of such applications are found in the Rospatent Rules.
7. The last three conditions are new.
8. A sublicense agreement may be registered provided the license agreement gives the licensee the right to permit third parties to use the patented invention, useful model or industrial design on the terms of sublicense agreed to by the owner or defined in a license agreement.
9. A sublicense agreement may be registered on condition that the license agreement provides for the right of the licensee to permit third persons to use the trademark on the terms of sublicense agreed by it with the owner or defined in a license agreement.
10. Article 1027 of the Civil Code of the Russian Federation.
11. Article 1028 of the Civil Code of the Russian Federation. It should be noted that the Procedure for the Registration of Commercial Concession (Subconcession) Agreements (approved by Order of the Ministry of Finance of the Russian Federation No. 105 of August 12, 2005) has not been abrogated and at present it is unclear whether commercial concession (subconcession) agreements (amendments or annulments of agreements) must still be registered with the territorial body of the Federal Tax Service of the Russian Federation (the registering body) that registered the legal entity or individual entrepreneur that is the rights-owner under the agreement.

## Contributor Profiles

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**Alicia M. Choi** focuses her practice on the areas of patent law. Her work includes preparing and prosecuting utility patent applications in the areas of electrical and computer engineering including information technology, software systems, wireless communication, medical diagnostic devices, semiconductors, analog and digital circuitry, and consumer electronics such as optical storage media and audio devices for US and international clients. Her experience also includes conducting novelty, patentability, invalidity and infringement analyses for various electrical devices and systems. Before entering the practice of law, Ms. Choi was a lead engineer for Rockwell Automation where she was involved in the integration of various programmable controllers and electronic operators.



**Olga M. Bezrukova** focuses her practice on intellectual property matters. She is a lawyer, a registered patent agent in the Russian Federation and a Eurasian patent agent. She advises her clients on registration and protection of intellectual property rights. As a patent agent, she handles the registration of both patents and trademarks. She also prepares and registers licensing agreements with the Russian patent authorities. She represents her clients in the same major transactions regarding intellectual property issues. Ms. Bezrukova advises clients on copyright matters, prepares appropriate copyright agreements, assists in registering software and databases, and advises clients regarding cryptography matters.



**LaRhonda J. Brown-Barrett** primarily focuses her practice on commercial transactions including foreign direct investment, intellectual property, privacy, financial services, employment and media content matters. She has counseled clients engaged in various cross-border transactions including the establishment of foreign invested enterprises; strategies for protecting and enforcing intellectual property rights; manufacturing, sales and distribution agreements; acquisitions; and licensing. Prior to her career in law, Ms. Brown-Barrett was an engineer and systems analyst.



**Qun (Helen) Liu** focuses her practice on intellectual property matters. Ms. Liu advises clients on patent strategies as well as patent preparation and prosecution. She assists clients in managing patent portfolios and provides infringement and validity analysis. Ms. Liu offers direct experience with patent preparation and prosecution both in the United States and around the world including Europe, Australia, Canada, Japan and China. With a strong technical background and experience, she advises clients in a broad range of industries including chemicals, pharmaceuticals, biotechnology, polymers, electronic engineering and nanotechnology.



**Keith Mullervy** focuses his practice on intellectual property matters with a focus on patent prosecution. His experience includes patent preparation and prosecution in several technologies including wireless communication systems, computer software, automotive systems, robotics, mechanical systems, imaging systems and radiation detection systems. Prior to law school, Mr. Mullervy worked in the

information technology industry as a software developer and systems analyst for several consulting companies.



**James L. Reed** focuses his practice on intellectual property matters including patent prosecution, counseling, litigation and intellectual property transactions in a variety of fields including medical devices; automotive, building and machinery; electrical; and

computer networks. Before turning to the practice of law, Mr. Reed worked for nine years as an aerospace engineering consultant to NASA. During that time he acquired skills in various aerospace and aerospace-related fields including fluid and structural mechanics, aerodynamics, control systems, thermodynamics and vibro-acoustics.



**David E. Rogers** practices in the areas of patent, trademark, trade dress and unfair competition law including preparing and prosecuting domestic and foreign patent and trademark applications, handling *inter partes* trademark proceedings including

oppositions, cancellations and Internet domain name disputes, developing internal business procedures for the protection of intellectual property rights, preparing contracts and technology transfer agreements, patent and trademark litigation, and preparing patent infringement and validity opinions. Mr. Rogers has experience with many technologies including complex machinery, mechanical and chemical manufacturing processes, specialty chemicals, plastics forming, rubber compounding and forming, consumer paper products, food products, explosives, medical devices, medical compositions, surgical procedures, business methods and building materials.



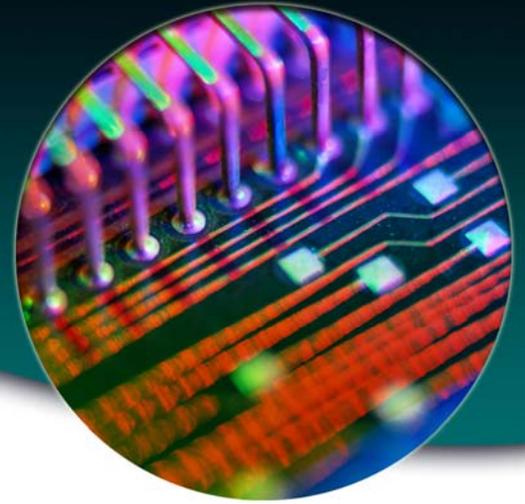
**Beth Seals** practice focuses on corporate and intellectual property matters. Ms. Seals worked as a research associate for a biotechnology research company prior to attending law school. While attending law school, she worked as a law clerk at Squire

Sanders, where she gained experience with a variety of documents in the areas of contract, intellectual property and corporate law.



**Philip Zender** is the intellectual property practice group leader for the firm's San Francisco office. His practice covers a broad range of US and international transactional matters in a wide variety of areas including information technology, computer and

semiconductor technology, biotechnology and pharmaceuticals, Internet, and media and entertainment. His experience includes providing assistance in e-commerce and Internet transactions, software licensing and development agreements, outsourcing agreements, pharmaceutical licensing and regulatory matters, multimedia transactions, distribution agreements, video game agreements, copyright and trademark registration, patent licensing, trade secret protection, Internet domain name disputes, research and technology development arrangements, technology transfers, infringement and unfair competition disputes, advertising issues, character merchandising, performing arts, publishing, gray market goods and right of publicity issues.



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