

The Trademark

Issue 5 2024

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Use it or lose it – the trademark tango

Ricardo Costa Macedo and Adriana Magalhães of Caiado Guerreiro discuss the importance of genuine use of trademarks in the market to maintain their validity in Portugal and the EU and protect against potential infringement by competitors.



Safeguarding gaming assets

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ENRIQUE DÍAZ

TEL: +52 55 5525 1422

E-MAIL:

EDIAZ@GOODRICHRIQUELME.COM

GUILLERMO SOSA

TEL: +52 55 5207 7561

E-MAIL:

GSOSA@GOODRICHRIQUELME.COM

JUAN SUÁREZ

TEL: +52 55 5207 9261

E-MAIL:

JCSUAREZ@GOODRICHRIQUELME.COM

JULIO PRIETO

TEL: +52 55 5207 8183

E-MAIL:

JPRIETO@GOODRICHRIQUELME.COM

GOODRICHRIQUELME.COM



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Editor & COO

Faye Waterford
faye@ctclegalmedia.com

Publishing Director

Chris Dooley
chris@ctclegalmedia.com

Publishing Sales Manager

Katie Kerr
katie@ctclegalmedia.com

Head of Digital

Ellen Peet
ellen@ctclegalmedia.com

Finance Director

Carla Dooley
accounts@ctclegalmedia.com

Subscription Enquiries

subscriptions@ctclegalmedia.com

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Editor's welcome



Maintaining trademark validity is a dance, requiring genuine use in the market to retain protection in Portugal and the EU. Our cover story this issue choreographs the trademark tango, providing practical advice for protection and defence against infringing competitors.

Further, we delve into the protection of assets in the gaming industry with best practises for safeguarding IP; we discuss the intense debate and concerns surrounding the recent judicial reform in Mexico and potential impact on the

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IP industry; evaluate the protection of packaging design in China; determine the strengths of trademark elements considering factors including target consumer groups; introduce the new Dark Patterns Regulations guidelines aimed at preventing deceptive online tactics in India; assess the protection of personal rights in the era of AI with review of recent cases; and provide updates for IP in Eurasia including detailing the increase in official fees in the region.

Our *Women in IP Leadership* segment features Alison McGinn, Partner at Banki Haddick Fiora, and Camilla Hamrin, Trademark Manager at Bergenstrågle & Partners AB.

Plus, find our Award Winning Law Firm Rankings for Europe.
Enjoy the issue!

Faye Waterford, Editor

Mission statement

The Trademark Lawyer educates and informs professionals working in the industry by disseminating and expanding knowledge globally. It features articles written by people at the top of their fields of expertise, which contain not just the facts but analysis and opinion. Important judgments are examined in case studies and topical issues are reviewed in longer feature articles. All of this and the top news stories are brought to your desk via the printed magazine or the website www.trademarklawyermagazine.com

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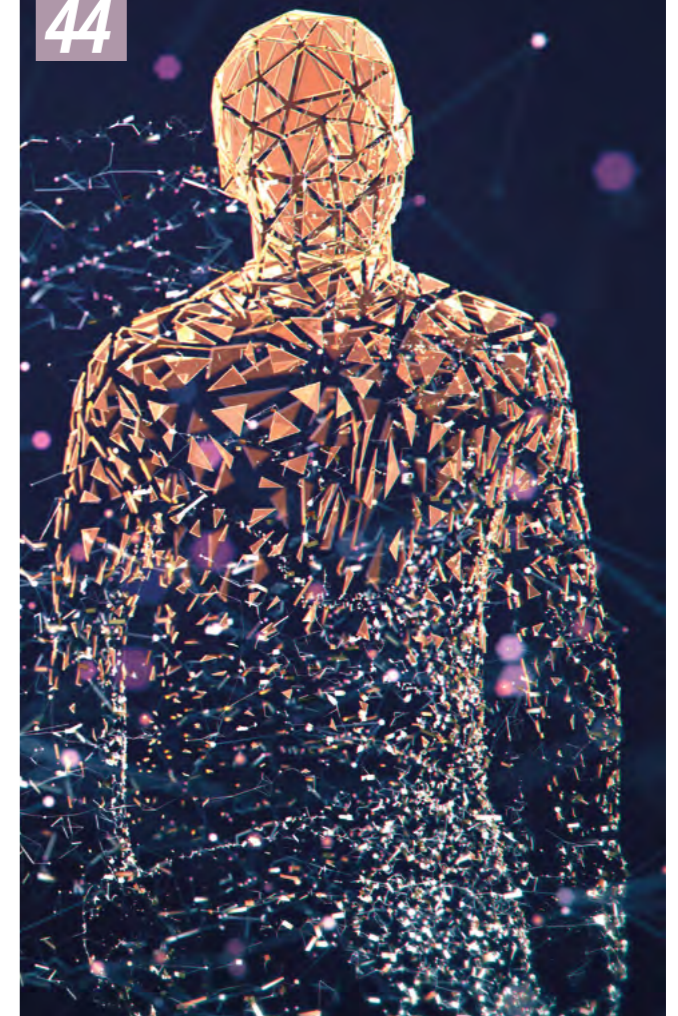


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**Lindsey Annable - Brand Protection Manager, Potter Clarkson. UK**

Lindsey is responsible for the management and development of the *iProvidence* service. She joined the company in 2020 with a background in intellectual property and brand protection. Lindsey has extensive experience in protecting brands across online marketplaces, domains and websites, social media, app stores, and NFT marketplaces.

**Francesco Bonini - Studio Bonini. Italy**

Francesco has 25 years of experience in Italian and EU trademark and design prosecution. He has had successful cases in oppositions, appeals, and cancellations both before the EUIPO and the Italian PTO. Francesco has his office in Vicenza, in the North-East of Italy. It has helped and helps several companies of the Venetian area to protect their IP rights, dealing with IP prosecution.

**Enrique A. Diaz - Senior Partner, Goodrich Riquelme. Mexico**

IP Latin American expert Enrique joined the firm in 1998, finished law school in 2001, and by 2010 he became the youngest lawyer to have ever been made senior partner in the firm's history. He is currently a foreign expert on Latin-American intellectual property, managing the prosecution of over 3500 trademarks and more than 1000 patents per year.

**Catherine Hillaert-Prevost - Expert IP Strategist, Consultant & Advisor. Switzerland**

Catherine has 35+ years' expertise leading IP strategies & portfolios in 160+ jurisdictions, and worked as French INPI Examiner, IP Counsel at law firms, Senior IP Counsel at major international companies Rhône-Poulenc, Rhodia, Nestlé, prior to being Global Head of IP & Anti-counterfeiting at Stoli Group for 12+ years. She now advises on IP protection, litigation, enforcement.

**Misum Hossain - Founder & Head, Lincoln Legal Chambers. India**

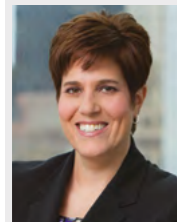
Misum has 18 years' trademark experience in registrations, dispute resolution and licensing. Misum, an alumnus of the University of London LLM programme, has advised clients for IP India, UKIPO, EUIPO, USPTO, IP AUS & CIPO. He is also currently Hon. VP at an academic non-profit. He has designed trademark courses, chaired seminars clocking 6K+ speaking hours, and trained 2.5K+ lawyers.

**Gang HU - Deputy General Manager, China Patent Agent (H.K.) Ltd. China**

Gang is a senior Chinese IP specialist and practitioner. He is good at solving difficult and complicated trademark litigation and non-litigation cases. Some of the influential cases he handled were widely reported on by media, and recent IP litigation cases represented by him were awarded by the Supreme People's Court as the annual guidance cases.

**Stacey C. Kalamaras - Founding Partner, Kalamaras Law Office, LLC. US**

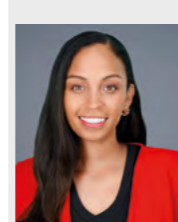
Stacey is the founding partner of Kalamaras Law Office LLC, an IP boutique providing full-service brand protection services to SMEs. Stacey spent most of her career in Big Law representing well-known brands in over 150 countries. Prior to law school, she worked as a marketing and advertising executive. Stacey is a devoted trainer of other lawyers, having trained more than 6,500 on brand protection topics since 2018.

**Barbara Leitao-Johnson - Associate General Counsel, Intellectual Property, IABBB. Latin America/USA**

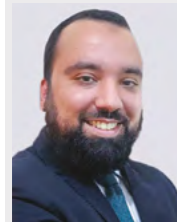
Barbara is a US based Brazilian Trademark Lawyer, having worked in several large Brazilian IP offices. With an LL.M. from George Washington University, DC, and after working at the IP protection areas of Facebook Reality Labs and Corsearch, she is currently taking the position of Associate General Counsel for IP at the International Association of Better Business Bureaus.

**Rachael Lodge Corrie - Partner, FOGA DALEY. Jamaica**

Rachael Lodge Corrie is a Partner of Foga Daley with a passion for Intellectual Property law, focused on brand portfolio management, trademark prosecution, non-routine trademark matters and advertising law. She is an active member of the Jamaican Bar Association, INTA's Young Practitioners Committee and a member of the Women's IP Today Steering Committee.

**Yasir Masood - IP Manager, Rouse & Co. Dubai**

An experienced German legal advisor specializing in IPRs, particularly trademarks, Yasir is dedicated to serving a diverse clientele in the UAE and MENA region. With an in-depth understanding of IP laws and procedures in the UAE, GCC, Europe, and US, his expertise encompasses filing, enforcement, and drafting. As an active member of INTA and AIJA, Yasir is committed to staying at the forefront of IP.

**Chris Mitchell - Member, Dickinson Wright. US**

Chris Mitchell, a member of Dickinson Wright, has practiced exclusively in the area of intellectual property law for over 25 years, handling trademark matters - from procurement to licensing and litigation - for clients throughout the world.

**Santiago R. O'Connor - Managing Partner, O'Connor & Power. Argentina**

Santiago is an attorney and trademark and patent agent advising domestic and foreign companies on local and international IP law in Argentina and across Latin America with extensive experience. He is the managing partner at O'Connor & Power in Buenos Aires, Argentina.

**Peter Sloane - Partner & Co-Chair of the Trademark and Copyright Practice, Leason Ellis LLP. US**

Peter Sloane is Partner and Co-Chair of the Trademark and Copyright Practice at Leason Ellis LLP, an IP boutique law firm in White Plains, New York. His practice includes trademark prosecution, U.S. and international, and federal court litigation.

**Charlotte Wilding - Partner, Keltie LLP. UK**

Charlotte Wilding is a partner of the trademark practice at Keltie LLP. An expert in her field, she specializes in providing strategic IP advice, as well as the prosecution, maintenance, and enforcement of IP rights. Charlotte is also an active member of the International Trademark Association's Publication Committee.

**Beata Wojtkowska - Partner, Kulikowska & Kulikowski. Poland**

Beata is a practice-oriented IP specialist, focused on Client's needs. Beata's key areas of activity are trademarks, trade names, geographical indications, combating unfair competition, and managing disputes.



Use it or lose it – the trademark tango

Ricardo Costa Macedo and Adriana Magalhães of Caiado Guerreiro discuss the importance of genuine use of trademarks in the market to maintain their validity in Portugal and the EU and protect against potential infringement by competitors.

In a world where the economic potential of distinctive signs is on the rise, especially in this digital age that we are experiencing, the registration of trademarks has become common practice to protect these intangible assets.

If a sign is registered and perhaps renewed by its owner, the latter would normally have the legitimacy to keep it. However, even if the registered owner of a trademark strictly complies with all renewal requirements, the same may be deprived of its rights over the trademark due to certain behaviors – or the lack thereof – namely the failure to genuinely use it.

The perception that a trademark is not being used genuinely in the market can lead to third parties filing applications for its registration to lapse, thus leading to the loss of validity of the trademark and to its owner being deprived of the possibility of economically exploiting the same.

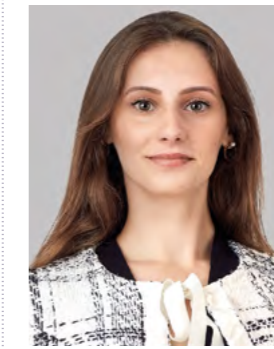
This phenomenon, far from being the exclusive concern of medium-sized companies that have invested in their intangible assets, affects all market players, from small local companies to large multinationals.

A paradigmatic example of this is the recent case of McDonald's, which saw the Court of the European Union withdraw, albeit partially, its exclusivity over the 'Big Mac' trademark. This decision was based on McDonald's inability to prove genuine use of the 'Big Mac' trademark in relation to certain products, such as poultry sandwiches, as well as in relation to services related to the operation of restaurants, for an uninterrupted period of five years.

As we have seen, a trademark does not have an infinite duration, but its registration is infinitely renewable. This potential longevity, however, is only justified to the extent that the sign is used genuinely for the goods and services for which it was registered and as it was registered. As



Ricardo Costa Macedo



Adriana Magalhães

such, the protection conferred is not a mere formality, but a right that only subsists when there is effective exploitation of the sign.

In Portugal, given the coexistence of national trademarks and European Union trademarks, the genuine use of registered signs is even more important.

In fact, the owner of a trademark who objects to the registration of a new trademark that they consider identical or similar with effects in the same territory may be surprised by a request to provide evidence of genuine use of such trademark, even though their trademark has been registered for longer.

Alongside these circumstances, and bearing in mind that a sign must be used as registered for all the goods and services it marks, there is also a trend towards increasingly long and exhaustive descriptions of goods and services associated with the trademark, which can increase the difficulty of proving genuine use in relation to each entry in such descriptions of goods and services.

When a sign is registered but not genuinely used in the market, it creates an unnecessary obstacle to economic activity and competition. Competitors who want to register and use the same or similar signs for certain products or services are blocked from doing so, even though the original sign is not being used, which stifles innovation and market growth.

Thus, the protection afforded to Portuguese and European Union trademarks, as well as the opposition to new registrations based on previously registered marks, only makes sense when those trademarks are actually used. Trademarks that are not genuinely used block the entry of new competitors, which weakens the system by distorting the competitive balance.

To avoid this scenario, Portuguese and EU law impose the obligation of effective use of registered



trademarks, and the lack of genuine use inevitably results in the registration expiring. The longevity of a trademark, therefore, lies not only in its formal renewal, but in the substance of its continuous and relevant use in the market.

The question of what constitutes 'genuine use' of a trademark has been the subject of various interpretations. On the one hand, some argue that simply demonstrating the intention to use the

trademark on the market may be sufficient. On the other hand, and as the popular saying warns us, there are those who consider that 'the road to hell is paved with good intentions'.

Genuine use of a trademark requires more than intentions; it requires the trademark to be used as it was registered, or with minimal changes that do not affect its distinctive character, for the goods and services indicated in the registration. It is a question of effective and real use, substantiated by invoices relating to the supply of the product or service and proof of sale, commercialization, distribution, etc. It is important to note that this use does not necessarily have to be carried out by the owner of the trademark; use by a licensee or a third party under the owner's control is also relevant.

In the doctrinal field, one usually finds two perspectives on 'genuine use'. The subjective conception, related to the user's intention, defines 'genuine use' as any use that is not artificial, fictitious, or merely for the purpose of preserving the trademark. In contrast, the objective conception, relating to the intensity of the use of the trademark, requires that the use be substantial and sufficiently visible in the market, so as to attract the attention of consumers to the trademark.

From both perspectives, the notoriety or size of the use is irrelevant; what matters is that the use is genuine and real.

The Portuguese Industrial Property Code transposes rules from European Directives and Regulations, so it is necessary to consider the guidelines arising from European case law regarding the characterization of 'genuine use' of a trademark, which seems to follow a subjective conception.

The essential function of a trademark is to guarantee the identity of origin of the goods and services for which it is registered, in order to create or maintain a market for these goods or services. This function excludes merely symbolic uses, the sole purpose of which is to maintain the rights conferred by the trademark.

Thus, the 'genuine use' of a trademark should be analyzed in light of all the facts and circumstances that prove its genuine commercial exploitation. Only then can it be concluded whether the use is sufficiently genuine to justify the continuation of the rights over the trademark.

As can be seen from commercial reality, it is not possible to establish in the abstract what the quantitative limit of use of the trademark must be for it to be considered genuine.

In fact, there may even be a minimum amount of use involved; the important thing is that there is sufficient objective commercial justification to prove that the use of the trademark is genuine.

Even in the case of European Union trademarks, which are protected in all EU countries, it is not necessary for the trademark to be used in all countries or even for its use to be geographically widespread in order to be considered genuine. The use of the EU trademark will be considered genuine if the essential function of the trademark is being pursued and if it is intended to create or maintain market shares for the protected goods or services.

When analyzing whether a European Union trademark fulfills its essential function, all the relevant facts and circumstances must be assessed, such as the characteristics of the market in question, the nature of the goods or

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The line of thought of the Portuguese and EU legislators requires only that the use of the trademark be genuine, i.e., not merely symbolic or artificial.
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services protected by the trademark, the territorial and quantitative scope of use, as well as the frequency and regularity of use.

The line of thought of the Portuguese and EU legislators requires only that the use of the trademark be genuine, i.e., not merely symbolic or artificial. Symbolic or artificial means the situation in which the owner of the registered trademark only formally maintains the registration of the sign, but in commercial terms the products and services do not actually indicate their business origin on the market.

On the other hand, if the owner of the trademark intends to effectively mark products or services so as to create or maintain a market for them, the use of the trademark is genuine, even if perhaps not very intense, as long as it is done as a trademark and not for any other purpose, such as the name of an establishment or company name.

Intermittent, irregular, or sporadic use of the trademark is also considered genuine use, preventing the trademark from expiring, insofar as the use is not merely symbolic or artificial. Thus, only a total and effective absence of use of the trademark on the market for five consecutive years will lead to the loss of the registration for lack of genuine use of the sign as a trademark under the terms in which it was registered.

On the other hand, even if the owner of a trademark has ceased to use it genuinely, it is still possible to avoid the expiry of the registration if such owner begins or resumes genuine use of the trademark within certain time limits prior to the filing of the application for expiry of that trademark.

Not using a trademark genuinely for a good reason also prevents the registration from lapsing. However, the law does not explain what it considers to be good reasons for not using a trademark genuinely enough to justify maintaining the registration.

What the Portuguese and EU laws have in mind are the obstacles that directly exist or have existed that make it impossible or unreasonable to make genuine use of such a trademark and that are independent of the will of the owner of the trademark, namely in cases of force majeure (wars, natural disasters) and measures by public authorities that prohibit the production or commercialization of the respective products.

From the above, it can be concluded that in the Portuguese trademark legal system, as well as in the European Union trademark legal system, substance should prevail over form, even if this is by way of an intention to use and not actually an intensive use of the trademark, as long as it can be shown that this is not just an act aimed at maintaining a formally valid registration without any connection to its actual use in the market.

Résumés

Ricardo Costa Macedo, Lawyer and Partner

Ricardo heads the Intellectual Property and Life Sciences groups at Caiado Guerreiro. His practice covers a wide range of contentious and non-contentious patent, trademark, and other intellectual property-related rights, such as trade secrets and unfair competition, in particular in the pharmaceutical, home care, food, and insurance sectors.

Ricardo graduated from the Faculty of Law of the Catholic University of Lisbon, in 1998. He undertook postgraduate studies in Information Society Law at the Faculty of Law of the University of Lisbon in 2000, and in Commercial Law at the College of Law, London in 2003. He was admitted to the Portuguese Bar Association in 2001.

Adriana Magalhães, Lawyer

Adriana completed her Law Degree, a Postgraduate Degree in Intellectual Law, and a Postgraduate Degree in Data Protection at the University of Lisbon Law School, in 2019. In 2023, Adriana completed her Master's Degree in Civil Law.

Adriana was admitted to the Portuguese Bar Association in 2022 and has been a member of Caiado Guerreiro's Intellectual Property since then.

She has been focusing her practice on a wide range of intellectual property matters, including trademarks, patents, designs, copyrights, and domain names, both in contentious and non-contentious issues, in various business sectors.

Contact

Caiado Guerreiro

Rua Castilho 39 15°,
1250-068 Lisboa

Tel: +351 21 371 7000

law@caiadoguerreiro.com

com

www.caiadoguerreiro.com

com



Trademark tactics for safeguarding gaming assets

Shelly Gayner, General Counsel and Global Head of Licensing for Mob Entertainment, Inc., and Paul Hoffer and Matthew Cutler of Harness IP outline the importance of trademark protection in the gaming industry and provide best practices for game developers and publishers to safeguard their intellectual property.

Résumés

Paul Hoffer is Of Counsel at Harness IP's Detroit Metro office, bringing over two decades of experience in trademark law. His practice spans trademark clearance, prosecution, enforcement, and brand management, with a particular focus on building global portfolios and handling complex litigation in both domestic and international forums. Paul has advised clients in diverse industries, including automotive, cannabis, fashion, and dietary supplements, offering strategic insights into trademark protection. Prior to joining Harness IP, he worked in-house at Harley-Davidson and ran his own law firm, focusing on intellectual property and litigation.

Shelly Gayner is an accomplished attorney and business executive with over 30 years of experience in the gaming, consumer products, and entertainment industries. She is currently the General Counsel and Global Head of Licensing for Mob Entertainment, Inc. Prior to Mob, she was General Counsel of Big Fish Games. Shelly began her career in the console gaming industry, holding key roles at Sega of America and the PlayStation division of Sony. Shelly transitioned to mobile gaming as the Vice President of Business Development and Legal at GSN Games. Shelly is well versed in console, mobile, PC, and Roblox platforms.

Matthew Cutler is a Principal at Harness IP, working from the firm's St. Louis Metro office. With almost 30 years of experience, Matt specializes in intellectual property litigation and is also a recognized leader in patent portfolio management, serving as a problem solver and trusted advisor on a wide range of IP issues. Matt offers practical, litigation-tested strategies for protecting and leveraging IP assets, including advising numerous gaming companies on their trademark, copyright, trade secret, and patent matters.

The gaming industry has significantly evolved and expanded over the last 50 years, from the arcade video games of the early 1970s to the launch of home video game consoles of the late 1970s, the 8-bit and 16-bit game consoles of the 80s, the 32-bit, 64-bit and portable game consoles of the 90s to the present where consumers have access to games on their phones. With this evolution of technology comes significant risk to intellectual property for game developers and publishers. As the reach of gaming has moved from arcades to pockets, more and more people are gaming around the globe. This exposure also increases the likelihood of third parties attempting to infringe the intellectual property of popular games. Now, more than ever, protecting the intellectual property associated with games is critical. It is vital to take steps to protect the names of games, characters, collections, events and missions, logos, taglines, and features, and to seek trademark protection in the United States and internationally. Below are some tips and best practices for you to consider to make sure you are doing what you can to protect your valuable assets.

Why register your trademark in the US

Although registering a trademark is not required, receiving US federal registration offers numerous benefits. When the United States Patent and Trademark Office ("USPTO") registers a trademark, the registration is thereafter listed in a database

that provides notice to the public that the trademark is registered and helps to protect against third parties registering a confusingly similar mark. Federal registration also allows the trademark owner the right to use the federal trademark registration symbol "®" with the trademark. Use of the federal trademark registration symbol provides notice to the public that the mark is federally registered and further helps deter others from using confusingly similar trademarks.

With federal registration comes a legal presumption that you are the owner of the trademark for the goods and services listed in the registration and have an exclusive right to use the trademark. After five years of registration, it is possible for the trademark owner to file for "incontestable" status with the USPTO. "Incontestable" status does not mean a trademark cannot be challenged by a third party but provides heightened protection that can help in, and to avoid, trademark disputes. "Incontestable" status is also considered conclusive evidence of the owner's rights in the trademark and the validity of the registration.

US trademark registration also bestows certain business advantages. Trademark registrations are a business asset and enhance the value of a company's brand. Trademark owners can also record their federal trademark registrations with US Customs and Border Protection to aid in blocking imports that are infringing goods or are counterfeits.

When should you file for trademark registration

Ideally, a federal trademark application should be filed once a trademark has been settled on, well in advance of pre-release marketing or the release of the game. In planning for filing a federal trademark application with the USPTO, you must take into consideration that the trademark application review process of the USPTO typically takes more than one year. Currently, the USPTO is taking at least nine months to perform an initial review of trademark applications.¹ This does not include the additional time needed if the USPTO issues an initial refusal for procedural or substantive issues with the application.

The USPTO examines applications based on their filing date and not on use dates. This means that if you apply first for a trademark and someone who used the mark before you files *after* your filing date, your application will have "priority" and be first to be reviewed. If your application is then allowed and published for opposition, the subsequent filer (and first user) bears the burden to oppose your application or cancel your registration. At the USPTO, the actual use dates only matter in opposition and cancellation proceedings. In such proceedings, the plaintiff can challenge a trademark filing on the grounds of the likelihood



Shelly Gayner



Paul Hoffer



Matthew Cutler

¹ Trademark processing wait times | USPTO: <https://www.uspto.gov/trademarks/application-timeline>

of confusion and introduce evidence of earlier use in commerce. Consequently, if you wait to file until after the name of the game has been made public, you run the risk of competitors or third parties filing a trademark application for the same name before you, resulting in you bearing the burden and cost of initiating costly proceedings and establishing priority of use.

Additionally, if you release a game without filing an application, a competitor may release a game shortly after you with the same name, or one that is confusingly similar, trying to ride the coattails of your marketing and advertising. In such a situation, you can file your trademark application and a "petition to make special" for a \$100 fee with the USPTO, requesting that the USPTO expedite the initial examination of your application. The USPTO only grants petitions to make special under limited circumstances, such as actual or threatened infringement, pending litigation, or registration, which is needed as a basis for securing a foreign registration. The USPTO does not consider the rollout of a marketing campaign as a sufficient circumstance for granting a petition. In addition to the filing fee, a petition needs to include additional information on the circumstances, such as a signed declaration setting forth the facts of the actual infringement, that action is being taken against the infringer, and examples of the infringing use.

In considering when to file a trademark application, gaming companies must also take into account that various people, such as competitors, are monitoring the USPTO public database for new trademark filings. If you are developing a long-awaited new game or a sequel to a popular release and want to file trademark applications for the name of the game, taglines, and game characters, you may not want that information publicly known until the game launch date. The USPTO does not allow for anonymity in its trademark applications, and all applications are made public in its database. What alternatives do you have if you want to keep your trademark choices secret?

“Incontestable” status does not mean a trademark cannot be challenged by a third party but provides heightened protection that can help in, and to avoid, trademark disputes.





Rather than waiting until the last moment before releasing the game to file an application, companies can try to keep trademark filings secret from the public through a "stealth filing." Stealth filings use the Paris Convention (an international intellectual property treaty to which there are 180 contracting member countries including the US) to secure a priority date in the US by filing a foreign trademark application with a Paris Convention signatory that does not have a publicly available database. A US application is then filed within six months of the foreign filing date under Section 44(d) of the Trademark Act claiming the priority filing date of a foreign application. The stealth filing will set the official filing date as the date the foreign application was filed, known as a priority filing date. For example, Company A files a foreign trademark application in January and then files a 44(d) application with the USPTO in May. However, a similar trademark application was filed by another party, Company B, in April. Company A's trademark application would have priority over Company B's April application because the official date for the filing would be the priority date in January, not May. These types of filings provide additional layers of protection and secrecy but are also very complex.

Another option trademark owners use to try to preserve secrecy is filing trademark applications in the name of a separate holding entity, such as an affiliated entity or subsidiary that is not publicly known to be connected to the trademark owner. In some situations, a company will create an entity for the sole purpose of disconnecting the trademark filing from the company. While this strategy can be effective, in addition to corporate and tax considerations, it raises several complications for filers in the US. Such complications include the questioning of whether the holding entity has the required bona fide intent to use the mark and what entity controls the use of the mark with respect to the nature and quality of the goods. Further, the transfer of the tentative trademark rights in an underlying intent-to-use application raises questions concerning the Lanham Act's anti-trademark-trafficking prohibitions. Complications such as these can result in an application, or a subsequent registration, being left vulnerable to challenge by third parties on the basis of it being invalid from the outset or abandoned via improper transfer. These consequences also may not arise until years later when a dispute develops.

Prior to filing a trademark application, it is recommended to have a preliminary trademark screening and/or a full trademark search done. A preliminary screening is a search of the USPTO trademark database for identical or near identical marks, typically performed by an attorney. Preliminary screenings afford a quick and cost-

“ Trademark owners can also record their federal trademark registrations with US Customs and Border Protection to aid in blocking imports that are infringing goods or are counterfeits. ”

effective initial determination of whether there is someone who has already filed for or is using a proposed trademark. A full trademark search is normally performed by a third-party company and is a comprehensive search checking several resources to determine whether your trademark conflicts with other existing trademarks. A full trademark search will search for trademarks that are confusingly similar and are used in connection with goods and services that are the same as or related to yours. Both the preliminary screenings and the full trademark search are effective preliminary steps because they can be completed within one to two weeks. This affords companies a quick turnaround time if the results of the search are negative and new trademarks need to be developed.

While it is helpful to have development teams come up with alternative names to search for, it is also recommended to limit the number of trademarks being searched because the more trademarks being searched, the more expensive the searches will be. It is also prudent to have the team developing the trademarks run a very preliminary Internet search to rule out prominent trademarks. For example, if the name "Mario" is being considered for a game character name, an in-house Internet search will reveal that name to be fraught with trademark complications. Consequently, you will not have to pay someone else to rule out such a trademark. These searches should be conducted well in advance of filing a trademark application, and especially before using a trademark. It can be very costly to select and begin using a trademark only to thereafter discover that you are infringing on another company's trademark, and you need to go back to square one and rebrand. It is also advantageous to be creative with new names and trademarks. The more arbitrary and fanciful, and less descriptive, the trademarks are, the better the chances are that the preliminary screening and full search will return positive results, and the USPTO will move the trademark application towards registration.

What can trademarks cover

In the gaming industry, trademarks can take various forms, including logos, brand names, slogans, or even specific characters or game elements. The following are examples of what can qualify as trademarks.

The primary way consumers recognize a game is by its name. Examples of popular video game names that are registered trademarks are "Halo", "Angry Birds", "Poppy Playtime", and "Fortnite". In addition to the name of a game, the game's logo can also serve as a trademark. The logo can be an illustrative depiction of the name or graphic symbols, such as a stylized or colorful



design, or even the icon used in connection with a game listing on an app store. For example, the "Fortnite" logo features the name "FORTNITE" in stylized lettering or a stylized "F," while the icon used for the "Candy Crush" on app stores depicts the design of three images of candies from the gameplay. Even the short and catchy tagline that is used to promote a game or brand, such as "It's in the Game" owned by Electronic Arts, Inc., can be a trademark.

Moreover, certain memorable attributes from within a game can serve as a trademark, such as the names and likeness of characters. For example, "Mario", "Donkey Kong", "Link", "Lara Craft", "Huggy Wuggy" and "Sonic the Hedgehog" are trademarks for the names of video game characters.

Trademarks can also extend outside the game itself. For instance, "Nintendo", "Epic Games", "Mob Entertainment" and "EA" are trademarks for the names of companies that create or distribute video games. When a video game becomes popular, companies will often expand their product line offerings to include apparel, plush, collectibles, and even in-game virtual currency or tokens. When companies expand their product lines, they can seek trademark registration to cover the new goods. The packaging a video game comes in is considered trade dress that can be inherently distinctive, which means the packaging primarily serves to designate the origin of the product, is conceptually separate from the product, and does not require proof that is has acquired secondary meaning. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992).

“ A federal trademark application should be filed once a trademark has been settled on, well in advance of pre-release marketing or the release of the game. ”

The trade dress of games

In addition to a game's packaging, a video game's look and presentation may also be considered trade dress. A game's look, feel, and presentation are nontraditional trademarks and can be associated with a particular game developer through consumer recognition, or secondary meaning, of the trade dress. *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205 (2000). Secondary meaning (or acquired distinctiveness) means that the trademark or trade dress "has come through use to be uniquely associated with a specific source." *Two Pesos, Inc. v. Taco Cabana, Inc.*, 112 S. Ct. 2753 (1992). Secondary meaning can be proved through sales volume totals, advertising, consumer surveys, manner, length, exclusivity of the trademark's use, and even a defendant's intent in copying. *Pebble Beach Co. v. Tour 18 I Ltd.*, 155 F.3d 526 (5th Cir. 1998). However, the extent of trade dress protection for a video game's look and feel is still a relatively new concept of law. Decisions over the last 15 years have found that elements in a graphic user interface may qualify as trade dress. *Tetris Holding, LLC v. Xio Interactive, Inc.*, 863 F. Supp. 2d 394 (D.N.J. 2012).

In *Tetris Holdings*, the Plaintiff was the video game developer and owner of the game. The Defendant, Xio Interactive, cloned "Tetris," called it "Nino," and designed it to duplicate the look and feel of "Tetris" by copying the block elements. The trade dress in the "Tetris" video game was comprised of the brightly colored "four equally sized, delineated blocks, and the long vertical rectangle playfield, which is higher than wide." *Id.* at 415. Tetris Holdings had to establish that



(1) the trade dress is distinctive in that it has acquired secondary meaning; (2) the trade dress is not functional, and (3) there is a likelihood of consumer confusion. *Id.* The only point of contention for the Court to decide was the functionality of the trade dress. The Court determined that the color and style of the block pieces were not functional, and the elements are not "mandated by the use or purpose of the game because numerous other choices are available to a game designer without affecting the functionality of the game." *Id.* at 416. The Court further decided that the design choices were not related to how the game works or functions, did not affect the cost of quality, or were essential to effective competition. *Id.*

Although there is still much uncertainty in the area of trade dress protection in video games, undoubtedly, there is protection for the look, feel, and presentation of a video game.

International trademark filings

Whether a gaming company is small or large, with today's gaming technology, the explosion of mobile gaming, and the global marketplace, companies may want to explore opportunities to expand their reach outside of the US. If the intent is to make the game available outside the US, a company will also want to seek international protection for its trademarks. The initial step is determining where to file to protect a company's trademarks. Specifically, consider countries with large populations of target customers who have access to your games. Also, take into consideration where the company is currently generating international fans by examining game sales and fans following a company's social media channels. Focus on countries or regions where the company has a large number of customers and fans. Once a list is developed, look ahead to targeted expansion territories over the next couple of years. Consider whether those countries where

“**Rather than waiting until the last moment before releasing the game to file an application, companies can try to keep trademark filings secret from the public through a “stealth filing.”**”

the company does not currently have a large following, but where it may want to target customers and fans for future growth of the game. Companies will also want to review countries where copying, squatting, or counterfeiting is a common problem. Consider reviewing the annually published United States Trade Representative Notorious Markets List and other resources that compile such data.² Filing in more countries will increase a company's costs for trademark registrations. As a company's business plan evolves, so too will its trademark strategy and its expanded scope of protection with additional filings.

Once international targets are determined, a company then must decide how to file its international trademark applications. There are two options for filing international trademark applications, the Madrid Protocol and direct filing.

Madrid Protocol: The Madrid Protocol is an international treaty administered by the World Intellectual Property Organization (WIPO). The Madrid Protocol is a convenient and cost-effective vehicle used to acquire and maintain trademark registrations in multiple jurisdictions through a single trademark office. Currently, there are over 130 countries covered by the Madrid Protocol. To utilize the Madrid Protocol, a company must be a national of, or have a domicile of business in, one of the Madrid Protocol's countries. The first step in filing a trademark application with the Madrid Protocol is to have, or have applied for, a national or regional trademark registration in the intellectual property office of a Madrid System member, such as the USPTO, which is called the Office of Origin. Then, a company may file one international trademark application seeking protection from all or any number of members of the Madrid Protocol, simultaneously. The Office of Origin will review that the international application mirrors the particulars of the national application or registration. WIPO then formally examines the international application to ensure it complies with all its requirements. If the application meets all requirements, WIPO then sends the application out to each of the member intellectual property offices for which protection has been sought. Each intellectual property office designated in the application will then substantively examine the application. Each designated office will grant or refuse protection within 12 to 18 months from the date WIPO notifies the designated office of the application. Additionally, once a company has its registration from the Office of Origin, it can further use that registration for additional Madrid Protocol filings.

Although there are significant advantages to the convenience and cost-effectiveness of the Madrid Protocol, there are several drawbacks. If a designated intellectual property office refuses

the application, a company may be required to hire a local representative to respond to the refusal. The international application is at risk if the Office of Origin application or registration upon which the WIPO filing is based fails to register the trademark or it is canceled within five years of its registration date. For instance, if the USPTO refuses registration or if the application is opposed or otherwise never registers, then the filings through the WIPO system fail.

Direct filing: The other option is to file separate national or regional (where available) trademark applications directly with each local intellectual property office in the country or region desired. To file local trademark applications, a company will need to hire a local attorney in each country of interest. While filing separate national trademark applications is typically more expensive up front, it offers distinct advantages. Direct foreign filings are not dependent upon a national application. For example, if a US application is refused or does not register, it will not impact the direct foreign filings. Additionally, because the direct foreign filings are independent of other trademark applications, the local attorney can tailor the claims for the locality which may allow for broader claims and less vulnerable trademark rights. While direct filing is initially

² USTR Releases 2023 Review of Notorious Markets for Counterfeiting and Piracy | United States Trade Representative: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2024/january/ustr-releases-2023-review-notorious-markets-counterfeiting-and-piracy>

more costly, it is the preferable option if a company is seeking protection in a small number of international countries.

The trademark registration process, both in the US and internationally, is complex and can be expensive. However, with planning, forward-thinking, and an understanding of potential pitfalls, small to large gaming businesses can develop a trademark strategy that protects their interests as well as meets their budgetary needs. Developing, securing, and evolving your trademark strategies is vital for your business today and in the future, and growing gaming companies are encouraged to revisit their trademark strategies regularly.

Contact

Harness IP

5445 Corporate Drive, Suite 200,
Troy, MI 48098

Tel: +1 248 641 1600
www.harnessip.com

Mob Entertainment

www.mobentertainment.com





Judicial reform in Mexico: the potential impact on the IP field

Victor Ramírez and Eduardo Arana of OLIVARES discuss the intense debate and concerns surrounding the recent judicial reform in Mexico that will vote in judges based on popularity and its potential impact on the intellectual property field.

Earlier this year, the former President of the Republic presented a package of proposed constitutional amendments, which included a restructuring of the Judiciary.

This initiative has generated intense debate in Mexico, as it seeks to drastically modify the structure and functioning of the justice system, including the election of Justices, Magistrates, and Judges through popular vote.

Various sectors, including members of the Judiciary itself, have expressed their rejection of the proposal. They argue that the election of Justices, Magistrates, and Judges by popular vote could compromise the specialization and impartiality that these judiciary positions should embody. Additionally, there are concerns that the reform could politicize the administration of justice, undermine judicial independence, and lead to delays in the resolution of proceedings, as well as unnecessary economic costs associated with the voting process.

Recent constitutional judicial reforms in Mexico

Recently, and despite the intense debate and concerns for the Judiciary Reform bill, in a very short period, the constitutional judicial reform act was approved by the Mexican Congress, by most of the state legislatures, signed by the President, and published in the Official Gazette of the Federation, taking effect on September 16.

This reform entails the following substantial modifications to the country's judicial system:

- **Election of justices, magistrates, and judges by popular vote:** this will be implemented gradually, beginning in 2025 and concluding in 2027.



Victor Ramirez

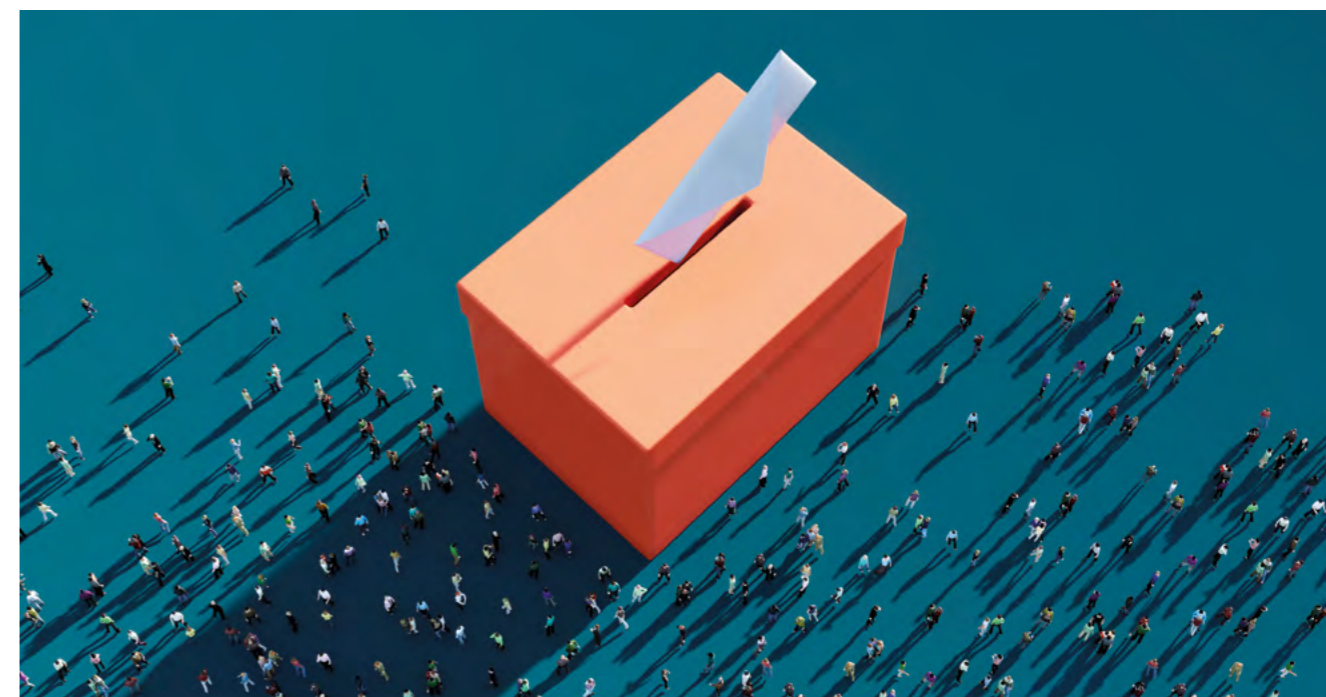


Eduardo Arana

- **Judicial career is no longer required:** candidates only need to be Mexican citizens, hold a professional law degree, and have a minimum GPA of eight. This change opens the door to new profiles within the judiciary, with the potential risk of a lack of specialization.
- **Supervision under a new body:** the Federal Judiciary Council will be replaced by the Judicial Discipline Tribunal, which will lead to a transition and restructuring of judicial oversight and control.
- **New electoral organization:** the National Electoral Institute (INE) will be responsible for organizing the elections for judicial positions, which will begin as early as the first half of 2025.

As of now, the Supreme Court of Justice has already admitted certain appeals against the reform, resulting in a certain degree of uncertainty regarding the timing and manner of its implementation. Moreover, personnel from the Federal Judicial Branch itself have determined they will resume activities no earlier than October 2, subject to prevailing conditions. Local and administrative courts continue to work normally.

Discussions and dissatisfaction surrounding this judicial reform proposal have intensified in recent days, to the point that, since August 19, 2024, members and officials of the judiciary suspended activities and called for a nationwide and indefinite strike.



Undoubtedly, the outcome of this process will be crucial in the history of Mexico's justice system. The suspension of activities will affect proceedings and cases pending before the Federal Judiciary, primarily in Circuit Courts and District Courts.

The potential impact on intellectual property

As to the possible impacts on the intellectual property field, we must comment that, up to this point in time, the main governmental entities that are responsible for deciding industrial property - and in particular trademark - matters, namely the Mexican Institute of Industrial Property (Mexican Trademark Office) and the IP specialized Chamber of the Federal Administrative Court, continue to operate normally.

So, fortunately, we can discard any immediate adverse impacts of the current in-force reform on the agencies and courts of law that resolve industrial property matters in Mexico at the first and second instance.

This is because the Mexican Institute of Industrial Property and the Federal Administrative Court are not part of the Judiciary Branch.

Indeed, the Mexican Institute of Industrial Property depends on the Ministry of Economy, and the resolutions it issues in the registration and maintenance of trademarks, as well as the resolutions of litigation procedures involving trademark rights, can be challenged before the Specialized Chamber on Industrial Property of the Federal Administrative Court of Justice, which depends on the Presidency of the Republic, which is why both instances continue to work normally until now without any affectation to trademark cases.

This does not mean that the reform will not be relevant for the industrial property field, since the Federal Circuit Courts (and the Supreme Court of Justice in some exceptional cases) are the 3rd and last instance when challenging decisions from the IP-specialized Chamber of the Federal Administrative Court.

According to the provisions of Article 73 of the Federal Constitution of Mexico, industrial property is an administrative subject that has a federal character, and therefore the competent authorities

Résumés

Victor Ramirez is co-leader of OLIVARES' trademark practice group, focusing chiefly on counseling, negotiating, and prosecuting Industrial Property disputes (nullity, caducity, and infringement proceedings) before the Mexican Patent and Trademark Office (IMPI). Since joining the firm in 1999, Victor has served clients across a variety of industries, including high-tech, electronics, and software, and has helped to develop anti-counterfeiting and antipiracy strategies to protect and enforce companies' intellectual property rights in both administrative and criminal venues, as well as on appeal in the courts.

Eduardo Arana Ramirez is a member of the Litigation team, focusing his practice in administrative, civil and commercial matters. He has participated in civil and commercial litigation, especially those focused on the claim of a compensation for damages caused by third parties infringing IP rights of our clients, as well as defending lawsuits of this nature. Noteworthy are proceedings before various administrative authorities, nullity claims before the Federal Court of Administrative Affairs (FCA) "Amparo" Lawsuits before District Courts and Federal Circuit Courts, mostly related to regulatory and intellectual property issues.



are Federal authorities; the Mexican Institute of Industrial Property in the first instance, the Federal Administrative Court (the IP specialized chamber) in the second instance, and finally the Federate Circuit Courts and the Supreme Court of the Nation (the latter being the exception) that are part of the Federal Judicial Branch, are those who study and resolve the challenges via constitutional appeal (called Amparo appeal), presented against the resolutions issued by the Federal Administrative Court.

Federal Circuit Courts, which are the last instance when appealing decisions from the Federal Administrative Court, are part of the Judiciary Branch, and it is at this stage that things can get complicated because, as we said before, the Judiciary Branch remains on strike.

Therefore, it is in the third and last instance of appeal where there could eventually be an effect on industrial property cases, including trademark cases.

As a result of the main changes established by the recent reform to the way in which the Judiciary Branch and the judges that comprise it are integrated, operate, and will be appointed, we consider that the possible risks of impacts loom over the procedural aspect of the trials and not over the substance of the IP matter.

What we are referring to is that the possible negative impacts could occur in the way in which the appeals are studied, processed, and resolved. Specifically, we estimate that the negative effects could occur in the following ways:

- Delay in the processing and resolution of constitutional appeals due to the current strikes and the possibility of new strikes in the future due to the notable discontent of the workers of the Federal Judicial Branch.

“ We consider that the possible risks of impacts loom over the procedural aspect of the trials and not over the substance of the IP matter. ”

- When the current judges, magistrates, and ministers are removed and replaced, to be elected by vote of the population, there is a risk that people with a lack of skills, experience, or specialization will reach these positions. Currently, many of the judges who handle industrial property cases are specialized judges with expertise in the matter, but since the main criterion for their election will be popularity, there is no certainty over their degree of specialization and experience.
- The politicization of the resolutions; since, instead of being impartial, the new judges could be pressured when resolving a case to seek to gain social acceptance instead of attending to the laws and international treaties.

In any case, the impacts, if any, are still to be seen and may be very subtle or not materialize at all. We will need to strike a balance between the risks perceived vs the benefits the reform is allegedly seeking: reduce or eliminate current cases and corruption, the influence of the status quo, and not always maintaining the best interests of the nation when solving the disputes.

Contact

OLIVARES

Pedro Luis Ogazón 17, Col. San Ángel, 01000, Ciudad de México
Tel: +52 55 5322 3000
olivaresnews@olivares.mx
www.olivares.mx

Identification and protection of “packaging design with certain influence”

Zhenkun Fu, Senior Partner at Corner Stone and Partners, evaluates the protection of packaging design with certain influence under the Anti-Unfair Competition Law of China, emphasizing the importance of prior rights, continuity, and distinctiveness in judicial protection.

According to Article 6 (1) of the Anti-Unfair Competition Law of the People's Republic of China (2017), *unauthorized use of a mark that is identical with or similar to the name, packaging, or design of another business's commodity which has influence to a certain extent constitutes unfair competition.*

Packaging refers to the auxiliary objects and containers used on products for identification and to facilitate their carrying, storage, and transportation. Design refers to the words, patterns, colors, and their arrangement and combination added to products or their packaging for the purpose of identifying and beautifying the products. “Packaging design” with certain influence refers to the packaging and design of products that are not commonly used by related products and have significant distinguishing characteristics. The right of packaging design with a certain influence is generated in the course of use and gradually becomes

remarkable and well-known with the time of continuous utilization and increase of publicity and advertisement, and should be protected by law according to prior rights.

Whether others who own design patents and copyrights can resist the right of packaging design remains uncertain. The protection of prior rights is a fundamental principle. The Supreme People's Court affirmed in a judgment that, according to the facts ascertained in the original examination, the design patent claimed by Sanya Company was applied for by a third party after the initiation of the first instance. The Court holds that the alleged infringement act of Sanya Company, in this case, cannot be legitimized by the authorization of the third party's design patent. The design patent involved in the case was authorized in 2017, which was later than the filing of the first instance and also later than the time of beginning the use of the packaging and design of the well-known product by Yangyuan Company. Therefore,



Sanya Company's application for retrial – claiming that there is no infringement in the exercise of the design patent right according to law - cannot be established, and this court does not support it.

In practice, the judicial protection of packaging design involves three problems:

1. Whether the popularity between the new and the old packaging design has continuity, and whether the evidence of the popularity of the old design can be used as the basis for determining that the new design constitutes "packaging design with certain influence".

In the case of the packaging design of "Harbin Beer" adjudicated by the Shanghai First Intermediate People's Court, Shanghai High People's Court, and the Supreme People's Court, it was determined that the new and the old designs with continuity should be protected.

The court of first instance held that, more importantly, the reason why the distinctive packaging design of well-known products is protected by law is that it serves the function of identifying the source of products through utilization, possessing characteristics of trademark rights. This interest is ultimately manifested in the goodwill of the business operator. Since the value of goodwill and the function of identifying the source of products persist for a period of time even after products are removed from the market, the utilization of similar packaging design by the defendant will continue to result in misidentification despite the plaintiff's current cessation of use of the packaging design.

The court of second instance held that the appellant appealed and claimed that the packaging design of Harbin beer, which the appellee purported to safeguard, did not possess distinctiveness. In this regard, this court holds that, firstly, although the packaging design of products also serves the purpose of identifying the source of products, it differs from registered trademarks, which cannot be changed at will, as the right

“**The reason why the distinctive packaging design of well-known products is protected by law is that it serves the function of identifying the source of products through utilization.**”



Zhenkun Fu

Résumé

Zhenkun Fu, Senior Partner and Trademark & Litigation Attorney

Zhenkun is a leading intellectual property law practitioner with more than 20 years' experience in prosecuting trademark and patent infringement, unfair competition, and anti-counterfeiting cases. His work with Fortune 500 companies has resulted in the recovery of millions of dollars in damages. As a leading IP litigator, having managed thousands of lawsuits, Zhenkun's groundwork and strategic insight, coupled with his exceptional relationships with AIC, BQS and PSB at national and local levels, makes him a key leader in intellectual property enforcement in China.

holder has the discretion to modify the patterns, texts, colors, and arrangement of the packaging design based on their own will as well as demands of market and consumers. Moreover, the reason why the distinctive packaging design of well-known products is protected by law is that it serves the function of identifying the source of products through utilization. Although the appellee has made some adjustments to its new packaging design, the new packaging design still contains the primary components of the packaging design involved in the case, which continues the functionality of the packaging design in identifying the source of products. Consequently, both the packaging design involved in the case and the new packaging design have the function of identifying Harbin beer; the appellee is entitled to demand the cessation of the counterfeiting of the packaging design involved in this case.

The Supreme People's Court upheld the first and second verdicts.

2. Whether the popularity of a series of packaging designs can influence each other and whether it can be identified that the series as a whole constitutes "packaging design with certain influence".

In the case of the packaging design of the series of "Xifeng Liquor (Huashan Tournament)" adjudicated by Xi'an Intermediate People's Court, Shaanxi High People's Court, and Supreme People's Court, it was determined that the packaging design of the series of products was highly similar in outer packaging's color, overall layout and style, and bottles' shape, design and proportion and other aspects, which should be protected by law.

The first instance judgment held that, in this case, the design of "Xifeng Liquor (Huashan Tournament) with 10 years and alcohol volume 45%", "Xifeng Liquor (Huashan Tournament) with 10 years and alcohol volume 52%", "'Xifeng Liquor (Huashan Tournament) with 20 years and alcohol volume 45%" and "Xifeng Liquor (Huashan Tournament) with 20 years and alcohol volume 52%" manufactured by Xifeng Liquor Company lies in the use and collocation of colors, characters, lines, and patterns. By combining these elements, the overall visual effect is unique. This series of products produced by the Xifeng Liquor Company has had great influence on a national scale, and their packaging and design have been widely used and publicized, which has the function of distinguishing the source of products.

The second instance judgment held that the trademark "Huashan Tournament" has been used on the packaging box of the above products since 2011. Xifeng Liquor Company and Hengfeng Company use various elements such as colors,



texts, lines, and patterns on the packaging and design of the above products, forming a unique overall visual effect of the products, which has the function of distinguishing the source of the products. From 2011 to 2015, "Xifeng Liquor (Huashan Tournament)" won the title of honor many times, and this series of products are widely sold in China and have a certain visibility.

The Supreme People's Court rejected the retrial application of the defendant, and determined that the packaging design of the plaintiff "from 2011 to 2015, 'Xifeng Liquor (Huashan Tournament)' won the title of honor many times and this series of products are widely sold in China and have a certain visibility." From the aforementioned judgment, we can discern that the court took into account the popularity of the overall series of products of "Huashan Tournament" rather than focusing on the products respectively in the determination of the popularity of the series of packaging designs.

3. Whether the visibility of the enterprise, brand, or trademark can be regarded as a factor influencing the popularity of the product or packaging design.

The Supreme People's Court pointed out that whether a product qualifies as a well-known product necessitates the submission of evidence proving its popularity. However, the popularity of a product and the visibility of an enterprise

and brand do not exist in isolation, but rather are interconnected and interdependent. The visibility of an enterprise and brand is based on the popularity of a product. The popularity of a specific product has a direct impact on the visibility of an enterprise and brand. Meanwhile, the visibility of an enterprise and brand also has an effect on the popularity of a specific product. Although the visibility of an enterprise and brand cannot be equated with the popularity of a specific product, it can be taken into account when judging the popularity of a specific product.

Based on the aforementioned judicial precedents, it can be observed that when a packaging design is first to be used and has a certain influence in the market, along with having the function of distinguishing the source of products/ services, choosing Article 6 of the Anti-Unfair Competition Law as the legal foundation to protect the IP rights is an effective legal approach.

“**The visibility of an enterprise and brand also has an effect on the popularity of a specific product.**”

Contact

Corner Stone & Partners

#1301-1303, Air China Century Plaza,
No.40 Xiaoyun Road, Chaoyang District,
Beijing 100027, China
Tel: +86 010 8446 4600
info@cornerstoneip.com.cn
www.cornerstoneip.com.cn/en/



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Camilla Hamrin: Trademark Manager, Bergenstråhle & Partners AB

An interview: inspirations, experiences, and ideas for equality.

This segment is dedicated to women working in the IP industry, providing a platform to share real accounts from rising women around the globe. In these interviews we will be discussing experiences, celebrating milestones and achievements, and putting forward ideas for advancing equality and diversity.

By providing a platform to share personal experiences we aim to continue the empowerment of women in the world of IP.



Camilla is a European Trademark and Design Attorney, and an Authorized Intellectual Property Attorney. She is Trademark Manager at Bergenstråhle & Partners AB and is responsible for the firm's trademark practice. Camilla has many years of experience as a partner and board member in the IP business in Sweden.

Camilla has nearly 30 years of practice providing business driven advice to clients in protecting and leveraging their intellectual assets and achieving their business objectives.

Over the years Camilla has given a wide range of clients legal advice on trademarks and related issues. She has extensive experience in the establishment and enforcement of trademark strategies in Sweden, Europe, and globally, including naming projects, trademark clearance, application strategies, trademark prosecution, portfolio optimization, and monitoring strategies. Camilla has also handled many negotiations regarding co-existence, assignments, and licensing, as well as enforcement matters such as oppositions, cancellations, and other infringement-related actions.

“It is important to strive for work that gives energy and not takes it, and to have meaningful free time with room for private interests, family, and friends.”

If you would like the opportunity to share your experiences with *Women in IP Leadership*, would like to nominate an individual to be involved, or would like to learn more about sponsorship, please contact our Editor.



I started as Trademark Manager at Bergenstråhle only a year and a half ago. It is important for me to both develop in the role and to develop the role itself.



Camilla has been ranked for several years in the Top 250 Women in IP and Trademark Star by MIP and as a Recommended Individual in WTR 1000. She has also been nominated Practitioner of the Year in Sweden by MIP.

Camilla has assisted several clients in *pro bono* projects, including the World Childhood Foundation, established by HM Queen Silvia of Sweden.

What inspired your career?

My interest in IP was awakened early at law school. During a lecture on IP, the professor advised that it was a very international specialization within law, which attracted me, having lived abroad for several years in the US, Italy, and Switzerland. So that was my inspiration to focus on IP law and I eventually discovered the trademark field. The professor was absolutely right, the IP field is truly international.

How have you found the pathway to your current position? And can you offer advice from your experience?

During and after law school, I worked as an assistant editor-in-chief at a leading Swedish legal periodical, *Juridisk Tidskrift*, and thought I might continue in publishing. My thesis supervisor asked me to hold a lecture based on my thesis, "Copyright and Applied Art". Many in the audience were from IP law firms, and it was only then that I became aware of law firms specializing in IP. I contacted them all, but unfortunately, none were hiring at that time. Eventually, there was an opening at a firm seeking a junior trademark attorney. I was quick to apply and got the job.

A few years later I was recruited to my former firm, where I stayed for 25 years. I became partner and was a member of the board for many years.

Last year I decided it was time for a change, and, with very good timing, there was an opening with Bergenstråhle seeking a Trademark Manager. I saw an exciting opportunity to use my extensive experience as a trademark attorney in a new

environment, focusing on the business development of the firm's trademark practice. I was attracted to the company, which has been a well-established IP firm since 1934 and that has grown significantly in recent years. Bergenstråhle has a modern and progressive approach to the IP business with many new ideas for the delivery of services to clients.

From my experience, a piece of advice is, as in any profession, that it of course is essential to work with experienced and skilled colleagues or other mentors who can always teach you more. Moreover, I believe it is valuable to be involved in other activities; for example, one can be part of a committee of an IP organization such as INTA, Marques, or ECTA. Another way of developing oneself and your company is to engage in the growth of your firm by working with business ideas, improving competence, or internal routines. Of course, sharing your expertise with younger talents is always rewarding.

Furthermore, I am convinced that having a good work-life balance is essential. It is important to strive for work that gives energy and not takes it, and to have meaningful free time with room for private interests, family, and friends. So, another piece of advice is to make sure you feel fulfilled and content in both areas of your life.

What challenges have you faced? And how have you overcome them?

I do not think I have really faced any significant challenges in my career. Of course, there have been times of heavy workloads and demands to provide fast turnarounds and very high capacity. Having trusting relationships with clients, good communication, and being able to prioritize has been helpful at those times.

What would you consider to be your greatest achievement in your career so far?

I am very proud to have been recognized for my expertise in trademarks, having been ranked for several years among the Top 250 Women in IP and Trademark Star by Managing Intellectual Property (MIP) and as a Recommended Individual by World Trademark Review and of having been nominated Practitioner of the Year in Sweden by MIP. Since these rankings are based on track record, the level of sophistication of work, and on feedback from clients and peers, it is an honor to be included.

Over the years, many new clients have turned to me based on recommendations and I am, of course, pleased that my client work has been appreciated.

One of the clients that I have represented is the World Childhood Foundation. The foundation was established by HM Queen Silvia of Sweden

in 1999 and works worldwide to safeguard children from violence and sexual abuse. I am proud to have supported with valuable IP advice on a *pro bono* basis to the foundation, whose work is of great impact to exposed children around the world.

What are your future career aspirations? And how will you work to achieve them?

I started as Trademark Manager at Bergenstråhle only a year and a half ago. It is important for me to both develop in the role and to develop the role itself. I look forward to continuing to focus on business development, client relations, and internal workflow to make our trademark offer even more attractive. Developing and striving to improve our offering is, of course, teamwork, so naturally there is plenty of support around me.

I still enjoy client work very much and want to remain a trusted advisor to present and new clients and continue to keep up long-standing client relationships. I also believe that it is important in my role as Trademark Manager to be part of the daily work with clients and their cases.

The IP business is facing several significant changes, driven by technological, legal, and economic factors, that will affect our work. One hot topic, not only in the IP industry, is, of course AI. AI will influence how we work by assisting us with automating processes and analyzing legal documents. I believe it will streamline our work and create even more value for the clients.

What changes would you like to see in the IP industry regarding equality and diversity in the next five years?

I think IP is an area of law that attracts women. In general, I believe that the IP business is quite open-minded when it comes to equality and diversity, although there, of course, is always room for improvement.

At Bergenstråhle, the majority of our lawyers are women, and all managing positions within our legal department are held by women, so we have come a long way in that respect.

Furthermore, at least in Sweden, many of the decision-makers at clients responsible for trademarks are women. Women typically have high positions within communication and brand strategy.

How do you think the empowerment of women can be continued and expanded in the IP sector?

I think creating formal and informal mentorship networks helps women in IP build connections, gain insights from experienced professionals, and navigate career challenges. Actively promoting women into leadership positions within IP-related organizations - law firms, patent offices, and corporate IP departments - ensures that women's



I think creating formal and informal mentorship networks helps women in IP build connections, gain insights from experienced professionals, and navigate career challenges.



perspectives are incorporated in decision-making processes. In addition, implementing policies that promote gender equality can continue and expand the empowerment of women in the IP sector.

Finally, I believe that specific rankings such as the Top 250 Women in IP and *The Trademark Lawyer's* interview series *Women in IP Leadership* can be inspiring and promoting for women in the IP field.



Alison McGinn: Partner, Banki Haddock Fiora

An interview: inspirations, experiences, and ideas for equality.

Alison is a Partner practicing intellectual property (IP) law and is Head of the Trademark Practice at law firm Banki Haddock Fiora in Sydney, Australia. She has extensive experience advising on IP issues in Australia and New Zealand, particularly in the branding and designs fields, including for some of the world's best-known brands and designers. She advises businesses on rebranding projects, trademark disputes, and related IP matters.

She has been recognized as a leader in the trademarks and branding field by the *World Trademark Review*, *Managing IP*, *Legal 500*, and *Doyle's Guide*. Alison is a member of INTA (currently serving on the Internet Committee) and IPSANZ.

What inspired your career?

When the time came to choose university courses at the end of my high schooling, I was unsure what I wanted to do. My science teacher suggested I choose a science degree combined with a law degree, so I applied for that! My aim was to keep my options open and opportunities broad, and to try out a few different things, and the double degree allowed me to do that over the following five years.

At university, I was immediately captivated by the IP law subjects – copyright, trademarks, and patents. The idea of helping inventors, artists, and businesses protect their ideas and creations really resonated with me. I realized that IP law



requires not only a deep understanding of legal principles but also an appreciation for the creative processes that drive humanity forward, as well as an understanding of how people perceive things. I knew as soon as I started the IP subjects that it was the area for me. I thought I would travel down the patents path as this seemed a good fit with my science degree, but circumstance led me to trademarks and I never looked back.

I love being part of a field that allows people and businesses to be rewarded for the things they create and build.

How have you found the pathway to your current position? And can you offer advice from your experience?

I started off practicing in criminal law as I was given an opportunity for work experience in that field that turned into a solicitor role. I was supposed to stay for three months but ended up practicing in that area for four years – it was a lot of fun and I enjoyed the feeling of helping clients and their families through the tough times of their lives. I also found the process of putting together a case strategy fascinating.

I have been incredibly lucky in my career, even from high school, where I have never been told any different than that I can be or do anything I would like. I have been lucky enough, on the whole, to have been shown respect by clients and others in the profession, and to be surrounded by some inspiring women.

If I were to offer advice to others based on my experience, I'd say it really helped me that IP law, and particularly branding and trademarks, aligns with my personality, interests, and strengths, which means that once I'd mastered the technical legal aspects, it didn't feel like work anymore. If you can play to your individual strengths, instead of striving towards something that doesn't come so naturally, your career path could be easier and more rewarding.

I would also recommend that young practitioners think of themselves as a sponge every day – absorb all the information, advice, and ideas on different ways of doing things that are presented to them, whether it be from mentors, colleagues,

teachers, clients, or others in the industry. You will never reach a point where you know everything; we are all still learning!

Networking is also key, particularly if you want to build your own practice, so I'd recommend actively engaging with others in the industry and taking advantage of opportunities to connect with people right from the time you start studying – it's never too early to start building relationships. I also think resilience is very important. There will be challenges, but embracing them as opportunities will help you move forward.

I think practitioners should also never lose sight of their priorities in their life overall. Whether that be family, health, or life balance. The work is important of course, but not losing sight of real-world priorities is key.

What challenges have you faced? And how have you overcome them?

Although I've been extremely fortunate to have a relatively smooth career path, one significant challenge I faced was transitioning from four years of criminal law to IP law. I found employers weren't willing to give someone with no experience in the field a chance to prove themselves. I, therefore, try nowadays to give opportunities to people who show a sincere interest, which I believe is the most important thing, even if they have little experience practicing in the area yet.

Criminal law and IP law are very different, so I had to build up new expertise and knowledge, and completing a Masters of Law, majoring in Intellectual Property, at that point prepared me well. There were transferrable skills that I did find useful, like advocacy and dealing with challenging clients.

I was then very lucky to have incredible mentors in the field who guided me and made me feel safe and supported in the new area.

My firm had the highest proportion of female partners than any other law firm in Australia (aside from very small or sole practitioner firms) when I joined as a partner and for many years before that, so I never had a question about whether partnership, or success, was possible as a woman. I felt fully supported in the firm, by everyone.

The majority of my team is now female, and I have mentored a number of female lawyers over the years, including through the Law Society of New South Wales Mentoring program.

What would you consider to be your greatest achievement in your career so far?

I would consider my greatest achievement to be the successful building of a dedicated and collaborative team of lawyers and administrative staff. Creating an environment where each team member supports one another and works cohesively has been incredibly rewarding. I take

great pride in the strong relationships and mutual respect that define our team, as they are essential to our collective success. Even when unexpected things happen, we always band together and help each other.

Additionally, I am proud of the excellent level of service the team consistently provides to our diverse clientele. Knowing that our clients trust us and are satisfied with our work makes it all worth it and keeps the motivation strong.

I really believe that fostering a positive, supportive, and effective work environment, and delivering outstanding results for clients, is the key to a strong and happy team.

I have been able to have a family as well as a rewarding career that I truly enjoy, and I want to help others in the firm to be able to achieve that too, no matter their gender.

What are your future career aspirations? And how will you work to achieve them?

My future career aspirations center around continuing to mentor and support my team, and further strengthening our client relationships. By investing in people, I believe we can enhance both individual performance and overall team success.

Ensuring that we continue to deliver exceptional service and personalized attention is my priority. Understanding the evolving needs of clients and adapting to meet those is an ongoing process in ensuring we are delivering the highest value to all clients.

What changes would you like to see in the IP industry regarding equality and diversity in the next five years?

I think the IP industry has made real progress with diversity, and women make up a great proportion of lawyers and attorneys in this field, but I think more inclusive representation across the board is needed. I think it's important to make the law in general accessible to people from different educational and socioeconomic backgrounds.

“If you can play to your individual strengths, instead of striving towards something that doesn't come so naturally, your career path could be easier and more rewarding.”



I was then very lucky to have incredible mentors in the field who guided me and made me feel safe and supported in the new area.”



Creating supportive work environments is also vital to ensure equal opportunities for everyone.

Embracing diversity not only enriches our work environment but also enhances our ability to serve clients with a wide range of perspectives and needs.

How do you think the empowerment of women can be continued and expanded in the IP sector?

Continuing and expanding the empowerment of women in the IP sector really hinges on embracing flexibility and fostering trust. Flexibility is crucial, although I don't think flexibility is only something that should be reserved for women at all. It should be offered across the entire workforce.

Allowing employees to get the job done in ways that might not fit traditional molds is, in my view, very important. This approach can help break down barriers and create a more inclusive and dynamic work environment, with long-term career growth and satisfaction.

I think providing women with access to mentors and sponsors is really important too. It's about creating pathways for growth and providing the encouragement needed to advance. Offering leadership training, networking opportunities, and educational resources can also help women build the skills and confidence they need to succeed.

Lastly, celebrating the achievements of women in the field is vital. Recognizing their successes not only inspires others but also reinforces a culture that values and promotes the contribution of women.



Recognizing their successes not only inspires others but also reinforces a culture that values and promotes the contribution of women.



LAW FIRM RANKINGS 2024

Europe and the UK

A comprehensive list of the 10 most well-respected law firms from Europe and the UK.





The Trademark Lawyer

GLOBAL REACH, LOCAL KNOWLEDGE

Throughout the next few pages, you will view a comprehensive list of the 10 most well-respected law firms from Europe, in alphabetical country and company order. Our focused list is derived from a multifaceted methodology, which uses months of industry research and feedback from our readers, clients, and esteemed connections around the world. All firms are ranked top 10 in their jurisdiction but are displayed alphabetically to avoid bias.

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- ABP Anwälte Burger und Partner
- BRAUNEIS RECHTSANWÄLTE
- CMS Reich-Rohrwig Hainz
- DORDA
- Gassauer-Fleissner
- GEISTWERT
- PENDL MAIR Attorneys at Law
- Puchberger & Partner Patentanwälte
- Schönherr
- Wiltschek Plasser

Belgium

- ALTIUS
- Bird & Bird
- Crowell & Moring
- Eubelius
- Fencer
- Monard Law
- NautaDutilh
- Simont Braun
- Stibbe
- Van Innis & Delarue

Bulgaria

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- CWB
- DGKV (Djingov, Gouginski, Kyutchukov & Velichkov)
- Dimitrov, Petrov & Co. (DPC)
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- Gugushev & Partners Law Office
- K TAHTADJIEV
- Kambourov & Partners
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M. Sc. Konstantin Tahtadjiev
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- Bird & Bird
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Determining the strengths of trademark elements

Anastasia Omelchenko of Zuykov and partners determines the strengths of trademark elements, emphasizing the importance of considering the specific designation, the relation to other elements of the mark, the specific goods, and the perception of the specific designation by the target consumer group.

As per subparagraph 2 of paragraph 6 of Article 1483 of the Russian Civil Code, "designations that are identical or confusingly similar to the trademarks of other persons protected in the Russian Federation cannot be registered as trademarks, including in accordance with the international treaty of the Russian Federation, in relation to similar goods and having earlier priority. At the same time, according to paragraph 3 of Article 1484, no one has the right to use, without the permission of the copyright holder, designations similar to his trademark in relation to goods for the individualization of which the trademark is registered, or homogeneous goods, if as a result of such use there is a likelihood of confusion".

The likelihood of confusion between a trademark and a disputed designation is determined based on the degree of similarity of the designations and the degree of homogeneity of the goods. Paragraph 162 of the Resolution of the Plenum of the Supreme Court of the Russian Federation dated April 23, 2019, No. 10 determines that the establishment of similarity is carried out by the court based on the results of comparison of the trademark and designation (including graphic, sound and semantic criteria) with taking into account the evidence presented by the parties according to their inner conviction. **In this case, the court takes into account – in relation to which elements there are similarities - strong or**



Anastasia Omelchenko

weak elements of the trademark and designation.

But how can we determine which trademark elements are strong and which are weak? This article will examine this issue from the perspective of current legal practice.

The Resolution of the Presidium of the IP Court dated June 24, 2022, in case No. SIP-661/2021 states that certain elements (including words) are recognized as strong or weak not in the abstract. Specifically, the element's strength is determined by:

1. The specific designation and in relation to other elements of that mark;
2. The specific goods (for example, in terms of descriptiveness or whether the use of the element is common for specific goods);
3. The perception of the specific designation by the target consumer group.

Accounting for other elements of a trademark

Arguments about the strength of a particular element of a particular trademark can only be analyzed in light of other elements of the same trademark.

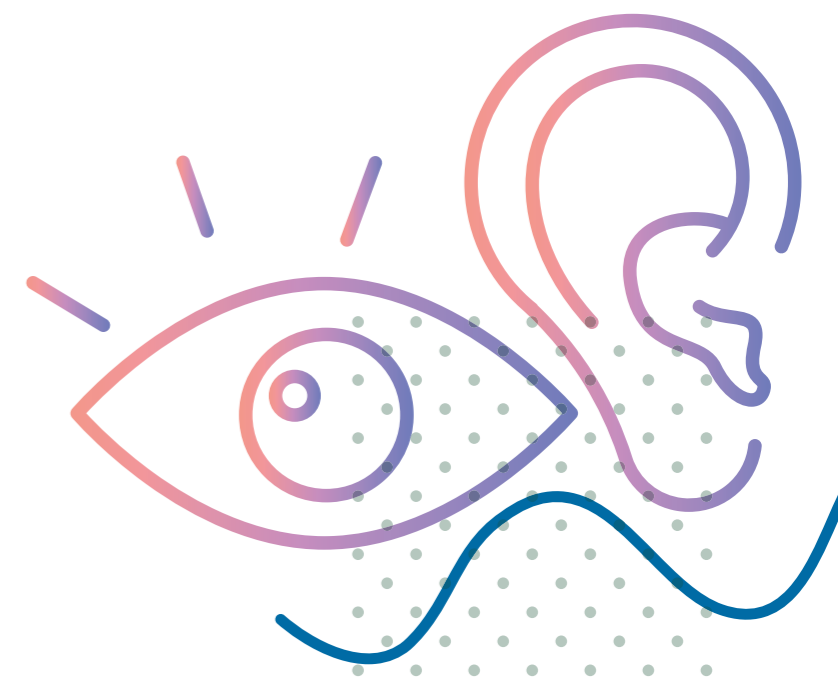
Thus, often-used elements in trademarks may have less strength compared to rarely-used elements. This is also reflected in paragraph 2.471 of the WIPO Intellectual Property Handbook. When comparing trademarks with a common element, the presence of other trademarks with the same element owned by other rights holders is considered. If such trademarks exist, consumers become accustomed to the use of this element by different entities and do not pay particular attention to it as a distinguishing feature.

Similarly, Rospatent follows this logic when examining a designation filed as a trademark. According to the FIPS Order No. 12 dated January 20, 2020, "as an argument indicating that there is no threat of confusion by consumers between the declared designation and the opposing trademark, information may be provided that a coinciding or similar element of the compared trademarks is used as part of the trademarks and designations used by third parties. In this case, the fact of simultaneous use by many persons of coinciding or similar elements of trademarks and designations can be taken into account when assessing the significance of these elements in the compared trademarks and designations for the purpose of individualizing the corresponding goods and services. In particular, taking into account specific circumstances, a conclusion can be drawn that the element included in a large number of trademarks and designations is weak, and its coincidence or similarity in the compared trademarks and designations does not in itself lead to their similarity to the point of confusion."

Consumer perception

The Presidium of the IP Court's rulings on September 23, 2021, in case No. SIP-871/2020, No. SIP-591/2020 indicates that when a trademark consists of several words, it is necessary to determine whether they are perceived as 'indivisible phrases or idiomatic expressions'. For example, a junior trademark consisting of several words should be evaluated to see if they are perceived as fixed phrases (e.g., "eyeball," "Indian summer," "man of the people," "an hour," "good tradition") or idiomatic expressions (e.g., "Monomakh's cap").

The designations of this group are characterized by integrity, due to which they acquire a new semantic meaning that is different from the semantic meaning of their constituent words. The meaning of such expressions is not related to the semantics of each individual word in its composition: the words of the phrase lose all independent characteristics of the word (lexical meaning, forms of change, syntactic function) except for their sound appearance. The connection between the words in such expressions is inseparable. Accordingly, such expressions, although formally they consist of several words, *are perceived as a single element due to their integrity and the loss of features by individual lexical units.* Several words can begin to be perceived as a single verbal element not only in the above cases, but also based on the peculiarities of the compositional structure of the elements of a trademark, due to which some words, which are independent lexical units, begin to be perceived by the consumer as a single whole in a specific trademark, taking into account the specifics of their location in it and the circumstances of use of the sign. Thus, the



“**Arguments about the strength of a particular element of a particular trademark can only be analyzed in light of other elements of the same trademark.**”

determination of the number of elements in a trademark is based on consumers' perceptions of it.

For example, in case No. SIP-434/2023, the Presidium of the IP Court found that the court of first instance rightfully proceeded from the fact that the disputed trademark includes a single design that does not break down into separate verbal elements "PLANET" and "SIBERIA". Acting in the context of the stated logic, the court of first instance came to the logical conclusion that the word "PLANET" included in the disputed designation is not perceived as an opposing service mark registered in the name of Ibatullin A.V.

Thus, the definition of strong and weak elements of a trademark is determined not in the abstract but in each specific case individually, taking into account other elements of the trademark, as well as the perception of the elements by consumers.

Contact

Zuykov and partners

Grokholsky Lane, 28 Moscow, Russia, 129090

Tel: +7 495 775 1637
info@zuykov.com

www.zuykov.com/en



Dark Patterns Regulation: a step forward for digital India

Safir Anand and Ritu Bhargava of Anand and Anand detail the newly introduced Dark Patterns Regulation guidelines in India that aim to prevent deceptive online tactics and promote transparency for a fairer and safer digital landscape.

The term 'Dark Patterns' was first coined by user experience specialist Harry Brignull to describe the ways in which software can subtly **trick users** into doing things they didn't mean to do or discourage behavior that's bad for the company. As a result, they subvert consumer autonomy, amounting to misled decision-making by way of advertisements or unfair trade practices. Studies also reveal that while Dark Patterns may be temporarily effective, they, however, negatively impact customer relations, resulting in bad reviews, decreased user trust, returns, disputes, etc.

The use of Dark Patterns in the realm of e-commerce has recently become one of the most talked about subjects. While the usage of Dark Patterns by internet players is not at all new, it gained prominence lately in light of the various regulatory discussions around it in the last couple of years. This issue is particularly pressing within India's rapidly growing e-commerce sector, which is expected to reach a market size of 350 billion USD by 2030, as per reports. According to a study, the **Advertising Standards Council of India** ("ASCI") recently mentioned that as many as 52 top Apps out of the 53 surveyed in India were found to be using dark patterns for marketing, with health tech online platforms topping the list followed by travel and fintech. One of the surveys conducted claims that a huge percentage of Indian consumers have experienced hidden fees associated with their online payments. Flyers quite often have raised concerns around charges associated with booking tickets that are not presented upfront, but only at the time of making payment. Health tech apps, grocery and shopping apps, movie ticketing spaces, etc., have the most



Safir Anand



Ritu Bhargava

number of dark patterns. In particular, senior citizens and new internet surfers are more susceptible and may accept such patterns as an integral part of the online world.

On this front, the Central Consumer Protection Authority ("CCPA"), on November 30, 2023, notified **Guidelines for Prevention and Regulation of Dark Patterns, 2023** ('Guidelines') under Section 18 of the Consumer Protection Act, 2019 ('CPA'). The Guidelines are intended to cover a broad spectrum of entities encompassing sellers, advertisers, and all platforms systemically providing goods or services in India. Other than the CCPA, the ASCI also issued the **Guidelines for Online Deceptive Design Patterns in Advertising**, to regulate Dark Patterns in Advertising ("ASCI Guidelines").

Dark patterns are considered manipulative as they exploit consumers' lack of knowledge about the digital environment, causing potential harm or financial loss. They create a sense of urgency, confusion, or pressure, leading users to make purchases, subscribe to services, or share personal information. Primarily, they prioritize the platform's goals over informed user choice, resulting in a crooked and often annoying online experience. A prominent example of Dark Patterns would be where a pop-up interrupts the users' interface with a clear 'X' mark to close such pop-up; however, the 'X' mark, instead of performing its intended function, results in the consumers being re-directed to another website or platform. Another very common example covers situations where consumers are able to sign up for services through a single click. However, to cancel or unsubscribe from it, consumers are faced with many confusing steps. Sometimes, they are

redirected to multiple pages that attempt to persuade them to continue their subscriptions. Only after clicking through such pages are consumers able to finally cancel the service. By scrutinizing such practices, the government aims to curb deceptive or confusing tactics and promote transparency for a fairer and safer online landscape in the country. The current Guidelines identify an indicative but not exhaustive list of 13 Dark Patterns, namely *False Urgency, Subscription Trap, Drip Pricing, Nagging, Bait and Switch, Basket Sneaking, Disguised Advertisement, Confirm Shaming, Forced Action, Interface interference, Trick Question, SaaS Billing and Rogue Malware*.

The current Guidelines do not enumerate penal provisions, and the same may be introduced in the near future. It may also be likely that the provisions of CPA apply in case of violations of the Guidelines, and in such cases, the concerned party will be required to comply with the relevant directions in terms of fines or/and otherwise issued by the authority. However, there needs to be clarity on this as the Guidelines currently do not incorporate specifics or guidance on the same. According to the CPA, as it stands to date, non-compliance with such directions can lead to imprisonment for up to six months, a fine of up to INR 20 lakh, or both. In addition, false or misleading advertisements, which are prejudicial to the interest of consumers, are also a punishable offense with imprisonment of up to two years and a fine of up to INR 10 lakh. The imprisonment and fine increase for subsequent offenses.

Résumés

Ritu Bhargava is a result-oriented legal professional with close to a decade of experience, having specialized in commercial transactions, general corporate, IP, litigation, and regulatory. A Gujarat National Law University alumnus, prior to re-joining Anand and Anand in March this year, Ritu was seconding with Google LLC where she was a part of the Commercial Team (India and West Asia) and provided seamless support to the business units like Ads, Google Marketing Platform, Google Analytics, Google Operations Center, India to name a few. Before the Google secondment, Ritu led the litigation and IP Team at udaan, a B2B e-commerce platform.

Safir Anand, a leading intellectual property expert at Anand and Anand, has over 29 years of experience specializing in trademarks, commercial and contractual IP, and IP strategy. Anand's impact is particularly notable in the fashion industry, where he has pioneered the recognition of IP as a tangible asset. His work has empowered top designers, like Sabyasachi, to protect their creations, facilitating significant brand growth and deterring infringement. Anand's expertise has also driven corporate stake acquisitions, such as Reliance's investment in the Manish Malhotra brand. His team also worked on getting the selvedge design of fashion designer Rajesh Pratap Singh registered.



The CCPA is an active regulator that can initiate *suo moto* cognizance of matters affecting consumer interests. An investigation can also be initiated upon receiving a complaint or upon receiving a direction from the Central Government.

The Guidelines and the ASCI Guidelines seem to be a great step in order to control the exploitation of consumer behavioral biases as Dark Patterns have become increasingly pervasive in online choice architectures. However, it is crucial to keep an eye on its enforcement so as to witness the real impact of informed consumer choice in the e-commerce space. At the same time, companies must initiate corrective measures to provide a transparent user experience and to secure long-term customer relationships. UI/UX design agencies should conduct thorough UX audits, educate stakeholders, and prioritize user experience.

Contact

Anand & Anand

First Channel Building Plot No. 17A,
Sector 16A, Film City, Noida,
Uttar Pradesh 201301, India
Tel: +91 120 4059 300
email@anandandanand.com
www.anandandanand.com



Protecting personality rights in the era of AI

Ranjan Narula and Abhishek Nangia of RNA, Technology and IP Attorneys consider the impact generative AI is having on the personality rights of celebrities, reviewing recent cases to assess court outcomes when content has been created without permission.

Over the past five years, AI has made significant advancements, with deep learning models being deployed across various scenarios, including creative industries. As AI applications are being embedded in our day-to-day life, the repercussions of AI deployment are becoming highly relevant and important. The ethical concerns associated with AI are multifaceted, including challenging issues of fairness, privacy and data protection, responsibility and accountability, safety and robustness, transparency, and environmental impact.

This article examines the impact of AI applications on personality rights of celebrities and the legal landscape.

Legal framework of protecting personality rights

Publicity and image rights are typically recognized as property rights rather than personal rights, making them assignable and licensable for commercial benefits. In practice, the law relating to publicity and image rights is still evolving with no codified law governing this area. Image rights stem from the right to privacy and the principle of human dignity outlined in Articles 19 and 21 of the Constitution.

Trademarks Act

There is no specific provision for protecting publicity and image rights. Celebrities can protect their names and images by registering them as trademarks. The definition of 'mark' under Section 2(m) of the Trademarks Act, 1999 includes 'names', making it possible for individuals to register their names as trademarks.

Further they can rely on the common law remedy of passing off to protect their publicity and image rights. This requires proof of the individual's reputation, the misrepresentation caused, and irreparable damage to the individual.

Copyright Act

The Copyright Act, 1957 does not define the word 'celebrity'. However, the definition of a 'performer' under Section 2(qq) includes an actor, singer, musician, dancer, acrobat, juggler, snake charmer, lecturer, or any other person who delivers a performance. Celebrities frequently invoke Sections 38, 38A, and 38B of the Copyright Act, 1957, which grant performers the right to receive credit and claim authorship of their performances. These provisions also provide performers with a negative right, allowing them to prevent others

from damaging their performances, which in turn protects their reputation.

Remedies under Information Technology Act, 2000, for AI generated content

The Information Technology Act, 2000, offers legal remedies for the misuse of AI-generated voice under Section 66D and publishing/circulating obscene material created through AI under Section 67.

- a) Section 66D – The provision envisages cheating by personation using communication devices and encompasses offenses where an individual's voice or image is misappropriated through AI. Punishment: up to three years imprisonment and a fine of up to Rs. one lakh.
- b) Section 66E provides for punishment for the violation of the privacy of a person by any means including video, photograph, film, and publishing it in printed or electronic form.
- c) Section 67 encompasses offenses where pornographic content involving the celebrity created through AI is published/circulated.
 - First conviction: punishment of up to three years imprisonment and a fine of up to Rs. five lakhs (US\$5,981) for publishing or transmitting obscene material in electronic form;
 - Subsequent conviction: imprisonment up to five years and a fine of up to Rs. 10 lakhs (US\$11,963).

Indian government issues advisory to intermediaries for deep fake content

Considering the growing concerns around misinformation powered by AI deepfakes, the Indian government issued an advisory in December 2023 to all intermediaries to act against deepfakes and misinformation. The advisory mandates that social media intermediaries must:

- (i) Comply with the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (IT Rules 2021).
- (ii) Make reasonable efforts to prevent users from hosting, displaying,



Ranjan Narula



Abhishek Nangia

Résumés

Ranjan Narula, Managing Partner

Ranjan founded the specialist IP law firm, RNA, in 2004, and is now its Managing Partner. Ranjan has over three decades of post qualification experience in advising companies and entrepreneurs on IP management, monetisation and Technology issues. Providing strategic advice in relation to IP clearance, acquisition, protection, exploitation, and enforcement. Handled over 500 civil and criminal actions for clients in various industries including the IT, telecom, apparel, FMCG, confectionery, beverages (alcoholic and non-alcoholic) and finance industries.

Ranjan is President of the Intellectual Property Attorneys Association (IPAA) and Former Board Member at International Trademark Association (INTA). Ranjan has been ranked as a leading IP practitioner by various publications including WTR 1000, IP Star (Managing IP), WIPR leaders, Who's Who legal, Asia IP experts and others. Ranjan is regularly invited to speak by Universities and chamber of commerce on IP issues.

Abhishek Nangia

Abhishek is a seasoned professional in advising clients of diverse sectors on a wide range of IP and IT issues in India and the Indian Sub-continent. Abhishek has worked closely on brand clearance, IP protection and enforcement, pre-litigation mediation, drafting and vetting of contracts, Brand Usage Policy, Privacy Policy, evolving e-commerce regulations, and domain name disputes.

With over 18 years of experience, Abhishek has been instrumental in developing creative strategies best suited to business' needs and is an expert in handling contentious and non-contentious matters before various forums including advertising/media clearance issues.

He regularly writes articles published in leading IP publications and has been ranked highly by independent agencies in the legal industry.

Abhishek is an active member of INTA – Data Protection Committee and Asian Patent Attorneys Association (APAA).

“Meta has started to label AI-generated content (videos, images, and audio) “Made with AI” on its platforms.”



uploading, modifying, publishing, transmitting, storing, updating, or sharing information related to the 11 types of prohibited content listed under Rule 3(1)(b). This rule aims to ensure platforms identify and promptly remove misinformation, false content impersonating others including deepfakes. Failure to comply with the IT Rules would take away the safe harbor protection extended to intermediaries under Section 79 of the IT Act.

Social media platforms responses to AI-generated content

Meta Policy on AI generated content

Meta has started to label AI-generated content (videos, images, and audio) "Made with AI" on its platforms. The new labelling approach applies to content posted on Meta's Facebook, Instagram, and Threads services.

YouTube

YouTube's policy is similar to Meta's in that it informs the user that the content they're seeing is synthetic. YouTube requires creators to disclose when they've created altered or synthetic content that is realistic, including using AI tools. When creators upload content, they will have to select to indicate that it contains 'realistic altered or synthetic material'.

LinkedIn

LinkedIn Professional Community Policies prohibit users from sharing synthetic or manipulated media that depicts a person saying something they did not say or doing something they did not do without clearly disclosing the fake or altered nature of the material.

Deepfakes and recent cases at Delhi High Court

Deepfakes are commonly understood as images, videos, or audio edited or created by manipulating text, picture, audio and video using AI tools. There has been a steep rise in the deep fake scams which impersonate not only users but prominent public figures across spheres to deceive consumers.

Recently, Rajat Sharma (famous Indian journalist) W.P.(C) 6560/2024 and Chaitanya Rohilla W.P.(C) 15596/2023 have approached the Delhi High Court objecting to the unregulated use of deep fakes and artificial intelligence. The plea filed by Rajat Sharma asks the government to develop a regulatory framework for dealing with deepfakes. The court has sought the Indian government comments on developing a regulatory framework to deal with deep fakes. Both cases are tagged together and currently pending.

“ There has been a steep rise in the deep fake scams that impersonate not only users but prominent public figures across spheres to deceive consumers. ”

AI impact on unauthorized use of celebrity's name, image and personality rights

The recent trend is to create sophisticated AI applications that can use names, voices, signatures, photographs, images, caricatures, likeness, personas, and other attributes of a celebrity to make money. To control indiscriminate use of their name and personality rights several celebrities have approached the Courts to stop its unauthorized commercial use.

- A) In *Jaikishan Kakubhai Saraf alias Jackie Shroff v. The Peppy Store and Others CS (COMM) 389 of 2024*, Jackie Shroff, a well-known Bollywood actor, filed a suit against 18 defendants (including AI chatbot that used attributes of his persona without his consent) for infringement of the registered marks, protection of his own name, image, likeness, persona, voice, various other distinctive attributes of his personality against misuse over the internet.

The Court:

- (i) Granted an *ex-parte* interim injunction in favor of Jackie Shroff and restrained the defendants from infringing the Plaintiff's personality/publicity rights by misappropriating the Plaintiff's (a) name 'JACKIE SHROFF', 'JACKIE', 'JAGGU DADA', (b) voice, (c) image for any commercial purpose without his consent.
- (ii) Restrained the defendants from selling wall art featuring animated images of the Plaintiff, merchandise using the Plaintiff's photograph and name and circulating videos tarnishing the reputation of the Plaintiff.

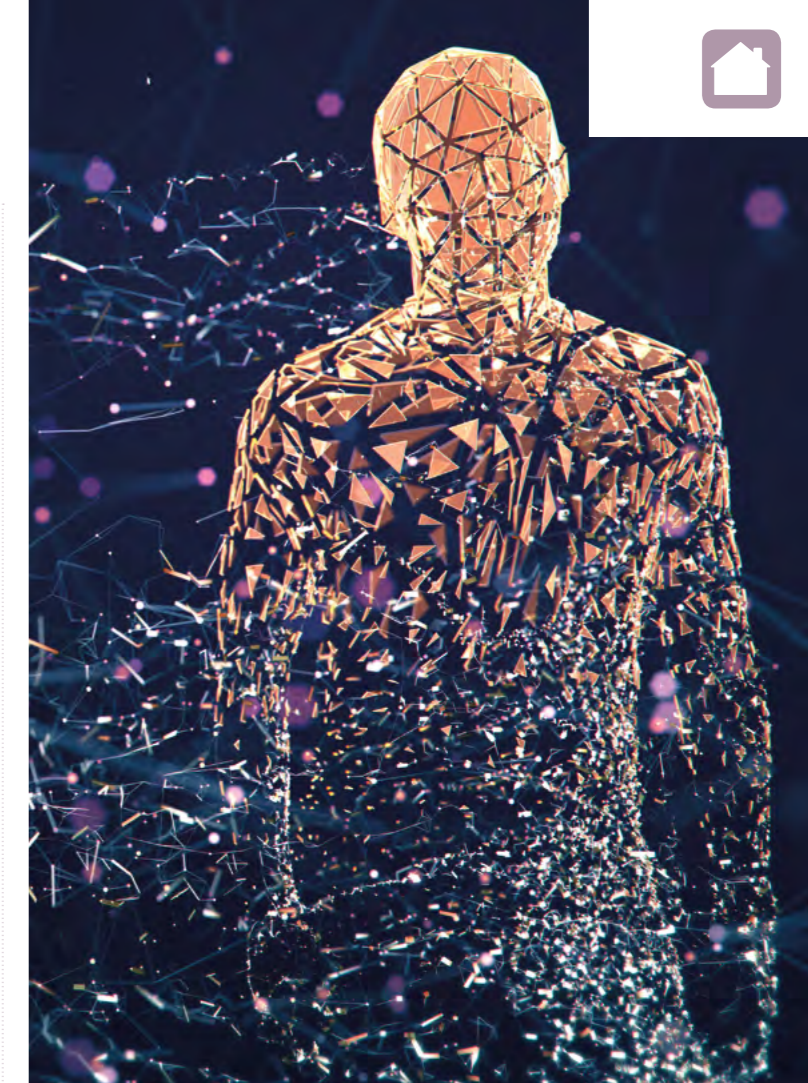
Interestingly, the court refused to direct a take-down of a video titled 'Jackie Shroff is Savage, Jackie Shroff Thug Life' posted by a YouTuber. The court held that it is an artistic expression and blocking it could set a precedent that stifles freedom of expression.

- B) In *Arijit Singh v. Codible Ventures LLP & Others (Commercial IPR Suit (L) No. 23443 of 2024)*, the Plaintiff, Arijit Singh, a famous playback singer in the Indian music industry, filed a suit against 38 defendants (including AI platforms, owners of restaurants and pubs,

organizers of virtual reality events, merchandisers, e-commerce portals, domain name registrars) seeking protection of his personality rights and publicity rights over his own name, voice, signatures, photograph, image, caricature, likeness, persona, and various other attributes of his personality against unauthorized commercial exploitation and misuse of Defendants in this case being (a) AI platforms using algorithms to create audio-visual content by using Plaintiff's personality traits (voice, mannerisms, photographs, etc.) to generate commercial gains, (b) Real Voice Cloning (RVCs) applications to convert any speech or voice recording or audio file into Plaintiff's voice, (c) a website called www.jammale.com which allowed the creation of songs with unauthorized use of Plaintiff's voice using AI models. Videos uploaded on social media channels promoting a step wise guideline for unauthorized conversion of any text or speech or voice recording or audio file into the Plaintiff's voice by using the AI platforms. In addition, certain Defendants were engaged in commercially exploiting the Plaintiff's publicity rights by selling merchandise bearing the Plaintiff's names, images, photographs, likeness, etc., on e-commerce platforms.

The court granted an *ex-parte* injunction order in favour of the Plaintiff and observed that:

- (i) Making AI tools available that enable the conversion of any voice into that of a celebrity without permission constitutes a violation of the celebrity's personality rights.
 - (ii) Defendants are restrained from violating Arijit Singh's Personality Rights and/or Publicity Rights by multiple third parties and AI platforms.
- C) In *Anil Kapoor v. Simply Life India, 2023 SCC OnLine Del 6914*, the Plaintiff, Anil Kapoor, well-known Bollywood actor, filed a court action alleging that the defendants, Simply Life India and others, including unknown persons pleaded as John Doe were misusing various features of his persona through technology, including artificial



“ Making AI tools available that enable the conversion of any voice into that of a celebrity without permission constitutes a violation of the celebrity's personality rights. ”

intelligence (AI), deepfakes and GIFs and making illicit commercial gains. Specifically, the defendants were using AI to produce images and videos that were derogatory to Anil Kapoor and other actresses and generated his images as cartoon characters using AI.

On September 20, 2023, the court ruled in favor of the plaintiff and observed that the:

- (i) Modern technological tools including AI, make it possible for illegal and unauthorized users to produce or imitate a celebrity's persona.
- (ii) Celebrities enjoy the right of privacy and do not wish to have their image, voice or likeness portrayed in a dark or grim manner (e.g., on porn websites).
- (iii) Defendants are restrained from using Anil Kapoor's name, likeness, image, voice, personality or any other aspects of his persona to create any merchandise and ringtones, or in any manner misusing the said attributes by using technological tools (e.g., AI,



machine learning, deep fakes, face morphing or GIFs), for monetary gains or for commercial purposes.

D) In *Network18 Media and Investments Limited & Ors. v. www.brawlersfightclub.com & Others*, CS (COMM) 449 of 2024, CNBC TV18, financial news television channel and Narasimhan (anchor in the interview) filed a suit seeking the removal of objectionable content from eight rogue websites containing a fabricated article titled 'CNBC-TV18 management refuses to comment on the scandal surrounding its interview Vantara (star of the forest)'.

Narasimhan (the anchor) conducted an interview with Anant Ambani, which was published on CNBC TV18's YouTube channel, where Ambani discussed various projects and his passion for wildlife. The rogue websites manipulated the interview using it to create an article to promote a ponzi investment scheme and redirected readers to a cryptocurrency trading platform named Everix Edge. The article was misleadingly presented as being published by the BBC (British public service broadcaster headquartered in London)

Contact

RNA, Technology and IP Attorneys

401-402, 4th Floor,
Suncity Success
Tower, Sector - 65,
Golf Course
Extension Road,
Gurgaon - 122 005,
National Capital
Region (Haryana),
India
Offices: Delhi |
Chennai
Tel: +91 124 429 6999
info@rnaip.com
www.rnaip.com

The Court observed that the impugned article violates the personality rights of Narasimhan (anchor in the interview) and issued an order to block rogue websites hosting false articles about an interview involving Reliance Industries Director Anant Ambani and TV18 journalist Anand Narasimhan.

To sum up

In conclusion, AI is revolutionizing the way brands collaborate with celebrities, presenting both opportunities and challenges. Therefore, it is imperative for regulatory authorities to formulate policies that strike a balance between fostering innovation and ensuring accountability. The accountability needs to be fixed not only for the companies creating AI applications that utilize a celebrity's name, voice, signature, photographs, likeness, and other attributes for commercial purposes but also the social media platforms that distribute the AI generated content. The legal landscape is evolving with courts recognizing the personality rights of celebrities and have issued *ex-parte* injunction orders against the AI applications where they find such use is unlicensed. At the same time, the challenges posed by the AI generated content and deep fakes require technology and law to work in tandem.

“Feeling gratitude and not expressing it is like wrapping a present and not giving it.”

— William Arthur Ward



For the last 20 years, RNA has been on an incredible journey of handling some of the most complex and interesting issues in the Intellectual Property landscape.

As we celebrate our 20th anniversary, we want to take a moment to express our deepest gratitude to all who have been an integral part of this incredible journey.

- To our clients (aka business partners, aka friends), thank you for your trust and continued support.
- To our friends, thank you for always being there with encouragement and guidance.
- To our dedicated staff, your hard work and commitment have been the backbone of our success.
- To our vendors, thank you for your reliable service and partnership.

Each of you has contributed to our growth and achievements over the past two decades, and for that, we are truly grateful.

www.rnaip.com



Vaz e Dias Advogados & Associados

VDAV is globally known for its excellence regarding all IP matters. Our trademark and patent services are rendered by professionals with technical knowledge and attorneys at law.

Phone: + 55 21 3176-6530 | **Fax:** + 55 21 3176-6528

Address: Rua da Rua da Assembléia number 10 offices 2422 - Centro, Rio de Janeiro - RJ, Brazil

CEP: 20011-000

Email: mail@vdav.com.br | **Website:** www.vdav.com.br



Eurasia news 2024: changes in the region

Dr. Tatiana Vakhnina and Dr. Alexey Vakhnin of Vakhnina and Partners provide updates for IP in Eurasia, including detailing the increase in official fees in Kazakhstan and Russia and the celebration of the 30th anniversary of the Eurasian Patent Office.

Eurasian Patent Office: 30th anniversary

September 09, 2024, marked the 30th anniversary of The Eurasian Patent Organization (EAPO). The 30th anniversary of the Eurasian Patent System is an important date for the Intellectual Property of all countries of the region.

On September 09, 2024, the EAPO Anniversary Meeting took place in the historical Metropol Hotel in Moscow. It brought together heads and representatives of all EAPO Members Patent Offices, as well as the representatives of Patent Offices and Patent Attorneys from around the world.

EAPO is an international organization established in 1995 by the Eurasian Patent Convention (EAPC) to grant Eurasian patents. For 30 years a single Eurasian patent has proved itself as an important legal mechanism for the business community. In this regard, the tasks to ensure the quality of services and the attractiveness of the system are reaching a new level.

The Eurasian Patent Convention was signed on September 09, 1994, in Moscow by the Republic of Armenia, Republic of Azerbaijan, Republic of Belarus, Republic of Georgia, Republic of Kazakhstan, Kyrgyz Republic, Republic of Moldova, Russian Federation, Republic of Tajikistan, Ukraine. It came into force on August 12, 1995, after Turkmenistan, Belarus, and Tajikistan deposited their instruments of accession to the Convention to the WIPO Director General, on March 1, 1995, May 8, 1995, and May 12, 1995, respectively. EAPC allows applicants to obtain regional legal protection along with the national patent registration procedures.

The Eurasian Patent Office is an executive body of the EAPO, administering the regional patent registration system, covering eight countries of the Eurasian region. The President of EAPO, Dr. Grigory Ivliev, has served as the EAPO President since February 11, 2022.



Dr. Tatiana Vakhnina



Dr. Alexey Vakhnin

To date, the following countries are members of the Eurasian Association: **Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Russia, Tajikistan, and Turkmenistan.**

We congratulate EAPO on its 30th Anniversary, and wish professional success and development!

Kazakhstan: increase in patent fees from July 2024

From July 2024, the government of Kazakhstan significantly increased the official fees for the registration of trademarks, geographical indications, and appellations of origin of goods. A number of official fees have been increased, including fees for filing a trademark application and examination, for extending a trademark certificate's term of validity, for each additional class in the trademark application after the third, etc.

Russian Federation: changes of official fees are in force from 5 October 2024

According to the official publications of Rospatent, official fees are increased from 5 October 2024. The fees for registration of rights and transactions for intellectual property have increased by 10-15% and the 30% discount for online filing will not be applied to any official fees from 5 October 2024.

The last time the fees for actions with intellectual property were significantly revised was in 2017. Amendments to the Decree of the Government of the Russian Federation No. 941 of December 10, 2008, are being publicly discussed, which approves the "Regulation on Patent Fees and Other Fees for Legally Significant Actions related to the Results of Intellectual Activity (RID) and Means of Individualization". These are related to inventions, utility models, designs, trademarks, and service marks, and

regional brands (geo-graphical indication and name of the place of origin of the goods).

The main changes are the cancellation of the 30% discount for filing applications online (*in electronic form*), as well as the increase of official fees by 10-15% for particular actions with intellectual property objects.

According to the information of the Russian Patent Office, the 30% discount for electronic filing of an application for registration of intellectual property rights and transactions with them has been in effect since 2017 and was a temporary measure encouraging the use of an electronic application form.

It should be noted that the fees for registration of intellectual property rights in Russia are significantly lower than in other countries.

Taking into account the multi-stage payment of fees, the changes will affect, among other, the applications that are under examination. At the same time, the fees will not be recalculated for previously paid stages of provided public services.

For example, if a formal examination of an invention application has been completed with a positive result, and at the time of entry of the amendments into force, the request for substantive examination of the application is not filed, then the fee for carrying out such an examination will need to be paid taking into account amendments in the Regulations on Duties.

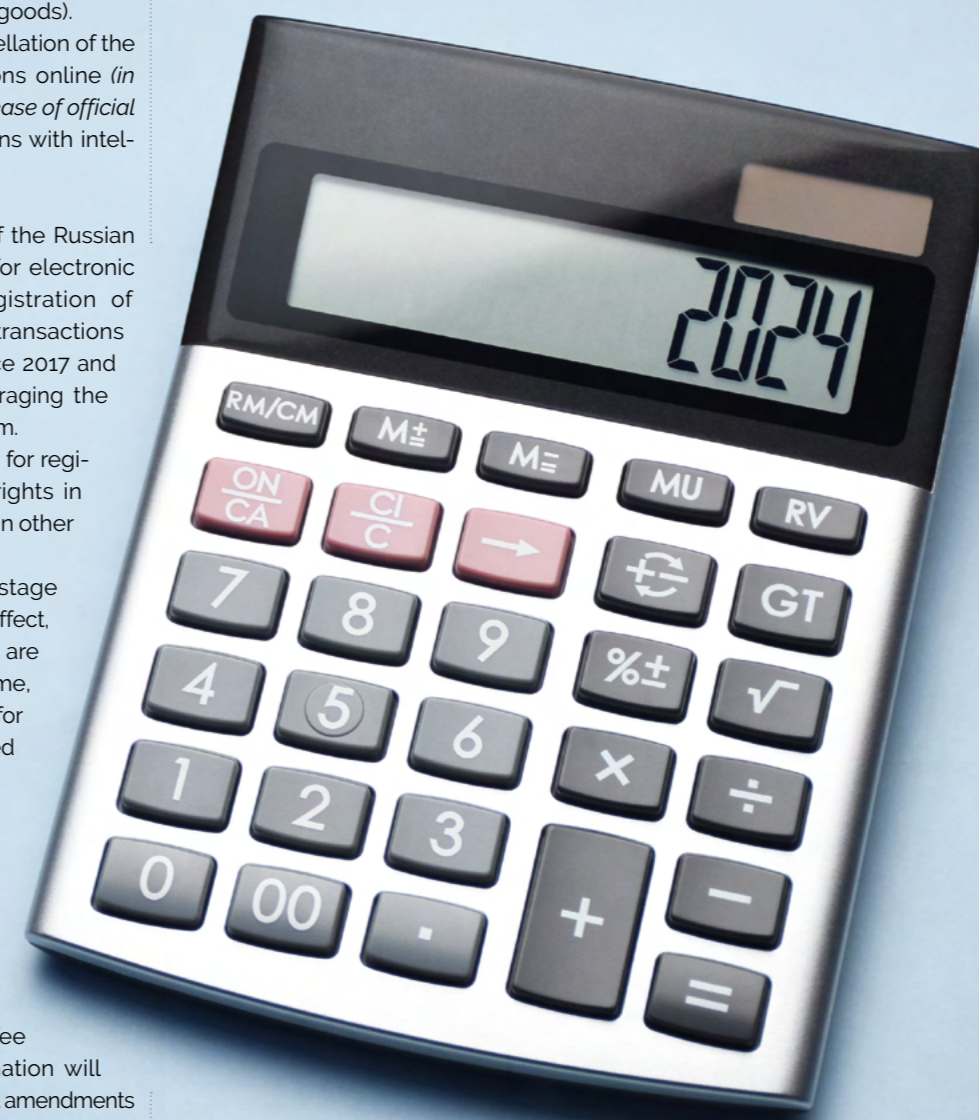
Russian Federation: the increase of the official fees for particular procedural actions has been approved

On July 23, 2024, Bill No. 577665-8, "On Amendments to Parts One and Two of the Tax Code of the Russian Federation and Certain Legislative Acts of the Russian Federation on Taxes and Fees," was approved. The law stipulates a significant increase of the official fees when applying to the court, and also introduces a new differentiation of fees depending on the amount of the lawsuit.

The main amendments include:

- An increase in the fee for filing of property lawsuits;
- Introduction of new fees for certain procedural actions.

According to the legislator, this step is aimed at compensating court costs and improving the quality of judicial acts.



Résumés

Dr. Tatiana Vakhnina is a Senior Partner and founder of Vakhnina and Partners, Eurasian Patent Attorney, Patent and Trademark Attorney of the Russian Federation with extensive experience in IP since the 1970s in trademark prosecution, disputes, and litigation. Tatiana is an Honorary Advocate of the Russian Federation, an active member of a number of Russian and International IP Organizations and the professional community of Patent Attorneys in Russia.

Dr. Alexey Vakhnin is Partner and Managing Director of Vakhnina and Partners. He is a Eurasian Patent Attorney, Patent and Trademark Attorney of the Russian Federation with extensive experience in IP since the 1990s.

Alexey is a member of the Eurasian Patent Attorneys Assembly (EPAA), FICPI, AIPPI, LESI, INTA, ECTA, PTMG, etc.

With a PhD in Medicine (Biochemistry and Immunology), working on patent matters, Alexey specializes in Medicine, Biotechnology, Biochemistry, Pharmacology, and Pharmaceuticals.

Moldova: Republic of Moldova joins the Geneva Act of the Lisbon Agreement

The Republic of Moldova deposited its instrument of ratification to the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indication ("Geneva Act").

Thanks to this event, which took place in July 2024, the Geneva Act now offers protection to 25 contracting parties covering up to 60 countries, including Moldova.

The Geneva Act will enter into force with respect to Moldova on October 2024.

Turkmenistan: Turkmenistan officially joins the Protocol to the Eurasian Patent Convention on the Protection of Designs

On July 13, the President of Turkmenistan signed the Law of Turkmenistan 'On Accession to the Protocol to the Eurasian Patent Convention' of September 09, 1994, on the protection of designs.

Full membership enables the EAPO to accede to the Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs.

According to Article 22 of the Protocol, this international treaty will enter into force for Turkmenistan three months after the deposit of the instrument of accession with the depositary.

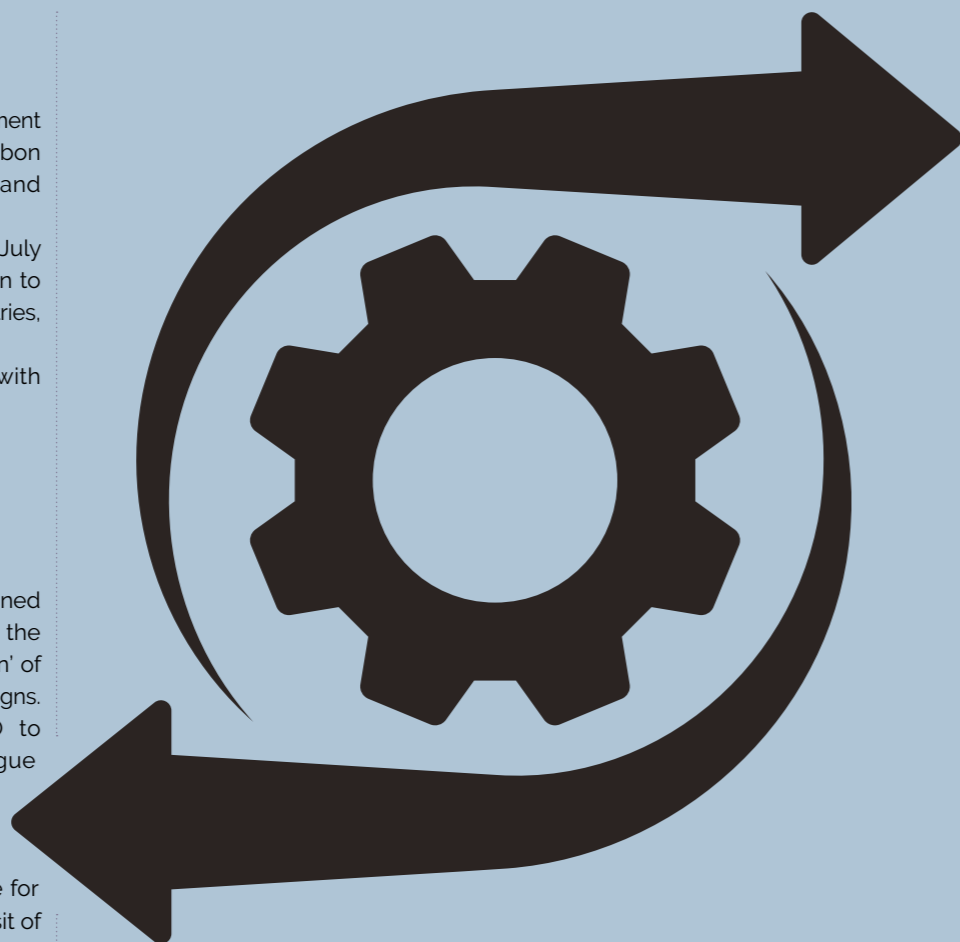
Uzbekistan: Uzbekistan joins The Hague Agreement Concerning the International Deposit of Industrial Designs

Uzbekistan has formally signed the Hague Agreement Concerning the International Deposit of Designs, a step to improve its international commerce and safeguard intellectual property rights.

Uzbekistan enhances global trade and IP protection by joining the Hague Agreement on Designs.

The Hague system is a centralized system for acquiring and maintaining rights for a design by filing a single international application to any number of countries that are members of this agreement. More than 70 countries, including the CIS and Baltic countries, are parties to the Geneva Act of the Hague Agreement.

Our specialists in Moscow, Yerevan, and Bishkek offices are ready to provide more information on your request. Patent and Trademark Attorneys of Vakhnina and Partners will be pleased to assist you and your clients if you have any questions or inquiries on IP matters in EAPO, Russia, Armenia, and other Eurasian countries.



“**From July 2024, the government of Kazakhstan significantly increased the official fees for the registration of trademarks, geographical indications, and appellations of origin of goods.**”

Contact

Vakhnina and Partners
 Moscow office (Russia):
 ip@vakhnina.ru

Yerevan office (Armenia):
 office@vakhnina.am

Bishkek office (Kyrgyzstan):
 kg@vakhnina.com

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005411 5368-7192/3

Website: www.oconorpower.com.ar
E-mail: soc@oconorpower.com.ar
ocp@oconorpower.com.ar
oconor@oconorpower.com.ar

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Our attorneys are members of INTA, FICPI, AIPPI, LESI, ECTA, PTMG.

Address: Yerevan, Republic of Armenia
Tel: +374 91 066393
Email: Armenia@vakhnina.com
Website: <http://about.vakhnina.com>
Contact: Dr. Alexey Vakhnin, Partner

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Email: Bahrain@unitedtm.com & unitedtrademark@unitedtm.com
Contact: Talal F.Khan & Mr Imad

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Tel: +8801727444888

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Tel/Fax: +591-2-2430671 / +591 79503777
Website: www.landivar.com
Email: ip@landivar.com - info@landivar.com
Contact: Martha Landivar, Marcial Navia

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Address: 2855 PGA Boulevard, Palm Beach Gardens, Florida 33410, USA
Tel: +1 561 833-9000
Fax: +1 561 833-9990
Contact: Michael Slavin
Website: www.CaribbeanTrademarks.com
Email: IP@CaribbeanTrademarks.com

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+57 60-1 3127928
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Email: info@veraabogados.com
Contact: Carolina Vera Matiz, Natalia Vera Matiz

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Contact: Dr. Karel Cermak - Managing Partner
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lcoral@drlawyer.com

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Contact: Gonzalo Menéndez, partner,
gmenendez@ideasips.com
Gustavo Noyola, partner,
noyola@ideasips.com

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Address: Bishkek, Kyrgyz Republic
Tel: +996-551-655-694
Email: ip@vakhnina.com
Website: <https://www.vakhnina.com>
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Email: ecruz@tciplaw.mx; mtovar@tciplaw.mx; contactus@tciplaw.mx
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Website: www.utmps.com
Email: morocco@unitedtm.com &
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Website: www.kraya.com.np
Email: info@kraya.com.np; kraya@kraya.com.np
Contacts: Nabin Khadka, Managing Partner
info@kraya.com.np
Susmita Bhattarai, Associate
kraya@kraya.com.np


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Website: www.aluko-oyebode.com
Email: A0IP@aluko-oyebode.com
Contacts: **Uche Nwokocha (Partner):**
Uche.Nwokocha@aluko-oyebode.com
Tel: +234 703 400 1093
Regina Onunwure (Senior Associate)

OMAN



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Address: Suite No. 702, 7th Floor, Commercial Centre, Ruwi Muscat, Sultanate of Oman, P. O. Box 3441, Postal Code 112 Ruwi, Sultanate of Oman

Website: www.utmps.com
Email: oman@unitedtm.com & unitedtrademark@unitedtm.com
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Email: info@khp.legal
Contact: Ramzan Khusainov, LL.M., Managing Partner
Anton Khomyakov, Ph.D., Senior Partner

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Address: Moscow, Russia
Tel: +7-495-946-7075
Website: <https://www.vakhnina.com>
Email: ip@vakhnina.com
Contact: Dr. Tatiana VAKHNINA
Dr. Alexey VAKHNIN

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Address: 30th Street, Olaya Opposite to Madarris Al Mustaqbil, P.O. Box 15185, Riyadh 11444, Kingdom of Saudi Arabia

Website: www.utmps.com
Email: saudia@unitedtm.com & unitedtrademark@unitedtm.com
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Email: email@bharuchaco.com
Contact: Mohammad Fazil Bharucha, Tayseer Fazil Bharucha

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Address: 85 The Mall Road, Lahore 54000, Pakistan

Tel: +92 42 36285588, +92 42 36285590, +92 42 36285581, +92 42 36285584
Fax: +92 42 36285585, +92 42 36285586, +92 42 36285587
Website: www.utmps.com & www.unitedip.com
Email: unitedtrademark@unitedtm.com
Contact: Yawar Irfan Khan, Hasan Irfan Khan

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+48 664 706 048 Helena, Warsaw
+48 530 163 922 Iwona, Gdansk

Website: www.fgghip.com
Email: contact@fgghip.com
Contact: Helena Gajek, Iwona Plodzich-Hennig


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Website: www.utmps.com
Email: tanzania@unitedtm.com &
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 Dubai, United Arab Emirates
Website: www.utmps.com
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Tel: +38 093 587 91 25
Website: <https://elmar-ip.com/>
Email: elmarip33@gmail.com
clients@elmar-ip.com
Contact: Mrs. Elvira Volkova
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 72 Chevonoarmyyska Str.,
 Kyiv 03150, Ukraine
Tel: +380(44) 593 96 93
Fax: +380(44) 451 40 48
Website: www.pakharenko.com
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Hotline: (+84) 988 746527
Website: <https://lawfirmelite.com/>
Email: info@lawfirmelite.com
Contact: Nguyen Tran Tuyen (Mr.)
 Patent & Trademark
 Attorney
tuyen@lawfirmelite.com
 Hoang Thanh Hong (Ms.)
 Manager of IP Division
hongth@lawfirmelite.com



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 Managing Partner,
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Fax: +86 10 84464908
Email: law@cornerstoneip.com.cn
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glp.eu

+39 02 54120878
glp.mi@glp.eu

+39 0432 506388
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