Greetings!

The Consulegis network has over 1,600 lawyers spread across 42 countries and more than 150 cities. You can follow Consulegis on Facebook at www.facebook.com/consulegis or at the Consulegis website www.consulegis.com.

Consulegis members specializing in intellectual property, entertainment law and information technology each provide professional services in their own specific country, and can collectively provide a unique, international team approach to issues involving multiple countries. Comprehensive services range from litigation to contract negotiations as well as protection of intellectual property rights and strategic planning.

Also consider obtaining a copy of the Consulegis Handbook on International Intellectual Property Law Basics covering more than 30 countries (see page 9 of this Newsletter). Please contact us to receive further information on Consulegis, our Specialist Group, or how to obtain specialized assistance from any of our members.

Best regards,

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A Note from the Editor...

Dear Readers,

Welcome to the Spring IP Newsletter! We have great participation from our members of the Intellectual Property, Entertainment Law and Information Technology Specialist Group of Consulegis covering a wide range of interesting international topics on current intellectual property issues as well as practical matters. Thank you for your contributions. The IP Newsletter is generally published biannually in the spring and in the fall. I encourage Consulegis members to submit articles for the upcoming Fall Newsletter. Enjoy and Happy Spring!

Cheers,

Cassandra

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*Special thanks to Sandhya Singh of Meister Seelig & Fein LLP for format editing.*
### Employee Inventions under French Law: Legal Developments

For several decades in France, the general principle has been that intellectual property vests in the inventor, except when the inventor is an employee. Currently, there are two categories relating to employee inventions.

The first category covers employees who are given precise instructions or have an express mission to carry out research. The invention automatically belongs to the employer. The only obligation is for the employer to pay the employee complementary remuneration, which, as a general rule is equivalent to a bonus of roughly one or several months’ salary.

The second category covers employees who do not have a mission to carry out research but the invention is created during the course of their employment and within the field of activity of the company. In this case, the employee must notify his/her employer who then decides whether to appropriate the invention. If it does, the company must pay the inventor a fair price, meaning the value of the invention at the date of its attribution to the employer taking into account normal perspectives at that date, the commercial and industrial utility of the invention and also the initial contribution of the employee and the employer.

These distinctions have generated an enormous amount of litigation. Recurrent difficulties with the existing law have led to the legislator proposing a new draft law in December 2010 (most likely to be enacted in Spring 2011), which envisions replacing the current categories by distinguishing inventions resulting within and outside the course of employment. Inventions within the course of employment will belong to the company while inventions outside the course of employment will belong to the employee. In the former case, the employee would be entitled to supplementary remuneration based on an evaluation of the initial contribution of the employee and the employer as well as the industrial and commercial utility of the invention. Where employees may be inventors, one should think about reviewing their employment contracts.

### Check Your Products, Packaging and Advertising!

Suits for "false patent marking" are currently the rage in the United States. Under the U.S. patent laws, it is permissible to mark your products and packaging with your current patent number(s), and include them in your advertising; however, it can be illegal to mark products or packaging with patent numbers after those patents have expired, or use expired patent numbers in advertising. Not only the U.S. government, but "any person" can file lawsuits, known as "qui tam," seeking penalties for false patent marking - up to $500 for every offense. Hundreds of qui tam lawsuits were filed in 2010 for false patent marking. The reason for this deluge is a decision by the Federal Circuit Court of Appeals in late 2009 - Forest Group v. Bon Tool Co. - that proclaimed that the statute penalty does not impose a single fine, as had previously been thought, but rather applies on a “per article” basis. Since the person bringing a qui tam lawsuit is entitled to keep 50% of any penalty (the other 50% going to the government), it is no wonder so many suits have been filed. The seeming absurdity of the potential penalties was highlighted in a later Federal Circuit decision - Pequignot v. Solo Cup Company - where it was noted that the maximum penalty for the number of articles claimed to have been falsely marked exceeded 21,757,893,672; and that the U.S. government's one-half share would be approximately $5.4 trillion, "sufficient to pay back 42% of the country's total national debt" (fortunately for Solo, it was able to escape liability). The law applies to domestic and foreign companies alike, and to both domestic and imported goods. The stakes are high, and though it can be expensive to remove numbers of expired patents (retooling, reprinting, etc.), businesses should check their products, packaging and advertising, and immediately remove any expired patent numbers.

While the false marking qui tam statute has been recently declared unconstitutional by one Ohio Federal District Court, our advice remains the same.

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Last year the court of The Hague delivered an essential judgment on intellectual property rights. In this case Nintendo, the renowned producer of computer games and game consoles, instituted legal action against several retailers active through web-based shops in the Netherlands. Nintendo filed for a cease and desist order for the trade on a special kind of flashcards and modchips compatible with Nintendo computers because these flashcards create the opportunity to distribute copies of computer games for which no license fees were paid to Nintendo. Nintendo claimed that since the profit Nintendo makes is mainly based on sale of computer games rather than profit on game consoles, it is of the utmost importance that only games to which Nintendo holds the copyright and/or receives license fees are sold. The court ruled that offering flashcards and modchips with the (exclusive) goal of facilitating the use of unauthorized copies of Nintendo games constitutes a breach of article 29a of the Copyright Act.

An important element was whether the games could only benefit from article 32a of the Copyright Act which specifically concerns security embedded in computer programs, or if the games could also be subject to the broader protection of article 29a of the Copyright Act concerning the protection of security measures for other works of IP.

The Court found that in cases, where both article 29a and article 32a of the Copyright Act could be applicable, the choice must be made based on which element of the game is the most important from an IP point of view. That is, the one that took the most creative effort from the maker. In this case the creative choices that were made from a software point of view were subjected to the creative choices that had already been made in the design of the game. Therefore the broader protection of article 29a was applied to the technical measures that were taken to protect the design of the games.

Score: Nintendo 1:0 Webshops. In any event, this remains an interesting (yet cumbersome) matter and not all judges (internationally) agree with this ruling.

Choosing a Business Name

Clients often think that they have adequate protection if they have a registered company name, or domain name, but this is hardly conclusive. On the contrary, initial registration of a name does not guarantee that it is protected from challenge by a third party at a later date. A name may be attached in the following ways:

- The Secretary of State may force a company to change its name if (a) the name is the same as or "too like" another registered name; (b) misleading information has been given for the purposes of a company's registration by a particular name or that an undertaking or assurance has been given for that purpose and has not been fulfilled; or (c) the registered name is so misleading in terms of indicating its activities that it is likely to cause harm to the public. It may also force a company to include the word “limited” where it has not done so or has ceased to benefit from an exemption of not using the word “limited.”
- If a name is the same as a name associated with the objector in which he has goodwill or where the name is so similar as to be likely to mislead.
- The company may be liable for passing off where a third party can prove that it has goodwill in its name, that the company is misrepresenting itself as that third party and that damage is caused as a result.
- Where the company uses a name, which is the same, similar or even in some cases dissimilar to a registered trade or service mark, the proprietor of the mark may be able to bring an action for trade mark infringement against the company.

The most cautious approach would be to carry out the enquiries mentioned, as well as a possible trade mark search. It is much better to start on the right foot, rather than get distracted by threats of litigation when the business has been started.
Trademark Infringement – The Adwords Debate

Trademark owners’ exclusive right to use their trademarks online has been curtailed by recent case-law related to the use of Google’s ‘AdWords.’ AdWords allow advertisers to bid for and purchase keywords linked to their brand so that when users type those keywords into Google, the advertiser’s website will appear in the sponsored results; their intention being to direct traffic to their website.

Interflora plc (a UK based flower delivery company) is currently pursuing Marks & Spencer plc (a UK high street retailer) over Marks & Spencer’s use of the “Interflora” trademark as an AdWord. The judge submitted ten questions to the ECJ seeking to identify what constituted ‘use’ of a trademark and what scope such ‘use’ had. Meanwhile, in a Google France case, the ECJ has issued a judgment that Google is not primarily liable for trademark infringement because it doesn’t itself use AdWords in trading, and this has rendered six of those questions redundant.

The remaining four unanswered questions address the issues of whether a trader using a competitor’s trademark through the AdWord facility would be in breach of trademark law, or whether it could confuse the public as to whether the companies are linked.

If Interflora is successful the decision could have a fundamental impact on online advertising in Europe. Companies would have to ensure that their AdWords do not infringe UK and EU Community trademarks or cause confusion.

If Marks & Spencer wins, companies trading in Europe with disposable funds will be able to continue purchasing AdWords relating to other companies’ trademarks, and it may encourage other companies to begin. This increases the chances of diverting traffic and ultimately providing more revenue which wouldn’t have otherwise been achieved.

Whichever way the decision falls, it will have a material effect on online retailers and online marketing.

Satellite Live Transmission of Football Matches: The End of Exclusive Territorial Licensing Within the European Union?

The Football Association Premier League (“FAPL”) is the copyright owner of football matches played in the English Premier League. FAPL exploits these rights by granting exclusive territorial licenses to its licensees. FAPL requires its licensees to prevent their broadcasts being viewed outside the licensed territory by encryption of its satellite delivered signal and by restrictions which licensees have to impose on the circulation and the use of authorized decoder cards to the licensed territory.

In two cases, the UK High Court of Justice submitted references for a preliminary ruling to the Court of Justice of the European Union. In a lengthy opinion, Advocate General Kokott set out that exclusive territorial licensing of broadcasting rights results in a partitioning of the internal market and in a restriction to the freedom to provide services. Kokott considers that the specific subject-matter of the rights in live football transmissions lies in their commercial exploitation, especially through the charge imposed for the decoder cards. The commercial exploitation of the rights in question is not undermined by the use of foreign decoder cards, as the corresponding charges have been paid for those cards. As EU law stands at the moment there are no comprehensive rights of the broadcaster protecting the communication of a broadcast to the public in the absence of an entry fee.

According to Kokott a decoder made by or sold with the consent of a service provider and sold with limited authorization to use the decoder, does not make the device an illicit device if it is used to obtain access to a protected service in a place or in a manner or by a person outside the authorization of the service provider.

Although there is no obligation for the EU Court of Justice to follow the Advocate-General’s opinion, in the majority of cases it will do so. If so this will cause a serious blow to exclusive territorial licensing by broadcasters of live football matches within the European Union and will create a single market for the transmission of encrypted broadcasts of live football matches within the European Union.

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Domain Reform in Estonia

The Board of Estonian Internet Foundation (EIF) launched new domain rules, introducing liberal amendments inspired by the EU domain registration rules. The transition period for applying new rules and re-registering active top domains with Estonian state feature .ee and other Estonia related top domains has now reached to the end. The domains that were not re-registered by the given deadline became inactive and all related web pages and email addresses ceased to function.

The general expectation from this domain reform was the release of inactive ee. domains that were kept reserved. Around 80% of .ee domain internet pages and approx 880 million pages of mostly Estonian language information have as a result disappeared from internet.

The key amendments of the reform are more flexible registration procedure and the establishment of domain arbitration. Estonian and also foreign natural and legal persons have now the possibility to register an unlimited number of ee. domains. It shall be still considered that the use of trademark or a similar sign in the domain is disputable. The Supreme Court has stated that the domain name is observable as an object of intellectual property and it does not matter, if it concerns the name of website or server.

Disputes related to the domains can be now settled in the Domain Disputes Committee. The existence of a special independent organ enables to settle legal disputes faster and cheaper. Still, the Committee is not a court of arbitration. Estonian and also foreign natural and legal persons have now the possibility to register an unlimited number of ee. domains. It shall be still considered that the use of trademark or a similar sign in the domain is disputable. The Supreme Court has stated that the domain name is observable as an object of intellectual property and it does not matter, if it concerns the name of website or server.

Hong Kong Laws Toughened to Rein in Copyright Infringement of Printed Publications

In Hong Kong, copyrights subside automatically upon the creation of a work, such as text, diagrams, sound recordings, movies and so on. Unlike with patents and registered designs, there is no need to register a copyright. There is no requirement of any standard of creativity either, and a copyright may subsist in something as simple as a photograph taken on your mobile phone.

In an age where the words ‘copy’ and ‘paste’ seem to have so effortlessly permeated our daily vernacular, copyright owners have been increasingly exposed to the risk of having their works copied and used by unauthorised persons. Since 1997, the legal position in Hong Kong was that it was a criminal offence to knowingly possess infringing copies of a copyright work in the course of trade or business.

Recently, legislative amendments in Hong Kong have expanded the scope of liability beyond merely possessing infringing copies of a copyright work, and introduced a new criminal offence known as the “copying and distribution” offence. There are four elements to the offence, which are:-

(1) the copying and distribution of copyrighted material on a frequent or regular basis;
(2) in the course of trade or business;
(3) without permission of the copyright owner; and
(4) which results in the financial loss to the copyright owner.

The “copying and distribution” offence is applicable only in respect of four types of printed publications, namely, books, newspapers, magazines and periodicals. The maximum penalty for the offence is four years’ imprisonment and a fine of HK$50,000 per infringing copy.

Aside from the individual liability of the employee making or distributing copyright-infringing material, the legislation imposes criminal liability on directors and partners of corporations which have engaged in copyright-infringing activities.

The law provides for various exemptions to the “copying and distributing” offence, one of which is distribution via the internet. However, such distribution is arguable covered by an all-encompassing provision which makes it an offence to distribute infringing copies to an extent which prejudicially affects the copyright owner.
AFFIRMED: Supreme Court Upholds Limitation Of U.S. First Sale Doctrine In Favor Of Omega

On December 13, 2010, the U.S. Supreme Court affirmed, by an equally divided court, a ruling in favor of Omega S.A. regarding a copyright holder’s rights to prevent importation of copyrighted works into the U.S., without the copyright holder’s authority.

The Omega legal team was headed by Consulegis member Collen IP. Omega is a Swiss manufacturer of luxury watches and owns a U.S. copyright registration for the Omega Globe Design that appears on OMEGA watches.

Costco is a wholesale club which sells goods in retail locations throughout the U.S. Costco is not an authorized OMEGA distributor.

FACTS: In 2004, OMEGA watches bearing the copyrighted design were sold at Costco locations. The serial numbers on the watches revealed the watches were from foreign countries and were sold to foreign distributors that have agreements with Omega containing territorial restrictions on resales.

Omega filed a complaint in federal court in California for copyright infringement against Costco for unlawful importation of copyrighted works without the copyright holder’s authority. Costco raised a first sale defense which states:

“...the owner of a particular copy...lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy....”

ISSUE: The central issue before the Supreme Court was the meaning of the phrase “lawfully made under this title.” Costco argued that “lawfully made under this title” meant made by or with the authority of the copyright holder. Omega argued that the U.S. Copyright Act should be territorial and not extend beyond the borders and protections of the U.S.

DECISION: The decision that the first sale doctrine does not apply to goods manufactured and sold abroad allows U.S. copyright holders to maintain and enforce their rights in the U.S. to distribute and control the importation of works manufactured and sold abroad.

In the field of unfair competition, not every violation of law leads to an inadmissibility. Only if the activity is considered ‘relevant’ (noticeable interference) is it possible to claim against such action.

The Federal Supreme Court of Germany (“Bundesgerichtshof” – BGH) decided in 2010, a misleading advertising – here an advertisement addressed to the general public (and also addressed to consumers) promoting used cars by mentioning prices without the VAT, even though the final price must be mentioned in B2C legal relations according to the German Price Regulation Code (“Preissangabenverordnung” – PangV) – is relevant even if the business deal takes place only in a B2B relation, for which the mentioned code is not applicable. The relevance is assumed due to the fact that the advertisement is capable to affect the interest of the competitors, because their higher pricing (incl. VAT) has brought them into a bad light (BGH I ZR 99/08 - 04.29.2010).

Why is this decision worth mentioning? Because it shows a possible trap and gives another point to consider while reviewing advertisements in respect of legal correctness.

In general the main focus while legally reviewing advertisements is brought only to the understanding of the addressee. In our case here, a promotion addressed to the general public, but regarding the price addressed only to used car dealers is considered unlawful. The missing VAT showed better prices of the advertising party in comparison to their competitors, which might bring the latter into a bad light because of the impression of a higher pricing, when in actuality it is not higher.

Even though the commercial was not addressed to the customer for business it still had the effect that their understanding also needed to be taken into consideration.

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In the context of representing a possible licensee of the multi-media company MGA, for the trademark and associated IP for the line of characters known as “Bratz,” the issue of rightful ownership faced us squarely. There had been a reversal by the United States Court of Appeals of a lower court injunction in favor of Mattel preventing MGA from using the IP. We had to decide whether or not to recommend that the client proceed with its license. Based on the initial injunction, MGA was recalling and having all licensees recall all products being sold under the brand and based on the IP. The lower court had held that the employee had developed the idea/concept while employed, and it was under an agreement that had a typical "work shop" clause, giving the employer the right to all "inventions" and that the provision covered ideas as well. The Court of Appeals first stayed the injunction last December; then recently it issued its decision reversing the District Court’s underlying decision (based on jury findings). It held that the “idea” could not be protected and that MGA, assignee of the creator’s rights, had effectively given this idea life and created the value, and that ideas were not inherently covered by an inventions clause. Mattel could not extend the protection of inventions to cover ideas, especially those the employee came up with on his own time. Non-competition clauses are narrowly construed in the US, and need to be unambiguous. If they are drawn clearly to cover “ideas” and “concepts” and also make it clear that the clause is to cover anything developed during the term of employment, whether or not during business hours or using company resources, the clause will likely be enforceable, but absent the specifics, the employer may have a hard time enforcing the clause beyond the written word. We still told the client to hold off because the Court of Appeals sent the case back for a new trial which is in progress at this writing. If Mattel prevails, our client could then be put in the position of a knowing infringer.

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If you are a trademark owner in the United States, it is important to enforce and maintain your rights to your trademark in a number of ways. First, you should apply to register your trademark with the United States Patent and Trademark Office (USPTO), even if you have not started using the trademark in interstate commerce but have a bona fide intention to do so, in order to preserve your rights. Second, you should claim ownership of trademarks by placing your trademark and the ™ symbol on all products and/or literature. Once your trademark is registered, you can replace the ™ symbol with the ® symbol. You should keep an eye out for trademark infringers, and also subscribe to trademark watch services that provide reports on applications made to the USPTO that are similar to your mark so that you can decide whether to object to their registration. Infringement claims may include, among other things, actions that create confusion among consumers, denigrate or dilute your trademark, or create a wrongful designation of origin. In the event you discover an infringing use of your trademark, you should consult experienced US legal counsel familiar with federal and state trademark laws and related potential claims (such as unfair competition). The first course of action would generally be to assert your ownership rights by sending a cease and desist letter to the infringer demanding that the infringer stop using the mark immediately. If the infringer continues to infringe, your next option, though costly, is to file a lawsuit to stop the improper use. The test for trademark infringement focuses on whether there is a likelihood of confusion between the marks. If you can prove that the use is likely to confuse consumers and that your business has suffered or may suffer financially as a result thereof, then the infringer may be stopped by the courts via an injunction, and may have to pay monetary damages based on your actual losses. In addition to these remedies, an infringer may also have to give up profits made as well as pay punitive damages, fines and attorneys’ fees.

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International Intellectual Property Law Basics, a Consulegis Handbook, provides a country-by-country look at copyright, trademark and patent law around the world. The basic intellectual property law for more than 30 countries and the European Union are covered. International Intellectual Property Law Basics is an easy-to-understand must-have resource in today’s global world.

The Handbook may be obtained from Consulegis, EWIV/EEIG at:

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ANNUAL GENERAL MEETING & SPRING CONFERENCE
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