# MARQUES and Italian PTO hold judges seminar

**Massimo Sterpi of Jacobacci Sterpi Francetti Regoli & de Haas looks back on the recent forum with Italian CTM judges in Venice.**

On 18th February, before the Winter Meeting, **MARQUES** and the Italian PTO jointly organised a very successful seminar in Venice, involving the most prominent Italian CTM judges – the judges of the 12 Italian specialised IP courts, who also have exclusive jurisdiction on CTM issues.

The seminar was the second organised by **MARQUES** with CTM judges, after the first that took place in Spain.

Due to the impressive roster of the most prominent Italian IP judges (including those from the Supreme Court and the major specialised IP courts, such as Milan, Rome, Naples and Venice), the seminar attracted a vast audience of more than 100 representatives of industry and IP practitioners.

The most prestigious law firms and brands were represented in the audience.

The seminar consisted of a speech from a CTM judge on a certain subject (such as distinctiveness of trade marks, well-known trade marks, cross-border measures, parallel imports or calculation of damages) followed by a panel discussion, where panellists were representatives of major brand owners, such as Gucci, Prada and Richemont.

Panel discussions were followed by lively Q&A sessions with members of the audience.
All CTM judges also prepared a written report of their speech and these materials will be published on the **MARQUES** website.

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## Contents:



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# MARQUES and Italian PTO hold judges seminar cont.

The format and content of the seminar was highly appreciated both by the speakers and attendees, as a unique opportunity for industry representatives to ask questions of direct interest to the judges of the specialised Italian IP courts.

Many attendees therefore expressed their wishes that this seminar could become a recurring annual event, in order to permit a continuous exchange of opinion between the specialised IP judges, industry and IP professionals.

The organisation of the event involved Cristina Duch and Ingrid De Groot of **MARQUES** and Renata Cerenza and Stefania Benincasa of the Italian PTO, as well as local **MARQUES** representatives Alessandra Romeo of Buzzi Notaro & Antonielli d'Oulx (member of the **MARQUES** Unfair Competition Team) and Massimo Sterpi of Jacobacci Sterpi Francetti Regoli & de Haas (**MARQUES** Council Member), who both chaired sessions of the event.

**The article on Champagne in the last issue was written by Keri Johnston and Alpesh Patel of Johnston Wassenaar in Canada.**

# Latest design developments

**The MARQUES Designs Team has been working on three important matters that may be of interest to readers. David Stone, Chair of the Team and a partner of Simmons & Simmons, explains.**

On 22nd February, the Designs Team launched the third edition of A Review of the First 400 Decisions on the Validity of Registered Community Designs. The full Review is available at: http://www.marques.org/Teams/TeamPage.asp?PageID=127&TeamCode=DesiTeam.

The third edition includes two innovations. We have included references to the 80-plus design decisions of the Board of Appeal. Roughly 50% of appeals have been successful, so it is important to include the changes that are being made by the Board of Appeal to RCD law and practice.

Second, the Review includes a table of design decisions in EU Member States and Switzerland, including decisions of national courts and Community Design Courts. The chart is by no means complete – many Member States do not maintain searchable databases of court decisions, so isolating those that relate to designs is a mammoth and not very accurate task. **MARQUES** members are invited to submit any additional decisions they know about, and to suggest amendments to the summaries in the charts if they spot any inaccuracies.
No fourth edition of the Review is planned. It is hoped that the CFI and ECJ will rule shortly on some pending design cases, providing clear guidance as to the meaning of some of the more contentious expressions in the legislation.

## Rejected RCD applications

In October 2008, **MARQUES** wrote to OHIM urging a change in procedure with reference to the 400 or so RCD applications that have been rejected by OHIM. OHIM does not examine RCD applications for novelty – rather, OHIM assesses whether an application contains a design (Article 3(a)) and whether a design is contrary to public policy or accepted principles of morality (Article 9).

OHIM currently does not include the details of rejected applications on its database. Users of the system therefore have no way of knowing the basis on which RCD applications are being rejected, and so are unable to advise clients and designers of the scope of Articles 3(a) and 9.

Continued

## Latest design developments continued

The OHIM Users' Group met in Alicante on 17th March 2009 to consider this issue, among others. There appears to be a difference in interpretation of the interaction of Articles 71 to 75 of the Designs Implementing Regulation. Article 71 states clearly that OHIM must maintain a database of all RCD applications. However, Articles 72 to 75 limit which documents on OHIM's files can be provided to the public. Articles 72 to 75 are included in a different chapter to Article 71 – a chapter headed INSPECTION OF FILES AND KEEPING OF FILES.

**MARQUES**'s argument is that OHIM should start from a position of transparency, and should provide what information it can to users of the system.

Discussions with OHIM are continuing – there may be a midway position that can be found, which provides information to users, while protecting designers whose designs are rejected.

**Locarno Classification**
*MARQUES has been granted observer status for the Pilot Group of the Ad Hoc Working Group of the Locarno Union.*

*This group is looking at ways to make the Locarno Classification more relevant to modern design law and practice. Locarno classifies things by what they do, whereas designs protect the appearance of a product – what it looks like. This misfit makes searching for designs expensive and inaccurate.*

*The Pilot Group met in Prague on 9th March 2009, and some progress was made. If any MARQUES members would like to be involved, please let me know.*

## New trends in counterfeiting in China

**As MARQUES launches a new Team devoted to China, LokeKhoon Tan and Duncan Willson of Baker & McKenzie LLP look at recent challenges for the pharmaceutical industry.**

In June 2008, a district court in Guangzhou, China, ruled that Qiqihar No 2 Pharmaceutical Company, Ltd, as well as two other companies and a hospital in Guangzhou, were to share responsibility for 14 deaths that resulted from counterfeit drugs.

The case, though an illustration of China's commitment to fighting the proliferation of counterfeit pharmaceuticals, highlights a nationwide epidemic. While counterfeit drugs are estimated to occupy about 10% of China's national market, fakes of certain pharmaceutical products are said to exceed 30%, while fakes in certain cities may exceed 40%. Not surprisingly, the prevalence of counterfeits has led to health scares and the loss of life.

Continued

## Counterfeiting in China continued

Like melamine-laced dog food, and lead-tainted toys, China's counterfeit pharmaceutical problems have gone global. In 1996, 89 children in Haiti died after consuming Chinese-produced cough syrup that contained anti-freeze. A few years later, Chinese-made diet pills took the lives of five women in Japan and Singapore.

The problem of fake pharmaceuticals stems from similar institutional and market factors as those of other counterfeit goods. Yet, there are significant differences. Most plainly, while counterfeiting is viewed by the public and indeed many enforcement authorities as a victimless crime, counterfeit drugs exact a harm upon consumers that is beyond traditional anti-counterfeiting statistics, such as lost sales.

As one of the leading exporters of counterfeit medicines, China has a responsibility to crack down on the production, distribution and export of fake drugs. In addition, the safety and health of Chinese consumers requires a nationwide and sustained commitment to keeping counterfeit pharmaceuticals off the shelves.

Recent regulatory revisions and draft amendments are a step in the right direction.

But several issues remain. China needs to continue its effort to replace incompetent, biased and poorly trained judges with a new generation of judges capable of adjudicating over complex pharmaceutical issues. And while the State Food and Drug Administration (SFDA) has been busy with structural reforms, only time will tell whether it will be an effective enforcement body. Questions remain as to whether local FDAs, in particular, will be as susceptible to protectionist pressures as their AIC counterparts.

In the meantime, drug makers should take a proactive approach to protecting their valuable IP in China, by pursuing effective cooperation with local regulatory agencies and creatively enforcing their trade marks. These efforts will not only allow pharmaceutical companies to profit from their significant investments, but also play a substantial role in the health of Chinese consumers.

**The MARQUES China Team was launched at the Winter Meeting in Venice. For more information, and to read a longer version of this article, visit the team pages on the MARQUES website. Click Here**

## Further progress on UNCITRAL

**IAM Team members Boudewijn van Vondelen of NautaDutilh and Jern Ern Chuah of Advanz Fidelis provide an update on the latest UNCITRAL discussions.**

The UNCITRAL Working Group held its 14th meeting from 20th to 24th October 2008 at the Vienna International Centre in Austria. UNCITRAL is the United Nations Commission on International Trade Law and its job is to prepare model legislation and guides for international commercial transactions. One of these guides is the Legislative Guide on Secured Transactions.

This Guide was adopted in December 2007 and an important Annex to the Guide is now being drafted. **MARQUES** attended the meeting to keep an eye on the latest developments in the complex field of secured transactions and IP rights.

The meeting in Austria was attended by both official delegations from states and representatives from various organisations.

Continued

# Further progress on UNCITRAL continued

Only states that are part of the select group that form the current UN representatives for this committee were invited. These include Germany, India, Italy, Switzerland, Croatia, Malaysia, Australia, the UK, the USA, Canada and France. Among non-governmental organisations were INTA, **MARQUES**, the Independent Film & TV Alliance (IFTA) and the International Music Industry (IFPI). WIPO was also represented.

## The Guide

The main goal of UNCITRAL is to harmonise international laws. This particular project aims to remove legal restrictions that exist when businesses are seeking to use their assets as a security for raising funds. It sounds promising, but as you may recall from earlier publications about UNCITRAL, the subject of intellectual property appears to have been heavily overlooked in the draft Guide that was worked on for several years.

The Guide was at first aimed at tangible assets and only included IP assets at a late stage, unfortunately without sufficient research on the typical properties of IP rights.

This resulted in a mismatch of security law and IP-related transactions.

As the owners of IP rights looked set to lose control over what licensees could do with their rights while they were raising finance by securitising those rights, the IP community was slowly awakened by organisations such as **MARQUES**, who took a leading role. These actions were initiated to avoid a situation where the lender would obtain a more powerful position towards the licensed rights than the IP owner, in the event that the licensee would not be able to fulfil his obligations to the lender.

Moreover, a proposed worldwide system for the registration of security interests in IP rights would lead to a dramatic change in how this subject is dealt with under national laws and lead to a determination that the potentially bad effects had to be stopped.

UNCITRAL came to realise that the Guide had inadequately dealt with IP issues and began to include more input from the IP community. In close cooperation with WIPO, various organisations and practitioners, including **MARQUES**, have responded to the draft Guide. Expert group meetings were held to review and recommend solutions to the potential problems that could have arisen by inadvertently overlooking IP.

The key IP issues that need to be considered relate to situations where IP rights behave differently compared to other assets, and as a result require special rules that are different from the general rules that apply to secured transactions in general. These include: the creation of a security right in IP; unitary concepts relating to a security right in IP; whether it is necessary to have a security right registered in a special register; the priority of rights; the rights and obligations of parties; third-party effectiveness and the enforcement of security rights; the rights of transferees and licensees; and conflicts of laws.

## The Annex

The UNCITRAL Legislative Guide on Secured Transactions has been adopted (though it awaits full ratification), but as a result of the objections raised, it was decided that there would need to be an Annex to the Legislative Guide, which will have rules customised to deal with these IP-specific issues. The Guide now contains Recommendation 4(b) which says that the Guide does not apply to "intellectual property in so far as the provisions of the law are inconsistent with national or international agreements, to which the State is a party, relating to intellectual property".

*For more details on the Vienna discussions and latest developments, continue reading this article on the IAM Team section of the MARQUES website.*

# European GI policies reviewed

**Paul Reeskamp of Allen & Overy provides the regular update from the MARQUES GI Team.**

On 15th October 2008 the European Commission launched a Green Paper to open the debate about its agricultural quality assurance policies. European farmers need to be able to compete with cheaper alternatives from other countries on the basis of their superior quality.

The Green Paper included a consultation, which posed a range of questions regarding EU farming requirements, marketing standards, organic farming, food-quality certification schemes and geographical indications (GIs). The European Commission has now published a summary of the responses that have been received. Most contributions came from the farming sector (27%), consumers (18%) and the food-processing sector (11%).

About half of the respondents consider the current framework of GI rights to be sufficient. A majority want the scope of products that are protected by GI rights to be increased. However, stricter criteria for protected geographical indications should not be introduced until the difference with protected designations of origin is communicated better. There is also a majority agreement that trade marks and GIs are two distinct systems and should co-exist. Most notable is the opposition of the food-processing industry to extending or introducing obligatory indication of place-of-production labels and other GI rights.

Greater enforcement of GI rights protection is required within the EU. However, the enforcement of GI rights and trade marks outside the EU is also considered problematic. Stronger bilateral and multilateral agreements in the WTO framework are required, because the TRIPs Agreement does not offer sufficient protection.

The **MARQUES** GI Team submitted comments responding to the questions related to GIs and trade marks, which reiterated the position that GIs should not undermine prior trade mark rights (an issue in the Bavarian beer case below). The team also supported the use of collective mark and certification mark regimes to protect both GIs and trade marks of European agricultural products in jurisdictions that offer such registrations.

## The WTO GI registry debate

After 15 years of negotiation between the EU (including Switzerland) and a group consisting of Australia, several Northern and Southern American, Asian and African countries, an agreement has yet to be reached on the creation of a multinational GI database concerning wines and spirits.


A recent discussion of the special sessions of the WTO TRIPs Council on 5th March 2009 highlighted a few legal disagreements between the two parties. The EU advocates that the registrations in the database are to be considered prima facie evidence, meaning they are accepted as correct, unless proven otherwise. However, while opponents argue that this inversion of the burden of proof creates a short-cut to gain IP protection in other countries, the EU holds that prospective right holders will still need to register to get protection in the countries where they want it.

Continued

# European GI policies reviewed continued

According to the EU, the prima facie evidence is useful when someone contests a GI on the basis of generics. The claimant should have to prove their qualification for the generic-exception offered by the TRIPs Agreement. Opponents are worried about the burden of proving genericness and the costs of maintaining the database, which the EU claims to be minimal.

### Coexistence of Bavaria

The Corte d'appello di Torino in Italy asked the European Court of Justice in its preliminary questions if the Dutch beer brand Bavaria and the GI Bayerisches Bier from Bavaria in Germany are allowed to co-exist, considering the rules for protection of GIs.
On 18th December 2008, the Advocate General rendered his opinion that this is indeed possible. His reasoning is that a GI protection cannot affect the validity or usability of an already existing trade mark, which contains the same words (in this case, Bavaria). However, the trade mark needs to be filed in good faith (according to section 14, subsection 2 of EC regulation 2081/92) and cannot be nullified or annulled by a national court.

# New gTLD rollout delayed

**Nick Wood of Com Laude, and a member of the MARQUES Council, reviews the latest progress on new generic top-level domains.**

ICANN, the Internet Corporation for Assigned Names & Numbers, has embarked on a programme of expansion that will see the domain name system grow dramatically with the introduction of hundreds of new generic top-level domains (gTLDs).

If ICANN succeeds then in five years' time, the 250 country code (ccTLD) registries of today could be overshadowed by 1,000 or more gTLD registries run by entrepreneurs and affinity groups, cities and even brands. The business of protecting trade marks in the domain name system will change forever.

In a First Draft Applicant Guidebook (DAG) published at the end of October 2008, Paul Twomey, President and CEO of ICANN, set out his vision of a domain name system no longer "constrained by only 21 gTLDs".

The fact that no-one outside the ICANN "family" of organisations with a commercial interest in the expansion of the domain name system had called for this expansion had not bothered ICANN very much until over 300 brand owners and associations including **MARQUES** submitted a range of comments on the First DAG.

As a result ICANN has slowed down. The proposed launch date of the application process has been put back from June 2009 by at least six months. In the Second DAG, published on 18th February along with a 155-page analysis of these comments, Paul Twomey says: "There have been a number of overarching issues raised in the comment process that require further work including Trade Mark Protection, Security & Stability, Malicious Conduct and Demand/ Economic Analysis. It is very important to take the time to resolve these overarching issues."

Soon afterwards, at the 34th ICANN Open Meeting in Mexico City, the Board of ICANN approved the establishment of a so-called Implementation Recommendation Team (IRT) to be formed by the Intellectual Property Constituency of ICANN to develop solutions to the first of these "overarching issues", namely trade mark protection in connection with the introduction of new gTLDs.

Continued

# New gTLD rollout delayed continued

The IRT has been asked to draft a report by 24th April 2009 for comment and to produce a final report no later than 24th May so it can be considered at ICANN's Sydney meeting in June. **MARQUES** hopes to be represented on the 15 member IRT and has issued an invitation to ICANN to host a consultative meeting in Europe during the process.

The IRT is charged with developing an implementable practical mechanism so that trade mark owners do not have to file defensive registrations at the second level in every new gTLD registry. The team will undoubtedly look closely at the idea of creating one registry of pre-validated IP rights that gTLD registry operators can access whilst running their pre-launch Rights Protection Mechanisms. Deloitte demonstrated such a system at the Mexico City ICANN meeting based on the validation systems used for the .eu, .mobi, .asia, .me and .tel sunrises.

Links:
**ICANN New gTLD Website - Click Here**
**Second Draft Applicant guidebook - Click Here**
**IRT - Click Here**

# Key issues for valuing brands

**Maria Falk of TetraPak and Jakob Balling of Arla Foods provide some tips on valuation for brand owners.**

Over recent years intangible assets have become more and more important and valuable to businesses. Historically, tangible assets were regarded as the main source of business value.

However, during recent years there has been a dramatic shift whereby intangible assets have become increasingly important. This is reflected in the growing divergence between the net asset value of companies and their market capitalisation.

## When is it relevant?

The increase in importance and value of brands makes it unavoidable to ask in what situations it would be beneficial to determine the value of your brands? Some examples are:

- Mergers and acquisitions
- External investor relations (as reflected in the balance sheet)
- Income and profit is generated through brands: identifying what drives this value enables management to increase a brand's performance, resulting in increased revenue, larger market share and higher profits
- Internal marketing management (for example marketing budgeting, new product and market development analysis, internal communication)
- Determining internal royalty rates
- Licensing and franchising
- Tax planning
- Securitisation
- Litigation support

## How to do it?

There is no globally approved standard method for valuing intangible assets, but there are a number of recognised methods for valuing brands. ISO, the International Organization for Standardization, is working on defining a standard for brand valuation with 14 participating countries, but the true value of a brand is ascertainable only when there is a willing buyer and a willing seller who reach agreement in the market place.

Continued

## Key issues for valuing brands continued

This makes it even more important to determine the purpose of valuing the brand when choosing what method to use.

Overall the different methods are split into quantitative and qualitative. Whereas purely quantitative methods focus solely on the present and predicted future sales of goods bearing the mark, purely qualitative methods focus solely on reputation, awareness, loyalty rates etc. Some methods combine quantitative and qualitative methods. There are a number of methods available and it is important to choose a method that best suits the particular industry, organisation and brand.

When your company has decided to do a valuation you should start the process by defining what you would like to have valued. There is no uniform definition of the brand – different people use the term differently. What is the asset we will be measuring? One trade mark? The brand including all the trade marks, designs, domain names etc connected to that brand?

Then define the purpose of the valuation – what commercial objective will be served? An important distinction can be made between technical and commercial valuations. Technical valuations are generally conducted for balance sheet reporting, tax planning, litigation, securitisation, licensing and mergers and acquisitions. Commercial valuations are used for the purposes of brand architecture, portfolio management, market strategy, budget allocation and brand scorecards. Another way of defining values would be to look at research-based valuations and purely financially driven approaches.

The brand is one of the few assets that can provide long-term competitive advantage – treasure it, take good care of it, value it!

**Links:**
**http://www.brandfinance.com/Uploads/pdfs/BrandValuation_Whatandwhy.pdf**
**http://faculty.haas.berkeley.edu/villas/mba299m/financial_value.pdf**
**http://ip-guiden.dkpto.dk/media/19907/janlindemann070606.ppt**
**http://knowledge.smu.edu.sg/article.cfm?articleid=1131**
**http://www.iso.org/iso/iso_technical_committee.html?commid=537863**
**http://www.absolutebrand.com/**
**http://www.interbrand.com/**
**http://www.brandfinance.com/**

## Regulation to tackle online abuse

**Selma Toplu Ünlü and Deniz Merve Ersoy of Mehmet Gün & Partners discuss a new regulation in Turkey.**

Widespread use of the internet has led to growth in the volume of electronic commerce. Correspondingly, new forms of trade mark infringement have arisen and previous means for trade mark protection have become inadequate to solve disputes. Use of trade marks by third parties in their domain names, or use as a meta tag or keyword, were not explicitly regulated by the main law, the Trade Mark Protection Decree Law number 556, in Turkey.

By Law 5833 amending the Trade Mark Protection Decree Law published in the Official Gazette on 28th January 2009, which came into force on the same date, the subject of the internet has been addressed specifically and separately.


Continued

## Regulation to tackle online abuse continued

Previously, prevention of these kinds of infringements was provided by the general rules on trade mark infringements. Especially, the infringing contents of the web pages had been removed due to Article 9 of the Decree Law, based on the fact that this infringing use set an example of use of a trade mark on the business documents and advertisements.

The infringing domain name uses were generally evaluated in the same way, for example the Court of Appeal had approved the first instance decision on the transfer of two domain names to BMW: www.istanbulbmw.net and www.istanbulbmw.com. In a trial on www.galatasaray.com, the Istanbul 1st Intellectual Property Court took into account the Uniform Domain Name Dispute Resolution Policy stating that the domain name owner could not prove his rights according to national law.

According to the Turkish doctrine, infringing uses via a meta tag or keyword were also assessed as trade mark infringement and unfair competition.

Fair use conditions such as use of the trade mark in a name or address or as a descriptive word are exceptions. Under the recently introduced Article 9 (e) of the Law, the trade mark owner should prove commercial effect of the infringing use, while according to the UDRP in a possible domain name dispute within the authorised institutions the complainant must prove that the user's domain name has been registered and is being used in bad faith.

While the Turkish courts examine the commercial effect, they may also consider the bad faith of the user. To see the interpretation, we are waiting for precedents.

## Products and services similarity issues

**Dealing with similarity usually consists of reporting comparison cases of products and services using criteria such as nature, function, destination and distribution networks. But, explain Franck Soutoul and Jean-Philippe Bresson of INLEX IP EXPERTISE, these criteria have to evolve in the face of diversified activities and retail services.**

The diversification criterion emerged in French practice when assessing the similarity of products/services involving clothing products.

On 6th September 2000, the Paris Court of Appeal ruled that clothing and perfumes were "obviously" similar by considering that ready-to-wear companies had diversified their activities to perfumes.

On 2nd December 2005, the same Court applied an identical reasoning for clothing and eyeglasses. A higher step was reached with the similarity of clothing and school supplies/stationery (Paris Court of Appeal, 24th February 2006), where the judge stated that while the nature, function and distribution networks of these products were not identical, the public would consider they have the same origin because of the tendency of some clothing companies to sell school supplies.

Some French courts however refused to apply the diversification criterion until the French High Court reaffirmed it on 6th May 2008.

### Similarity of retail services

Under Community practice, no enumeration of the products to which retail services applied was initially required.

Continued

# Products and services similarity issues continued

Only in 2001 did the OHIM President recommend such enumeration.

Ruling in the Praktiker case on 7th July 2005, the ECJ upheld the finding that an indication of the products related to the retail services was necessary.

This change of practice generated Community trade marks covering retail services without mentioning the products to which those services relate and trade marks indicating the products to which retail services apply.
The similarity between products and retail services mentioning the products involved with such services is admitted by Community case law.

Examiners admit their similarity through the direct connection between them. More difficult to solve is the similarity/complementary character of retail services without an indication of specific products.

The European Court of First Instance laid down how to solve this second situation on 24th September 2008 (O Store v The O Store) ruling that "retail and wholesale services, including on-line retail store services, on account of the very general wording can include all goods, including those covered by the earlier trade mark so that they display similarities to the goods concerned".

The Court consequently admitted a similarity between these services and any products that

could be involved.

**Consider other classes for pharmaceuticals**
When it comes to pharmaceuticals, classes 5, 10, 35, 42 and 44 are usually considered for searches or watches.

The decision of the Board of Appeal of 24th November 2008 shows that there are other potential and surrounding classes to consider.

The Board ruled that the "distribution of consumer goods and products of all kinds, in particular pharmaceutical, veterinary and sanitary preparations" (class 39) and "manufacture of consumer goods and products of all kinds, in particular pharmaceutical, veterinary and sanitary preparations" (in class 40) run under the contested trade mark were highly similar to the pharmaceuticals claimed in class 5 of the earlier marks.

**Follow the case law**
Similarity situations have direct consequences for trade mark strategies including searches, filing applications, oppositions and watches. The preservation of the diversification criterion in the French practice implies special considerations when clothing products are involved.

Retail sale services make it more important than ever to systematically include class 35 in each and every aspect of the trade mark's life. New similarity situations however always occur and taking the pulse of the case law is always a must.