NEWS LEXTTER

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INTELLECTUAL PROPERTY

2nd NATIONAL CONGRESS ON INTELLECTUAL PROPERTY

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EDITORIAL CONTENTS

Editorial

PLMJ is once again proud to actively promote and play a part in the organisation of the National Congress on Intellectual Property. The congress is now in its second year and will take place at the rectory of Lisbon's *Universidade Nova* on 29 and 30 September 2010.

The 2nd Congress on Intellectual Property, under the theme "Culture, Innovation, Heritage and Science" will without doubt be a notable milestone of a scientific nature in the theoretical debate on legal-technical issues relating to intellectual property. However, this should not overshadow the practical aspect of the defence of rights related to the invention, creation and commercialisation of innovations of an intellectual nature.

Themes as important as the defence and preservation of works and content in an increasingly technological and globalised world, the protection of innovation, the sharing of knowledge, the law of culture and fashion, the fight against counterfeiting and the means for resolving intellectual property disputes will be the subject of in-depth analysis and debate.

In its various sessions, the congress will also cover the themes of intellectual property in literary works, the management of copyright and rights connected to the digital environment, the digital use of literary works, journalism, newspapers' archives and clipping, without forgetting the management of rights over musical and audiovisual works, the calculation of losses and the award of compensation for violation of intellectual property rights.

The panel of guest speakers for this edition of the National Congress on Intellectual Property brings together a broad and varied set of personalities from Portugal and abroad, all of whom ore leading figures in the field of intellectual property. The congress features the participation of individuals from academia, the legal profession, the judiciary, industry and associations representing the latter and these individuals will contribute greatly to the richness, liveliness and interest of the debates.

We end by inviting whoever is interested in attending and participating in the 2nd National Congress on Intellectual Property to register for the congress – which they can do using the form referred to below - and by welcoming everyone in the sure knowledge that that we will get the best out of the debate on the fascinating materials that appear in the programme.

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Innovation, Intellectual Property and Knowledge

Even if it is imperceptible, Portugal seems to have changed its economic model. If it hasn't changed, it has at least interiorised the importance of not remaining outside the more general movement of the knowledge economy. For a few years now we have be getting to know words like innovation, entrepreneurialism and spin-offs. At the same time we have got to know the names of some of the protagonists: Hovione, Bial, Biocant, Y Dreams, Mobicomp…

In the same way, we have just about become aware that some of our universities are active centres for research leading to the introduction of new products on the market or that some better-known companies come from these university environments. The average observer has the idea of the importance of the universities of Minho, Aveiro, Coimbra, *Universidade Nova, Instituto Superior Técnico*…

However, it is better to separate official and media pronouncements from the reality. We all remember about ten years ago, talk about the information society and how it, or at least its initial enthusiasm, was fading away. At a certain point, these interesting themes are always appropriated into general discussion. This creates an illusion of immediate progress, of a certain change in pattern, another catchphrase helping to simplify the language …

However, it is better to separate official and media pronouncements from the reality. We all remember about ten years ago, talk about the information society and how it, or at least its initial enthusiasm, was fading away.

We should also be a little cautious with the statistics such as those published by the newspaper *Expresso* (edition of 7 August 2010) where we read that the growth in the number of requests for patents was 208% between 2004 and 2009. The truth is that when we start from a long way behind, progress almost always seems to be spectacular.

But not everything should be reduced to a speech. The truth is that we have indicators, data, realities that show that it is possible to present very interesting results in certain sectors. On the other hand, the fact we are talking about all this, that we are seeking out true specialists, that we are fostering the idea that universities are centres of active research, may help in laying a more solid foundation for a social movement that undoubtedly exists. It would even be important that a voice be given to the true researchers and entrepreneurs and not just those based in the great centres or who have the easiest access to the media.

Curiously, in this article in *Expresso* - and it is not insignificant that a newspaper of these dimensions dedicates two central pages to the theme - only Professor António Câmara refers directly to industrial property as an instrument that enables the internationalisation of Portuguese companies. In fact, one of the ways to move this general discussion on to more concrete themes - without which we would be where we were ten years, ago making promises to this world and the other on the topic of the "Information Society" – is to place importance on intellectual property. Statistics are not enough. Trademarks and patents need to be tools in the transformation of the current reality. For this reason, as we always say, the idea of their protection is very important. It is not possible to sustain, as often happens among us, parallel debates on the defence of home-grown innovation and, at the same time, to go along with the ideological softening of intellectual property, or to ignore the fact that the theme is political. We must bear in mind that we are facing the greatest attack we have ever seen against intellectual property. It is a worldwide campaign that is well-prepared and well-led and we must also recognise that it is echoed in the exaggerations by the other side.

There are those who recommend, in the reformulation of the new functions of the state which are the fruit of the economic crisis we are going through, that the state definitively take on the role of investor in innovation, training and knowledge, or to give it another name, the intelligent state. But it would be important for all these roles to be connected. The investor, the entrepreneur or the researcher, figures that are often one and the same, would appreciate such an incentive. .

A few days ago, a magazine from the newspaper "Le Monde" asked about the future of France: a museum or a high-tech country?

Who knows? Portugal could think about choosing the two paths: continuing to invest in the most dynamic public and private research sectors, in universities and in companies, accompanied by the rediscovery of its cultural heritage, both tangible and intangible

Curiously, perhaps the interesting experience of the first is some way takes advantage of the second way and that some of those in the first group can contribute to the bringing more depth to the second way.

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Nanotechnologies – Research, Regulate, Produce, Advance

With Portuguese and foreign companies making the intelligent choice of turning to the growing area of nanotechnology and investment in research in this area, the claim of many that nanotechnology can be considered as one of the key technologies of the 21st century has been affirmed.

Its application to so many current areas (textiles, cosmetics, energy, chemicals, electronics and food) means we are living with this reality on a daily basis. The current and future uses in areas such as medicine (from diagnosis to medication) lead us to believe in its potential and in a significant improvement in our living conditions.

On the issue of regulation, right from the start it is clear that current legislation practically covers the use of all materials and products now used on the nano scale. However, the doubts that still exist, especially in issues of security and risk management and the practical effects of the use of certain materials and their behaviour on a nano scale, require the identification of knowledge gaps between the existing legislation and the possible need to adapt to new realities and applications.

Not only are the legislative areas varied (safety, data protection, consumer, employment, health, the environment, not to speak of any specific area according to the product in question) but they also have an effect upon other transversal areas such as registration, evaluation, classification, labelling and packaging.

On the issue of regulation, right from the start it is clear that current legislation practically covers the use of all materials and products now used on the nano scale.

On 24 April of last year the European Parliament approved a resolution on regulatory aspects of nanomaterials (2008/2208(INI))[1] which considered, among other issues, that "the advances in nanomaterials should have a significant influence on political decisions in the areas of public health, employment, health and safety at work, the information society, energy, transport, security and space research". Recognising the absence of specific legislation on nanotechnologies, the European Parliament believed that the Commission should "review all the relevant legislation within two years with a view to ensuring the safety of all uses of nanomaterials in products with a potential impact on health, the environment or safety throughout their life-cycle, as well as ensuring that legislative provisions and instruments of execution reflect the specific characteristics of the nanomaterials that workers, consumers and/or the environment may be exposed to". The European Economic and Social Committee also made a similar recommendation in the same year.

In reality and in doing justice to these concerns, the European Commission undertook to present a new report in 2011, with particular focus on the issues raised by the European Parliament and the EESC, and also to present information on the types and uses of nanomaterials including safety aspects in the same year.

This area is one which is particularly sensitive and of crucial importance to research and investment since the means of protection of ownership of these products is of vital importance because of the need to protect the invention and the human and economic investment it involves.

The lack of clarity in the applicable legislation is also reflected in the area of intellectual property. This area is one which is particularly sensitive and of crucial importance to research and investment since the means of protection of ownership of these products is of vital importance because of the need to protect the invention and the human and economic investment it involves. One of the challenges lies precisely in the fact that nanotechnologies are not a uniform class of invention as the nanomaterials are "only" a "sample" of the traditional materials, but on a much reduced scale. On the other hand, some of the patents already granted (in the USA) involve improvements in pre-existing industries, for example, in the area of semiconductors). Others cover the production of instruments nanotechnology or building blocks (as is the case with atomic microscopes that can manipulate individual molecules or carbon nanotubes that can be used in the construction of products that are extremely strong but also extremely light – from bullet proof vests to space lifts) [2]. This latter issue– the significant

[1] Consult at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0328+0+DOC+XML+V0//PT

[2] *Lemley, Mark A., Patenting Nanotechnology, 58 STAN.L.Rev.601*

number of building blocks patented at the beginning, especially in the USA, with the diversity of products used and created together with the enormous present and future development in this area innovation, both in companies and in universities, makes us believe in the need to revisit the whole legal framework of both nanotechnologies and intellectual property.

It is not by chance that the European Patent Institute itself is drawing attention to the growing number of patents, which are ever earlier and in greater numbers. "That could potentially hamper innovation by acting as a disincentive for other institutions to embark on similar research. Although this is a general trend in patenting, nanotechnology-related inventions could be especially affected since it is a young and growing field. To avoid an inflation of low-quality patent applications that could clog up the EPO and create a backlog, the EPO has introduced a quality policy to bring certainty to the market, for both the applicant and the public. The EPO's approach is one of "quality rather than quantity"[3].

It is therefore necessary to create a structure that properly reflects the innovative characteristics of nanotechnologies and that, at the same time, is committed to advances in science, protecting innovation, managing risk and maintaining the necessary levels of safety. This would be a good decision and an excellent strategy for European and domestic development.

The legendary invincible Damascus swords of the 17th Century that were at the same time hard malleable had a secret that can now be revealed: they were made using carbon nanotubes. Today in the 21st century, science has explained the legend, but it is still good to believe that we are invincible.

[3] Vd. http://www.epo.org/

Green Technologies - The Path to "Ecologisation" of Intellectual Property?

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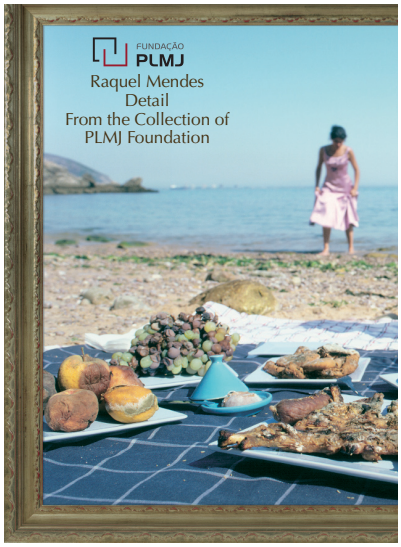

Green technologies, or clean technologies, are the latest thing and - not only because of their novelty but especially because of the role they could play on implementing environmental policies and in the fight against climate change - they are a new and fundamental challenge in the field of intellectual property.

In the order of the day, the question arises as to whether and how we should move towards the "ecologisation" of intellectual property to give it an active role in the development of green technologies.

The answer to this question invariably leads to the same dilemma: if, on the one hand, the public interest in protecting the environment, one of the most pressing problems of our age, can justify (or even impose) the bringing of more flexibility to the system; or if on the other hand we have to bear in mind that the protection of intellectual property rights is crucial as an incentive to the often heavy investment necessary for the introduction of clean technologies to the market.

In this context, voices can be heard calling for a slackening of the system of intellectual property rights in the area of green technologies by, for example, making it easier for inventions to be transferred to developing countries or by the creation of exceptions to the requirement for licensing.

Those who espouse that opinion believe that a very strict system of patents may amount to a barrier to the transfer of technology in this area and argue that, given the importance of climate change, any developments that enable us to fight it or reduce its effects, should be implemented as quickly as possible and shared by everyone regardless of the harm caused to the exclusive rights of their inventors.

On the other hand there are those who speak out forcefully against this position, ar-

guing that it would only be valid if the said technology had already been created and was ready to be used. In reality, this is not the case given that, in many areas, additional research and development are necessary. Going on, the lack of intellectual property rights for the full protection of innovations would prevent investors from achieving the earnings that would enable them to be compensated for the investments they made. In the final analysis this could lead to the said investments being cut off or substantially reduced and this would hamper the desirable development of these technologies

In addition to the argument that intellectual property rights are not a barrier to the transfer of green technologies, as expressly confirmed in the report presented by the Commission in 2009 , other arguments are also presented such as the fact that intellectual property rights foster competition by arguments are also presented such as the fact that intellectual property rights foster competition by allowing smaller companies to enter a market to which they would otherwise not have access

[1] Report of the Commission, *Are IPR a Barrier to the Transfer of Climate Change Technology?*, 2009.

and the argument that the development of intellectual property should not impose on the role of environmental laws.

So it seems clear, at least at this point, that intellectual property is not taking the path of total "ecologisation". Without recommending a radical slackening of intellectual property rights, we could move towards adjusting them and making them more flexible to provide an incentive to the creation and development of new and more efficient green technologies, by a variety of alternative methods such as:

(i) In a negative way, using intellectual property to prevent the patenting of polluting technologies thus requiring that all patented inventions be ecological.

(ii) In a positive way, encouraging and facilitating the granting of patents of an ecological nature. In other words, ensuring preferential treatment for the granting of "green" patents, such as faster tests, lower rates or prior publication.

(iii) A mixed system that combines both the above solutions.

Making intellectual property more flexible in this way has already been put into practice in some cases through the creation of accelerated procedures for the granting of patents. An example of this is the "green channel" created by the UK Intellectual Property Office (UKIPO). This presents shorter periods for examination and enables the applicant to request prior publication. Similarly, the US Patent and Trademark Office (USPTO) has announced that it will revise its Green Technology Programme so as to include more categories of potentially eligible technology that may benefit from the accelerated procedures for the granting of patents.

These are just some examples and it is certain that an "ecologisation" of intellectual property may have different forms and levels. In any case, it will always be necessary to face up to two challenges: the difficult task of defining what is understood by "ecological" inventions and the quest for a balance between the right to protect innovation and the right to benefit from clean technologies.

Heritage and Architecture - Cultural Assets

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Cultural heritage has inevitably played an important role in building the image of a nation. In light of this fact, legal mechanisms to protect and value this heritage have been developed over time.

Currently, the Basic Law on the Framework for Protection and Valuing of Cultural Heritage (Law 107/2001 of 8 September de 8 – "LPC") is the main legislative instrument and has some associated regulatory provisions.

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The LPC offers us a definition of the objective of the administrative procedure for classification. From this we can see the following legal conceptualisation of a cultural asset: "Tangible and intangible assets that represent material witness with value in civilisation or culture are considered to be cultural assets". The LPC establishes that from among cultural assets, those which have "relevant cultural interest" should be the subject of special protection and appreciation. The Law also makes it clear that "relevant cultural interest (...) will reflect values of memory, antiquity, authenticity, originality, rarity, individuality or exemplarity".

So, faced with this set of concepts, many of which are undefined, we would say that the classification of cultural heritage is dependent on the discretionary judgment of the state. The state exercises its judgment

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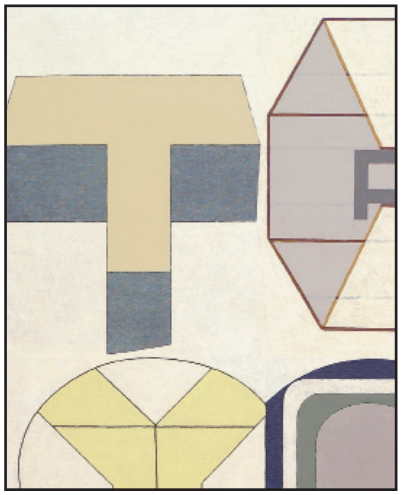

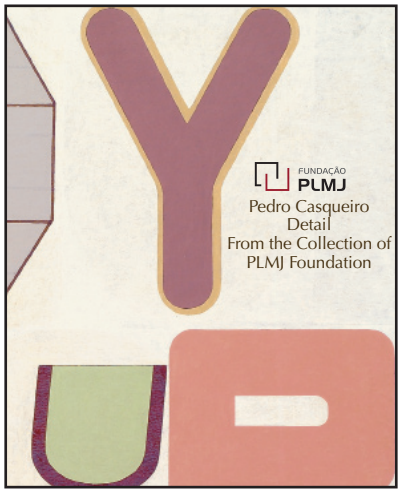

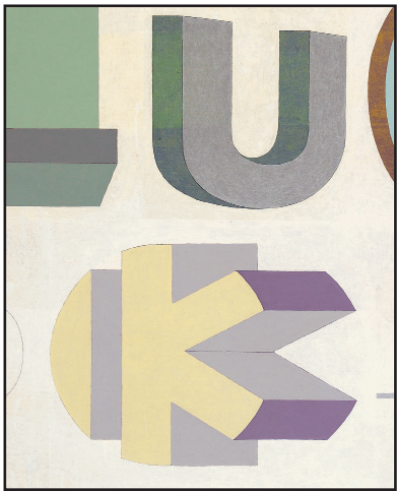

through specific bodies, principally IGESPAR in carrying out the processes for classification and inventory of real property and the Institute of Museums and Conservation for the classification of specific items of personal property of national interest that form part of museum collections and the Regional Directions of Culture.

As to the categorisation of cultural assets that are subject to classification, the LPC determines that the assets can be personal property or real property. In case of personal property, it is important to point out that when it belongs to private individuals, the classification the property is far more dependent on the free will of those individuals as compared to the classification of real property. In the case of real property, this is classifiable as monuments, sets or sites, the definitions of which we may only find in public international law, in particular in the UNESCO Convention 1972 – the Convention Concerning the Protection of World Cultural and Natural Heritage. The cultural assets which are real property mentioned in the LPC have their own system. Regulation of that system came into force under Decree-Law 139/2009 of 15 de June.

Under the LPC, the administrative act of classification has three hierarchical levels for valuing cultural assets which are as follows and in order of importance:

i) cultural assets of national interest - in the case of real property these are know as National Monuments and in the case of personal property, as National Treasures. An example of the latter was the classification Fernando Pessoa's collection of documents on 30 June 2009.

ii) cultural assets of public interest – when the question of national interest is still at issue, but of lesser relevance when compared to the interest underlying the classification of a cultural asset of national interest.

iii) cultural assets of municipal interest - these represent a cultural value of predominant significance for a specific municipality but they do not have the same interest on a national level.

The outcome of an administrative procedure for classification of cultural assets has a number of consequences including, among other:

i) the granting of special rights to the owners of the cultural assets (for example, the right to require purchase of the classified property by the state and the right to compensation when the classification results in a prohibition or serious restriction on the use of the asset) as well as special (for example, the duty to conserve and protect the classified cultural assets and to avoid their loss or destruction)

ii) special duties on the part of the state, such as, among others, the organisation of inventories, support projects for museums, programmes for public visits, programmes for development of tourism, or the creation of a fund for the safeguard of cultural heritage

iii) a specific system for transfer and the right of preference in the case of sale or gift in lieu of assets that are classified or in the process of classification. In this context we refer to the system of "protection zones" regulated by Decree-Law 309/2009 of 23 October, and

iv) a system applicable to exportation, transport and importation of cultural assets.

The violation of any of the numerous duties referred to above can lead to "cultural damage". In generic terms we can qualify this as harm caused to cultural assets. Cultural damage is subject to a range of criminal sanctions (spread between the Criminal Code for the crime of qualified damage and the LPC or other regulatory legislation)

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administrative sanctions the system of civil liability.

We conclude with the following clarification: the legal definition of cultural asset, as the subject of an administrative procedure for classification, should not be confused with the classification of a work protected by copyright ("intellectual creations in the literary, scientific and artistic, exteriorised in any way ..." according to article 1 of the current Code Copyright and Connected Rights). In effect, we could see a cultural asset that is classifiable under the LPC that, under copyright law would not qualify as a protected "work". For this to be the case, it is enough for the element of creativity to be missing but for the asset to have some value in terms of civilisation, or to be faced with a cultural asset where the protection has run out and it is now in the public domain. This phenomenon is due to the difference in the main interests that are to be safeguarded in any given situation. In the case of cultural assets, the collective interest is the "centre of attention" and in copyright, what is important is the individual interest of the owner. However, it is natural that a common denominator between both realities stands out: the integration into the concept, at least in the wider sense, of CULTURE!

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