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Welcome to the April edition of the International Associates Action Group Newsletter. We are still looking for contributors so please get in touch with me at david@gearhartlaw.com. All articles are welcome, long or short, previously published or new. If interested in becoming an editor or just want to get involved in our Action group please do let myself or Matthias Berger know. See you next Month!

Yours,

David Postolski

Welcome to our IAG April 2019 Newsletter

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New rules for commercial contests and promotions in Brazil

In Brazil, the Lotteries, Races, Publicity Contests and Amusement Machines are regulated by the Department of the Treasury, according to Law 5.768/71, which foresees in its article 1 that the free distribution of prizes through contests, for advertising purposes, will depend on the previous authorization of said public entity.

According to article 2 of Decree 70.951/72, the referred authorization will only be issued to companies that (i) develop commercial, industrial, or real state purchase and sell activities; and (ii) are in regular situation with federal, state and municipal taxes.

This authorization used to be issued by Caixa Econômica Federal, also referred as to CAIXA, one of the largest government-owned financial institutions in Latin America. The Trade Promotion Representation was responsible for issuing the authorizations internally (REPCO) and the whole proceeding required paper documents.

Article 4 of the same Decree establishes that no individual or company will distribute or promise to distribute prizes through contests or similar operations out of the cases and conditions foreseen in Law 5.768/71.

In a first analysis, the scope of the above legislation is to regulate the marketing strategy of companies consistent in the free distribution of prizes aiming at the increase of the products/services selling or the promotion of trademarks.

On December 12, 2018, Law 13,756/2018 came into effect to move the responsibility to approve such contests and promotions to the Ministry of Economy.

From now on, all applications should be filed with the Commercial Promotion Control System (SCPC) and the whole proceeding is electronic.

The term for filing the application is 40-120 days before the beginning of the promotion and the Federal Tax Liability Payment Form must be obtained before the National Treasury.

Other changes already provided by the above piece of legislation are the following: (i) the surveillance fee charged to file the application will be monetarily updated; and (ii) the authorizations will be granted on a provisional basis and by each promotional event, which cannot exceed a period of 12 (twelve) months.

Additionally, sanctions were fixed by Law 13,756/2018 as far as violations to the rules of Law 5.768/71 and Decree 70.951/72 are concerned: (i) withdrawal of authorization; (ii) prohibition to carry out operations governed by Law No. 5,768/71, for a period established by the Ministry of Economy, which may not exceed two (2) years; and (iii) a fine of up to one hundred percent (100%) of the sum of the values of the assets promised as prizes, to be established by the Ministry of Economy.

Under Law 13,756/2018, the government has two years, renewable by two others, to regulate it, meaning that more substantial changes are expected soon.

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Names of Goods or Services

The name of the goods or service in issue represents a limitation on the registrability of a trademark in Canada.

Subsection 12(1)(c) of the Trademarks Act provides that a trademark is not registrable if it is the name in any language of any of the goods or services in association with which it is used or proposed to be used.

All languages are considered. Registration is denied to this type of trademark since these marks cannot distinguish goods or services of one person from the goods or services of others. This type of trademark differs from trademarks which are clearly descriptive of character or quality or origin of the goods or services in issue because they are not eligible for registration, even upon proof of secondary meaning.

For example, an applicant sought to register the trademark RICO TTA FRESCA based upon proposed use of the mark in Canada in association with "cheese; cheese namely ricotta cheese". The application was successfully opposed on the ground that the mark was a straightforward translation of the designation FRESH RICOTTA (or the French equivalent RICOTTA FRAÎCHE) and not registrable.

If only a portion of the trademark is the name of the goods or services and the remaining portion of the mark contains distinctive matter, the Trademarks Office may require an applicant for registration of the trademark to disclaim the right to the exclusive use of the portion of the trademark which is a name.

If a trademark is allowed to become the name of the goods or services through popular use of the mark as a generic term the registration may be attacked because the mark is no longer distinctive. The popularity of the mark becomes its own enemy. For example, the trademark ESCALATOR in association with a vertical transportation system consisting of a moving staircase was lost on this basis. The registration is lost for lack of distinctiveness and future applications are then blocked by subsection 12(1)(3).

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Russian Internet Providers And Media Companies Sign Anti-Piracy Memorandum

After several months of negotiations moderated by the Russian Federal Service for Supervision of Communications, Information Technology and Mass Media (Roskomnadzor), Russian rights holders and major Internet companies signed an anti-piracy memorandum on November 1, 2018 in the capital of Moscow. The memorandum came into force on November 23, 2018 and will be effective until its expiration date, September 1, 2019. The parties may agree to extend the term of the memorandum unless a relevant law has been adopted in the meantime.

The memorandum establishes an out of court procedure allowing rights holders to request removal of URLs pointing to infringing audio-visual content (including live broadcasts) from Internet search results. Current Russian laws provide mechanisms for rights holders to temporarily or permanently block a webpage with infringing content, however there was no mechanism that could prevent a URL from appearing in search results. The development of the memorandum was instigated when Gazprom-Media, a large Russian media holding, sued Yandex, the provider of the most popular Russian search engine, for including URLs pointing to infringing content in its search results.

The document was signed by three major Russian Internet services administrators:

- Yandex;
- Mail.Ru (the third most popular search engine in Russia after Yandex and Google and the administrator of Russia’s top three social networks: VK, Odnoklassniki and MyWorld); and
- Rambler (a popular media portal with 49 million visitors a month). Google Inc. was invited to join the memorandum, but the company has not provided an official response yet. URLs that point to infringing content have been subject to removal from Google search results since 1998, according to the US Digital Millennium Copyright Act.

The rights holders that signed the document are several major television channels and media holdings: Gazprom-Media, National Media Group, Channel One Russia, All-Russia State Television and Radio Broadcasting Company (VGTRK), CTC Media, KinoPoisk, Internet Video Association and Television and Film Producers Associations.

The rights holders agreed to create a register of URLs pointing to infringing audio-visual content, appoint a registrar responsible for its maintenance and then file applications for URL removal to the registrar. Upon checking the applicant’s documents and comparing the audio-visual content at the reported URL with the lawfully published content, the registrar will decide whether to include the reported URL into the register. Internet services administrators must have their search engines automatically refer to the register and remove all included URLs from their search results within six hours.

During the transitional period (from November 23, 2018 until May 23, 2019) Internet services administrators must refer to the register every 60 minutes. During this period, the procedure is only available to exclusive rights holders – the owners of the audio-visual content or their exclusive licensees.

After the end of the transitional period (from May 24, 2019 until September 1, 2019), Internet services administrators will have to refer to the register every five minutes. During this term, depending on whether the parties to the memorandum reach an agreement and negotiate its terms, the procedure might become available to non-exclusive licensees as well.

The rights holders that did not sign the memorandum will also be able to request URL removal by submitting a special form. If the request is justified, the URL should be deleted within 24 hours.

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New Uzbekistan Resolution Aims To Strengthen Enforcement Efforts

On February 8, 2019, the Uzbek Government signed a Resolution “On Measures to Improve Public Administration in the Field of Intellectual Property”, intended to improve the IP protection system in the country.

The text of the resolution identifies inadequate public service system, insufficient interagency cooperation, failure to detect and tackle IP infringement in a timely manner, high official fees and lack of qualified personnel as major impediments to enforcement efforts.

Under the resolution, the Agency for Intellectual Property, which operated as an independent government agency, was recently transferred under the wing of the Ministry of Justice.

The main highlights of the new resolution are the following:

- The Agency now publishes information on pending trademark applications on its website within one business day from receiving the applications; before, information on pending trademark applications was obtained through an availability search which involved a special request and fee, while the Agency only published information on registered trademarks;
- Manufacturers, suppliers, vendors or their representatives may submit official written observations and oppositions before the Agency against pending bad faith trademark applications; before, such observations were considered as unofficial requests;
- Exclusive trademark rights are now active from the moment of official registration, not the moment of official publication as stipulated by the previous law;
- The five-year non-use grace period has been reduced to three years.

By July 1, 2019:

- The Ministry of Justice and the Department for Combating Economic Crimes under the Prosecutor General’s office will have to review all trademarks registered in Uzbekistan, identify all well-known trademarks registered in bad faith (probably meaning famous trademarks and brands; this is yet to be clarified) and take measures to cancel such registrations;
- The Agency, in partnership with the Customs Committee and the Department for Combating Economic Crimes, needs to develop and implement a single integrated and constantly updated IP database which will allow online and real time tracking of IP rights that have received or lost legal protection, and automatic inclusion and exclusion of IP rights from the Customs IP Registry upon receipt or loss of legal protection, respectively.

The main reason behind the need to review all registered trademarks is that there have been numerous cases of companies with globally known brands encountering difficulties when entering the Uzbek market, because their trademarks were already registered in the name of Uzbek citizens and legal entities. However, in Uzbek legislation the legal notion of a “well-known trademark” does not necessarily encompass all famous foreign brands, which is why the Ministry of Justice will have to come up with specific amendments to the legislation in force.

Starting from September 1, 2019, it will be possible to file trademark applications in electronic form through local centers of the State Services Agency under the Ministry of Justice or through the Single Portal of Interactive State Services; before the Resolution, trademark applications could only be submitted in paper form directly to the Agency for Intellectual Property in Tashkent.

The resolution also envisages a step-by-step reduction of trademark- and industrial design-related official fees from January 1, 2020.

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Eurasian Economic Union Makes Progress With Customs Register, Eurasian Trademark

Two documents were recently signed in the Eurasian Economic Union (EAEU) moving forward the process of establishing the unified IP system – detailed regulations on running the EAEU Customs Register and the Agreement on EAEU Trademarks, Service Marks and Appellations of Origin.

**EAEU Customs Register**

The Realization Plan establishing the rules of operation of the EAEU Customs Register, adopted by the Eurasian Economic Commission (EEC) on October 30, 2018, entered into force on December 6, 2018.

The Realization Plan describes the procedures to be followed by the EEC, EAEU member states’ customs authorities and rights holders, as well as any interested parties wishing to obtain information on a particular trademark, service mark or appellation of origin.

While the Realization Plan is a technical document which does not contain new information for rights holders, it is important because it is the last regulation which had to be adopted for the EAEU Customs Register to become operational, which is now expected to happen soon.

**Agreement on EAEU Trademarks, Service Marks and Appellations of Origin**

On December 6, 2018, the Council of the EEC signed the Agreement on EAEU Trademarks, Service Marks and Appellations of Origin. The Agreement will become effective after the EEC adopts additional regulations governing its implementation, which is expected in 2020.

The signing of the Agreement confirms that the final text passed internal approvals in all EAEU member states and concludes the negotiation stage. It is now only a question of technicalities that need to be completed before we see EAEU trademarks, service marks and appellations of origin become the new standard for the region, some time in 2020.

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Acquired Distinctiveness

There are limitations to the registrability of descriptive trademarks. If all else fails a brand owner may have to file evidence of acquired distinctiveness to overcome an objection to obtain a registration.

Subsection 12(2) of the Trademarks Act can provide relief for a clearly descriptive trademark that is otherwise not registrable if the mark has been used in Canada by the applicant or its predecessor in title, and the mark has become distinctive at the date of applying for its registration.

What is Required?

An applicant who claims that its trademark is registrable under the subsection must file with the Registrar evidence consisting of an affidavit or statutory declaration establishing the extent to which, and the time during which, the trademark has been used in Canada and any other evidence the Registrar may require to support the claim. The onus of showing acquired distinctiveness is on the applicant. While this has been categorized as a heavy burden, the standard of proof remains on the balance of probabilities and reference to a heavy burden refers to the exceptional nature of the subsection.

The subsection may be satisfied by evidence of acquired distinctiveness in a defined territorial area in Canada, such as a specific province or provinces. In such a case the Registrar will restrict the registration to the defined territory in which the trademark has been shown to have become distinctive.

What is decided?

The issue is whether the mark has been used in Canada and become distinctive at the date of applying for its registration. A claim of acquired distinctiveness depends on all the circumstances relating to the use of the mark. Exclusive use of the mark may be compelling evidence but is not an absolute requirement. A trademark with acquired distinctiveness in a substantial portion of the relevant market may be registered.

In considering the evidence presented, the methods employed in selecting each individual who swears an affidavit will be assessed to determine whether they are representative. Leading questions or other inappropriate practices must not be used to obtain evidence. Survey evidence, if reliable and valid, may be used to show acquired distinctiveness.

Comment

The existence of this exception can be very helpful but unfortunately, gathering the required evidence and presenting it in affidavit form can be time consuming and expensive.

Once the amendments to the Act are in force in June of this year, there will be an expanded ability for examiners to require that such evidence be filed where the examiner considers that the applied for mark is not inherently distinctive or, the applied for mark is a non-traditional mark.

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On January 1, 2019, Act LXVII amending a number of industrial property laws entered into force in Hungary. The Act was primarily intended to transpose Directive (EU) 2015/2436 into national legislation, meeting the deadline of January 14, 2019 by which Hungary had to fulfill its harmonization obligations.

In addition to the restructuring of fees for trademark-related services, the Act introduced a number of other amendments, discussed below.

The graphical representation requirement no longer applies when submitting a trademark application, opening way for the registration of new types of trademarks, including position, pattern, motion and multimedia marks.

The Act emphasizes the need to precisely define the list of goods and services. Namely, "the goods and services for which protection is sought shall be identified by the applicant with sufficient clarity and precision to enable the competent authorities and economic operators, on that sole basis, to determine the extent of the protection sought."

Grounds for refusal have been revised and clarified. The amendments include the following:

- Likelihood of association will not be considered a separate relative ground for refusal; it will be examined within the frame of likelihood of confusion;
- Trademarks with reputation can claim a broader scope of protection – their holders can oppose or challenge not only identical and confusingly similar trademarks that are used for similar goods or services, but also similar trademarks used for goods or services that are not similar.
- The definition of earlier rights has been clarified;
- New grounds for refusal were introduced for geographical indications.

In opposition proceedings, a cooling-off period of two to four months was introduced. This period must be jointly requested by both parties.

An oral hearing must also be jointly requested by both parties, not only one of the parties. However, in complex cases, the Hungarian IPO can still request an oral hearing without a request filed by the parties.

The rights and obligations arising from trademark protection, as well as the extent and the limitation of trademark protection have been defined in a more precise way.

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Streaming services demanded to pay royalties for public performance rights in Brazil

The Brazilian Copyright Law – Federal Law 9,610/98 - regulates the protection of literary, artistic or scientific works. The law protects: (a) economic rights - the author has the exclusive right to use his work as he sees fit; and to authorize its use by third parties (e.g. for public performance); and (b) moral rights - the author's right to be recognized as the creator of the work in question; to prevent it from being used inadequately or in part; and to withdraw it from circulation if he so desires.

The public performance right is one of the economic rights and is currently regulated by the following sections:

i) section 5, item VI, which defines communication to the public as the act by which a work is made accessible to the public by any means or process that does not consist in the distribution of copies;

ii) section 29 which establishes the principle that the previous and express authorization of the author is required for use of the work by means of, among others, musical performance and the audiovisual, cinematographic exhibition or the exhibition by other similar process; and

iii) section 31 which establishes the principle of the independence of the different forms of use of works and that any authorization granted by the author or the producer, as the case may be, for one such use shall not constitute authorization of any other of the uses.

The owners of the copyright and neighbouring rights (interpreters, performers and producers of sound recordings) are currently organized in associations and these associations have elected ECAD as the sole office for collection and distribution of royalties related to the public performance of musical works.

Despite the above provisions, Federal Law 9,610/98 has no particular provisions about digital exploitation of works.

While there is no legislation regulating digital exploitation of works, the positioning adopted by the Courts so far regarding streaming services was that no royalties would be due.

Regarding simulcasting service, no extra payment would be due to ECAD because the radio station or broadcaster already collected public performance fees for the over-the-air transmission of the same programming.

In relation to the webcasting service, State Courts considered that this type of service would involve a different right not encompassed by public performance as, although all users have at their disposal the same library of musical works, each individual user has the ability to select the content which he/ she would be willing to listen and, in addition, the time when they would like to start listening and the place.

ECAD, on the other hand, has been sustaining for several years that any streaming service involves a public performance of music based on the definition of public performance of our Copyright Act – Law 9610/98 as follows:

Section 68 §2 Public performance refers to the utilization of musical or literary and musical compositions, with the participation of artists, remunerated or not, or the utilization of phonograms and audiovisual works in places visited by the public, by any means, including broadcasting or transmission by any way and film exhibition.

In a court action filed by ECAD against a company from the telecommunication segment, the Superior Court of Justice rendered a groundbreaking decision determining that streaming services are covered by the above concept of public performance set forth by section 68 §2.

The following arguments were cited by the Justices to motivate the above decision:

a) streaming is a technology which allows the continuous transmission of packets of data and information without the need for the user to download the files to be executed;

b) there are various types of streaming, among which are the simulcasting and webcasting. The first involves the simultaneously transmission of a certain content by different channels (over the air and on the internet) while the webcasting involves only the transmission by the Internet, which can happen with the intervention of the user or not (interactive of not);

c) according to sections 5, II and 68, paragraphs 2 and 3 of the Copyright Act, it is possible to affirm that streaming is one of the types under our law in which the works are transmitted and the internet is a place of public attendance and thus streaming can be characterized as a public performance;
d) according to the Copyright Law, the number of persons which are in the place where the public performance is taking place is irrelevant in order for the place to be considered a place of public attendance. What is relevant is the inclusion of works in the reach of a collective public which attends the digital ambient which will be able at any time to access the works which were made available there. Therefore, what characterizes the public performance of the musical work on the internet is its making available due to the transmission in view of the potential reach of an indeterminate number of persons;

e) our law has recognized a broad right of communication to the public in which the simple making available of the work already qualifies its use as a public execution, encompassing therefor, the interactive digital transmission (section 29, VII, of the Copyright Law) or any other form of transmission which enables the collection of royalties by ECAD;

f) the criteria used to determine the need for authorization of use by the copyright owner is related to the mode of exploration and not to the content. Therefore, in the case of simulcasting, even if the transmitted content is exactly the same, the channel of transmission are not the same, and therefore are independent, (our Copyright Law, in section 31, prescribes that the authorization granted to one mode of exploration is does not extend automatically to any of the others as they should be considered independent); and

g) ECAD has the power to fix the amounts to be collected according to its regulations and the decision of the societies which are members of ECAD during its general assembly.

In other words, streaming services, interactive (like Spotify and YouTube) or not (such as online radio), will have to pay royalties to ECAD.

The decision issued by the Superior Court of Justice recognized the right of collecting royalties from public performance within the internet environment – considered by the Justices a place of public frequency.

Following the Justices’ rationale, the simple fact that the use of a work is made in place of public frequency is sufficient to transform this act in a public performance.

This decision, particularly, was rendered on February 08, 2017. Though a few scholars have been sustaining that ECAD would only be allowed to collect royalties since such date, the decision did not create any right (instead, it only recognized the right to collect royalties) and, in theory, ECAD may try to collect royalties in a prior date limited, of course, by the statute of limitations (3 years).

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Uzbekistan Simplifies Approval Of Medicines Registered In 20 Other Countries

Uzbekistan’s president signed a decree on June 22, 2018 abolishing the requirement to examine the safety, quality and effectiveness of medicines authorized in countries with high regulatory requirements. Previously, no medicines registered abroad were eligible for marketing authorizations under the simplified procedure in Uzbekistan. The 20 countries, determined by another presidential decree dated September 24, 2018, are the following:

Australia; Belgium; UK; Germany; Denmark; Israel; Ireland; Spain; Italy; Canada; South Korea; Netherlands; Norway; Slovenia; USA; Finland; France; Switzerland; Sweden; and Japan.

Uzbekistan will also apply the simplified procedure to medicines registered by the European Medicines Agency (EMA), an EU agency for the evaluation of medicinal products.

The simplified procedure was established by the Resolution of the Cabinet of Ministers No. 862, dated October 24, 2018. The competent authority is the State Center for Expertise and Standardization of Medicines, Medical Devices and Medical Equipment under the Ministry of Health.

The following are eligible for accelerated approval:

- medicines authorized in one of the countries with high regulatory requirements;
- new combinations of medicines already authorized in Uzbekistan; and
- medicines already authorized in Uzbekistan but produced in new forms, dosages or packages, with a different label or by other manufacturers.

Under the simplified procedure, once the applicant submits the required documents and pays the EUR 1,082 (USD 1,237) application fee, the State Center has 15 working days to reach the decision on granting a marketing authorization and one working day to notify the applicant. Approved medicines are recorded into the State Register of Medicines, Medical Devices and Medical Equipment and are initially valid for a period of five years. After this period, the holder can apply for renewal and after the renewal, the marketing authorization will remain valid for an unlimited period.

An application may be refused if it contains incomplete or invalid information, but applicants can re-apply within 15 working days upon receipt of a notification of refusal.

The authorization can be terminated if:

- the medicinal product is banned in Uzbekistan or in the country where it was originally authorized;
- the medication causes serious side effects not specified in the instructions for use; or
- the applicant requests termination.

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