The European Patent Office will not raise official fees above inflation for the next four years, President Benoit Battistelli said yesterday. Interviewed after addressing yesterday’s IP Panel Lunch, he also promised “we will find a solution” to the controversial question of the level of renewal fees for the proposed Unitary Patent.

A committee representing participating member states is discussing those fees, but has yet to publish any details. However, Battistelli said the most important criteria is that the Unitary Patent should be “business-attractive”. It must also be budget-neutral for the EPO, and reasonable for member states.

Battistelli, whose term was recently extended by the Administrative Council until 2018, said the fees would be known at least six months before the first Unitary Patents are granted, which is expected to be in 2016. “I think we could fix as a target June 2015,” he said.

He identified the successful implementation of the Unitary Patent as one of the achievements he would like to complete by 2018, along with an improved IT system, positive social relations with the Office staff, the maintenance of the EPO’s reputation for quality and the development of international cooperation. “We have increased transparency despite what some negative minds say. All the goals are known so everyone can measure them,” he said.

In his speech, Battistelli emphasised that the Office is investing in training and tools (such as the CPC, Patent Translate and Early Certainty from Search) to meet the challenges arising from a growing workload and greater complexity. It has also added 500 examiners in recent years.

He told the AIPPI Congress News that the EPO will maintain and improve quality by simplifying procedures and enabling examiners to focus on “the core issues of search, examination and opposition”. He said: “This improvement in quality is substantive and significant and is for the sake of the IP world system.”

Asked about criticisms of his initiatives, Battistelli said most people accepted the need for change and added: “The EPO is a great European success story and staff can be proud of what they have achieved.” He said the vote in the Administrative Council showed he has the support of member states and stakeholders.

Read the full interview with Battistelli on managingip.com

How valuable are trade mark surveys?

A lively discussion about the use of survey evidence in trade mark cases took place yesterday, with a judge, a survey expert and a litigator sharing their perspectives.

Robert Sacoff of Pattishall McAuliffe in Chicago started off by underlining his view that surveys absolutely should be allowed. “Canada is one of the countries that doesn’t seem to like trade mark surveys very much, perhaps following the lead of the UK,” he noted. He said Canadian and UK thinking is that judges should use their own common sense, excluding influences of their “own idiosyncratic knowledge or temperament” to determine whether the casual consumer would be likely to be confused.

“Who, I don’t know how you do that,” said Sacoff, “to speak for a whole group of potential people.”

The most common form of survey in the US is a mall intercept, with phone and internet surveys becoming more common. However, they don’t come cheap. “You probably can’t get any kind of survey for less than $25,000-30,000,” said Sacoff. “And you could very easily be talking about six figures.” He added you are not obliged to disclose the survey results if they are unfavourable.

Great care must be taken when doing surveys. He pointed to the recent Starbucks case as an example of potential pitfalls to avoid. “ Pretty much everyone in the trade mark community thought Starbucks should have won this case,” said Sacoff. A centerpiece of the case was a phone survey asking 600 people what they associate with the name Starbucks. “They didn’t do very well out of that,” said Sacoff. The Second Circuit said the survey was “fundamentally flawed” because its conclusions were drawn from how consumers thought of the term in isolation and not in a real-world context.

Judge Vanessa Gilmore of the Southern District of Texas agreed that a judge is unlikely to represent the group in question and therefore there is a strong need for survey evidence. “I think survey evidence should be given high value and high priority, even more than experts.

Anyone can hire an expert to say anything,” she said.

However, Judge Gilmore pointed to a report by the University of Pennsylvania on the role of surveys in trade mark litigation in the US that cited 16.6% of district court cases mentioning surveys as being relied on when determining the case. “It found surveys are not used as much as you think, or hope,” said Judge Gilmore.

She revealed her own research had indicated that confusion rates of 7% to 21% in consumer surveys have been found sufficient to support a conclusion of actual confusion among any real consumer. Judge Gilmore said she is not strongly influenced if a survey is not done, but revealed she was reversed by an appeals court once because the lack of a survey was seen as negative. “A negative inference was drawn by a failure to do a survey by a defendant.”

Anne Niedermann of the Institut für Demoskopie Allensbach in Germany said the process disadvantages small to medium companies who cannot afford to do a survey. She proposed a solution of surveys being commissioned not by the parties but by the court. Judge Gilmore responded that she couldn’t imagine that being well received in US by lawyers. “They would ask me to butt out of their business,” she said. Sacoff added: “I would run to another court!”

Interview with Judge Gilmore: page 3
The rules of the pharma game

I
t is fast-paced, frantic and the stakes are high. The rules are complicated, and sometimes unseemly fights break out between the participants. It's also become a national game in Canada.

All this may be true of hockey. But it also applies to the complex world of pharmaceutical litigation. It was appropriate then that four workshops yesterday were devoted to pharmaceutical issues, spanning: utility/disclosure requirements; biosimilars; patent term extension/SPCs; and early resolution mechanisms for patent disputes regarding approved drug products.

Not surprisingly, given its long history of disputes between innovator and generic companies, Canada featured prominently in all of yesterday's panels. In the first workshop, William P Mayo of Aitken Klee discussed the Plavix case pending before the country's Supreme Court, in which AIPPI yesterday filed an amicus brief (see below), which concerns the doctrine of "promised utility".

"It will be nice to have clarity from the Supreme Court on the notion of 'promise,'" said Mayo. But he also stressed that, whatever the outcome, applicants should not lose sight of the fact that Canadian courts will apply the legal principles case-by-case: "Not all patents are being defeated on the basis of crazy promises in Canada."

As moderator Mary Ann Dillahunty of Oncologytics Biotech said, utility requirements can be key in deciding when and where to file pharmaceutical patents. Jurgen Meier of Vossius & Partner in Germany discussed EPO practice on "the plausibility test". He summarized this as: "You need to give a plausible explanation why your invention is working ... It's not enough to put laundry lists of compounds and diseases. You need a clear and unambiguous teaching which is plausible in your application."

Meanwhile, in China, as Bonan Lin of Nestle said, utility requirements in the United States, Australia, the EPC and European countries, and Japan. It concludes: "(A) determination on the disclosure requirements in Canada is, to the extent permissible or practical, consistent with the disclosure requirements of other major jurisdictions can only lead to greater certainty and lower costs for patentees who seek patent protection in Canada." Other organisations that have filed briefs in this case include BIOTECanada, Canada’s Research-Based Pharmaceutical Companies, the Centre for Intellectual Property Policy, the Canadian Generic Pharmaceutical Association and FICPI. The case is due to be heard by the Court later this year.

AIPPI yesterday filed an intervention before the Supreme Court of Canada in the dispute between Apotex and Sanofi-Aventis concerning the drug Plavix. The case concerns the utility requirement in Canadian patent law.

The amicus-style brief notes that following the Supreme Court's decisions in AZT (2002) and VIAGRA (2012), "there has been uncertainty with respect to the precise scope of the utility requirement under Canadian patent law in Canada. In particular the extent to which the utility of a patented invention should be disclosed or supported in the patent specification." In AZT, the Court stated that utility must either be demonstrated or be a sound prediction based on information and expertise available at the filing date. In VIAGRA, the Court declined to decide the scope of any disclosure requirement associated with "sound prediction". The brief states that this "remains an open question in the jurisprudence of this Court, and an area of significant uncertainty in Canadian law".

Noting that the Court has in previous cases said it is desirable not to apply Canada’s IP laws in a judicial vacuum, AIPPI submits that (1) many jurisdictions have a utility or industrial applicability requirement, (2) for many jurisdictions, the utility or industrial applicability must be indicated in the specification if it is not otherwise obvious, (3) for many jurisdictions there is no requirement that proof or support be provided in the patent specification, and (4) in a number of jurisdictions "it is relatively rare that utility or industrial applicability is a basis to deny the grant of a patent or for invalidating a granted patent".

The brief draws on research done by AIPPI over the years and reviews the utility/industrial applicability requirement in the United States, Australia, the EPC and European countries, and Japan. It concludes: "(A) determination on the disclosure requirements in Canada that is, to the extent permissible or practical, consistent with the disclosure requirements of other major jurisdictions can only lead to greater certainty and lower costs for patentees who seek patent protection in Canada." Other organisations that have filed briefs in this case include BIOTECanada, Canada’s Research-Based Pharmaceutical Companies, the Centre for Intellectual Property Policy, the Canadian Generic Pharmaceutical Association and FICPI. The case is due to be heard by the Court later this year.

Clarifying utility in Canada

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“I suggest that countries that are considering this issue look at the Canadian system and run as far away as possible.”
A panelist called for clarification about what defines “the public” in copyright disputes in Asia yesterday’s “Copyright aspects of embedding, framing and hyperlinking” workshop.

Tony Yeo, director at Drew & Napier, said Singapore has no definition of “the public” when the issue of making something “freely available to the public” is being discussed, adding that this contrasts with the position in Japan.

He pointed to the case in Singapore of RecordTV v MediaCorp TV, in which RecordTV used an internet-based digital video recorder to make MediaCorp programs available online. The court of appeals found that the registered users did not constitute “the public” because the communications were made “privately and individually.”

“This is an issue touched on by the Aereo case, and that went the other way,” said Yeo. Perhaps if Aereo had come out earlier, the Singapore decision might have gone the other way.”

Fellow panelist Dale Nelson of Warner Brothers noted the language of the Aereo decision talking about performance being activated at a “turn of the knob—a click on a website”. “The Aereo decision found direct liability for public performance so I think it provides an opportunity to rethink some of the decisions that have been made about direct infringement,” Nelson said.

Judge Vanessa Gilmore of the Southern District of Texas has been enjoying the chance to gain an international view during her time at the AIPPI Congress. She notes that IP cases require a particular knowledge compared with other cases.

“A lot more technical knowledge is required in IP cases for the most part,” she says. “You just have to do a lot more studying in terms of matters outside the law. So, for instance, in all my IP cases I have lawyers do tutorials for me on whatever the technology happens to be. In most cases you are just studying the law, but in IP cases you are studying the law and trying to understand the technology.”

The Southern District of Texas was sound out a couple of years ago about becoming a specialist court for patent cases, but the court declined.

“They wanted us to get the special designation of being a patent court because we had such a heavy IP docket,” says Gilmore, who took part in yesterday’s session on trade mark surveys. “We have enough cases. We weren’t particularly interested in getting a special designation, so as a court we decided not to seek that designation out.”

The IP caseload could be set to increase in any case. Texas’s Southern District now has the same rules about an expedited patent docket and special patent scheduling as the Eastern District of Texas. It also has an airport in a major hub, unlike the Eastern District. Judge Gilmore said it is not whether or not a case is IP or not that is important to her, but rather whether the lawyers involved are good or not.

“If I have good lawyers and they do a good job and they understand it is their job to make sure that the court understands what is going on, then it is fine. If I have bad lawyers that aren’t willing to do their work then it is not fine,” she says.

So what are some of the biggest mistakes IP lawyers can make?

“Not educating the judge well. Not showing up for Markman hearings with some piece of technology that they could easily bring for the court to see,” she says. “I’m in Texas so we do a lot of oil and gas and industry litigation in patents. So it’s a bolt, it’s a nut, it’s a plunger, it is something I can see. People show up and they don’t bring me anything! And I say, ‘Can I actually get to see it? Is it too big to bring into the court room?’ And they say, ‘No, it fits in your hand.’ Well, it would have been really nice to have it.”

Judge Gilmore was given the dubious distinction of being a “judicial diva” by the Above the Law blog, a label she decided to embrace (and include in the title of her book “You Can’t Make This Stuff Up: Tales From A Judicial Diva”).

“I decided to own it,” she says. “First I was getting mad, then I was getting upset, then I thought, ‘You know what? Maybe I am a diva. I am just going to own this.’ I thought I can either get mad or laugh at it.”

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For inquiries please contact:

Beijing HQ Office
Kingsound International Center
11/F. Block B, 116 Zhizhujuan Rd.Haidian District, Beijing 100097
Tel.: +86(10)5893 0011 | Fax: +86(10)5893 0022
Email: ks@kingsound-ip.com.cn
Website: www.kingsound-ip.com.cn

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The Denver office is operational
Leading through a time of change

Felipe Claro, partner at Chile law firm Claro & Cia, will be taking over as AIPPI president for the next two years. He has ambitious goals for his tenure, including streamlining the association to be more responsive to members, as he tells Michael Loney.

“My plan is to lead the changes agreed by the ExCo and try to make the association more flexible and more beneficial to members so we can attract more people,” he says.

Claro says he is keen for AIPPI to continue to realize its potential, as it has done for more than a century.

“We need to make a further movement at the board level to better impact the real world,” he says. “There are a lot of good challenges presently.”

A special committee, Q337, has proposed a new role and structure for the executive committee, the Council of Presidents and the Bureau, and it now needs to be decided how that proposal will be handled.

“We have been working in this area for several years now,” says Claro. “The special committee and the Bureau will propose to the Executive Committee big changes in the way we organize, with everything with a view to streamlining the structures. Sometimes the structure of AIPPI can be a bit complicated to members. They say we could do things so they are easier to understand and more user-friendly. We are working on that.

“We also have to understand that local support is very important to our members so we are not only focusing on international meetings but we also want to support regional and national meetings, and we have been sending people to support those groups.”

He believes the AIPPI, which has membership in more than 100 countries, is well placed. He points to the boom of design filings in China, the developments in plain packaging, and the debate over international exhaustion of copyright as examples of issues that AIPPI can help lead.

“Things are changing very rapidly and we cannot be observers. We want to be the main actors of the IP field,” says Claro. “We really want to help different countries to reach a common view or common way of doing things, without losing their own character.”

He draws an analogy to the solar system to show the different moving parts involved. “You have different planets, which in this case are the different countries. All of them are spinning round the sun, which would be the IP system. So the IP communities are like the solar system because they all have to be together but without clashing and without going out of the system.

“Another idea we think is very important is enforcement. In this example of the solar system enforcement is gravity. So everyone has to be in place and not clash other people and other countries and not go outside the system so you can rely on a very organised IP system.

That’s why harmonisation is so important, so everyone knows their own place without invading the neighbour’s place.”

Claro says increasing the membership of the AIPPI is also important. “I would love to see more African countries involved in AIPPI,” he says. “We have two or three countries active in Africa, but so far there is little IP development and it is very hard to attract them. My question would be: what can we do to improve IP systems in Africa so they can have a real interest in joining the association?”

Claro also wants to increase revenues so that the association can provide more services and benefits to its members. “So far as we can streamline the structure, we can make everything easier and more connected among the groups,” he says. “Our association is a federation of national groups. The more interaction among the national groups there is, the better it is for the association.”

The AIPPI is in the process of hiring an executive director, a new position that is expected to be filled by the middle of next year. Claro says this week’s Congress in Toronto will provide a good opportunity for potential applicants to decide whether they would like to put themselves forward for the job.

“The applications for the new position will be received until the end of September so Toronto is a good place for some people to decide whether or not to apply to the position,” notes Claro.

Next year’s AIPPI Congress will have a distinctly Latin flavour. It is being held in Rio de Janeiro from July 13.

The specific content of the programme is still being drafted but Elisabeth Kasznar Fekete of Brazilian law firm Kasznar Leonardos gave AIPPI Congress News a preview of what to expect. Kasznar Fekete is president of the Brazilian Intellectual Property Association for the 2014-2015 term and president of the Brazilian national group for the AIPPI.

Brazil’s presidential elections on October 5 could exert a big influence on next year’s Congress. Marina Silva of the Socialist Party has a chance of ousting incumbent President Dilma Rousseff of the Workers Party.

“It will have an impact on next year because Brazil is seeking a new model and new policies that will lead the country to more economic growth,” says Kasznar Leonardos.

Brazil has a number of growing markets that are heavily dependent on IP including biodiversity and genetic resources, agriculture, airline technologies, and oil and gas.

The Brazilian Intellectual Property Association held a conference in August in which the impact of IP on the economy and competitiveness dominated discussions. The first ever study of economic issues on IP in Brazil was presented at the conference. Kasznar Fekete has written a paper to be submitted to the presidential candidates.

“We want to explain to these candidates what are the expectations and the concrete proposals that we have for policies that can improve the Brazilian system,” she says. “We would like candidates that support maintaining the strength and importance of IP rights for investors and maintaining the stability of IP law.”

One big issue is increasing the resources at the Brazilian Patent and Trademark Office so it can fight against its backlog. “In Brazil granting a patent can take 10 years 12 years, maybe even more,” says Kasznar Leonardos. “One of the main reasons for that is our patent examiners have eight or nine times more applications to examine than their colleagues in the US or Europe. The number of examiners is not sufficient.”

On the trade mark side, Brazil’s Chamber of Foreign Trade approved accession to the Madrid Protocol. But the backlog means Brazil would not meet the Protocol’s requirements for which examination must be completed.

“The Madrid Protocol I don’t think will be the priority for the next government, but innovation is,” says Kasznar Fekete. She would like to see changes to make Brazilian IP law more flexible. Brazilian law is very restrictive on granting biodiversity patents, for example.

The conference is being held at the Windsor Barra Hotel Convention Center in the Barra da Tijuca borough in the west of Rio.

Rio plays a vital role in the country’s IP system, making it an ideal place to hold next year’s Congress. Kasznar Fekete notes that Brazil is unusual because its patent and trade mark office is not located in the capital of Brasilia. As such, the specialised courts are mainly in Rio because the patent and trade mark office is there. The beaches are not bad either.

See you in Rio next year!
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TEL: +92-42-36285588-90, +92-42-36285581-84
FAX: +92-42-36285585, 36285586, 36285587
Email: UnitedTrademark@UnitedTm.com
Websites: www.utmps.com and www.unitedip.com

Dubai (UAE)
Suits 401-402, Al-Hawai Tower
Sheikh Zayed Road
Dubai, United Arab Emirates
Tel: +971-4-3437 544
Fax: +971-4-3437 546
Email: Dubai@UnitedTm.com

Jordan
Suite 7, 2nd Floor
Chicago Building, Al Abdali
11190, Amman, Jordan
Tel: +962-6-583088
Fax: +962-6-583089
Email: Jordan@UnitedTm.com

Lebanon
6th Floor, Buri Al-Ghazal Bldg., Tabaris, Beirut
Lebanon
Tel: +961-1-21 5373
Fax: +961-1-21 5374
Email: Lebanon@UnitedTm.com

Morocco
58, Rue Ibn Batouta,
P.T. No. 4, 1er Etage,
Casablanca
Morocco
Tel: +212-522206096
Email: Morocco@UnitedTm.com

Oman
Suite No. 702, 7th Floor
Oman Commercial Centre
Ruwi, Muscat, Sultanate of Oman
Tel: +968-24-787555, 704788
Fax: +968-24-794447
Email: Oman@UnitedTm.com

Qatar
Villa # 40, Al Amir Street
Al Mirqab Area, Doha
Qatar
Tel: +974-444 3083, 444 3093
Fax: +974-444 7311
Email: Qatar@UnitedTm.com

Saudi Arabia
Behind Matkaba Al Shawwaf
30th Street-Diya, Riyadh 1444
Kingdom of Saudi Arabia
Tel: +966 -11- 4616157, 4655477
Fax: +966 -11- 4616156, 4622134
Email: SaudiArabia@UnitedTm.com

Sharjah (UAE)
Suite 203, Al Buairah Building
Buaharah Corniche
Sharjah, United Arab Emirates
Tel: +971-6-5722742
Fax: +971-6-5722741
Email: UAE@UnitedTm.com

Sudan
Flat No.1, 3rd Floor, Al Hurriya St.
Shaik Al Deen Brothers Bldg.
Al Hurian Street, Khartoum, Sudan
Tel: +249-183-740634
Fax: +249-183-796031
Email: sudan@UnitedTm.com

Tanzania
Shauri Moyo Area,
Puguu Road
Dar-Es-Salaam
Tanzania
Tel: +255-222862800
Email: Tanzania@UnitedTm.com

Yemen
6th Floor, Ideal Clinic Building, Hadda Street, Sana’a, Yemen.
Tel: +967 181 9642 Email: yemen@UnitedTm.com
The recent insolvency of several large companies that owned significant patent portfolios and engaged in international licensing arrangements has highlighted the devastating effects on parties to such agreements should the licensor or licensee become insolvent. The treatment of IP licence agreements during bankruptcy or insolvency proceedings throws up many complicated questions. This issue will be debated today in the plenary session that takes place before the General Assembly.

Many countries do not provide clear protection or guidance to licensing parties involved in insolvency. And national approaches vary dramatically even in those countries where guidance is in place.

Wide range of opinions
The Working Committee for this Question received reports from 39 national and regional groups, which contained many suggestions. A wide range of opinions were given about whether, how, and the degree to which an administrator’s abilities to adopt, assign, modify, or terminate an IP licence should be restricted. Areas of some consensus included such restrictions not being dependent upon registration of the licence, the type of licence, the type of IP rights involved and the existence of security interest.

Some 24 of the 39 responding groups indicated that a voluntary registration system is available for IP licences in their jurisdiction. But implementation of the system and the rights covered vary widely among the groups. “In most cases, the voluntary registration systems are not necessary for validity of the licence, but may be desirable for public notice purposes and for enforcement of rights against third parties,” said the Working Committee summary report, prepared by John Osha. Eight groups said registration is mandatory in at least some cases.

The group reports reflected a wide variety of approaches to bankruptcy and insolvency proceedings. Thirty of the groups reported that the bankruptcy law does not treat IP rights or licences differently from other types of rights and contracts. Exceptions include Canada, Estonia, Norway, the Republic of Korea, Sweden and the United States. In the US, IP rights or licences are treated as distinct from other types of contracts, assets and property rights by statute.

Possible improvements
The groups were asked whether there were other changes to the law in their countries that would be advisable to protect IP licences in bankruptcy. The Canadian group noted it would be good to close the gap between federal and provincial legislation by including provisional legislation language that parallels the provisions relating to IP licences in federal bankruptcy laws. The French group suggested strengthening of rights of pre-emption, or preferential allocation of court-ordered IP licences in favour of the licensee.

When asked whether harmonisation of laws relating to treatment of IP licensing in bankruptcy and insolvency proceedings was desirable, all groups answered yes except Portugal and Uruguay.

The group reports from Argentina, China, Egypt, Germany, Hungary, Japan, Mexico, the Netherlands, and Republic of Korea supported generally strict limitations on the administrator’s power to modify or terminate an IP licence, emphasising the importance of the language of the licence contract itself.

The group reports from Canada, Finland, France, Latvia, Norway, the Philippines, Portugal, Turkey and the United States generally supported allowing the administrator to adopt or terminate an IP licence subject to reasonable restrictions. Sweden, Switzerland, Ukraine and Uruguay suggested that a case-by-case determination is best and restrictions should not be put in place that would impede the discretion of the administrator. Twenty of the groups said that any such restrictions should not depend upon the pre-bankruptcy registration of the IP licence.

Many countries do not provide clear protection or guidance to licensing parties involved in insolvency

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Hammering out principles

The group reports were taken on board in Sunday’s Working Committee meeting, chaired by Wilfrido Fernandez of Paraguay, which discussed whether and under what circumstances an administrator of such a proceeding may adopt, modify or terminate such an agreement. A number of suggested principles for a draft resolution were debated.

The first three proposed principles attracted some debate during the meeting but were unchanged. These were: harmonisation of the laws governing the treatment of IP licences during bankruptcy and insolvency proceedings should be strongly encouraged at both regional and international levels; the pertinent legal rules should apply equally to all types of IP rights, and make no distinction between foreign and national IP rights; the pertinent rules should apply equally to exclusive or non-exclusive licences.

The fourth principle, relating to contractual clauses, attracted a lot of debate, however. When there is a bankruptcy it is down to the judge to decide whether the licence agreement stands. The original proposal was a clear-cut statement that contractual clauses should be enforceable. However, the debate during the working committee shifted this to becoming less clear by adding that they should be enforceable “as a rule”, and saying the exceptions must safeguard legitimate interests. The US representative wanted to change the whole sense of the statement by saying clauses “should not as a rule be enforceable”, but this was only supported by one other person.

Also on the subject of contractual clauses, a principle was approved that clauses in an IP licence agreement restricting or prohibiting transfer or assignment of such IP licences during a bankruptcy or insolvency proceeding should be enforceable. It was debated whether this statement should include the phrase “absent conflict with relevant statutes”, but this was voted out.

Other principles agreed upon were: in the event of termination of an IP licence agreement during a bankruptcy or insolvency proceeding, the licensee should not be able to continue using the underlying IP rights unless the licence is fully paid up; rules should be enacted that specifically address IP rights or IP licences in bankruptcy or insolvency proceeding, in addition to rules governing other types of contracts, assets and property rights; the administrator’s ability to adopt, assign, modify or terminate an IP licence, if any, should be restricted based on keeping the balance of different interests involved and upon guaranteeing the normal exploitation of IP licences and the payment to creditors involved in bankruptcy and insolvency proceedings.

It was agreed that the solvent licensee should have the option to acquire the pertinent IP rights or to continue as a licensee, at least until the regular termination of the contract.

A principle was also agreed upon that there should be limitations on the administrator’s ability to adopt, assign, modify or terminate an IP licence, if any, emphasising the importance of the language of the licence agreement itself. The phrasing for this originally stated “strict limitations” but that was viewed as vague because it did not say what the limitations were.

Other principles debated included whether the restrictions should depend on which party is insolvent, should not depend on whether a licence is exclusive or non-exclusive, and should not depend on the type of IP licence involved.
Experience the real Toronto

Toronto boasts a strong theatrical tradition, and there are a number of productions you can go to while you are in town.

Among the many shows on during the conference, the Princess of Wales Theatre has the Tony-award-winning musical The Book of Mormon, the Royal Alexandra Theatre has Timberlake Wertenbaker’s Our Country’s Good, and the musical The Book of Mormon, the Royal Alexandra Theatre

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Hit the tiles

If you feel the urge to get your groove on, Toronto has nightclub and dance venues to meet your needs. According to the official website for Toronto tourism, “Queen West, Parkdale and Ossington are the areas that people now flock to for nightlife.”

On Ossington are hipster spots The Ossington and Levack Block, which are both a split between a lounge and dance party. Parkdale has increased in prominence in recent years as a result of underground dance parties, and you can find electronic music in clubs such as Wrongbar. For attende- es from South America, or indeed any salsa enthusiasts, LuLu Lounge hosts Latin dance parties.

If you just fancy a drink, Queen Street West has numerous bars. This includes the Horseshoe tavern, one of the most historic music venues in Toronto.

Things to do

Toronto nightlife

Try the local brews

Attendees arrived in town at the tail end of the Toronto International Film Festival, but the good news is the Congress is taking place slap bang in the middle of Toronto Beer Week. This is billed by the organisers as “a collective series of events dedicated to the celebration and advance- ment of the craft beer movement”.

There are more than 100 events, including beer dinners, cask beer tastings, brewing demonstrations and beer educa- tion. The “Week” lasts nine days from September 12-20, and includes 35 craft breweries and 70 venues.

One of the more intriguing events on Tuesday and Wednesday is the “Beer Makes History Better Walking Tour”, which starts outside the Hockey Hall of Fame and will stop at three historic pubs, as well as the St Lawrence Market to sample some Canadian delicacies. It will finish in the Distillery District, providing you are still able to walk by then.

For more information go to www.torontobeerweek.com

Catch a show

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Tuck into some food

Toronto is a very multicultural city so has a wide variety of food, including Chinese, Japanese, Mexican, Ethiopian, French and Italian. Some of the best Chinese food is on Dundas and Spadina. The original Chinatown is on Dundas between Bay and University. The largest Chinatown is on Spadina around Dundas. Italian restaurants can be found in Little Italy, on College Street West between Euclid Avenue and Shaw Street. The theatre district has French cuisine at Marcel’s.

Some of the city’s best upscale restaurants include Jacobs & Co steakhouse on Brant Street, Canoe on Wellington Street West, and Nata Bene on Queen Street West and Scaramouche. Near the Convention Centre, Zagat recom- mends La Fenice, Toca Restaurant, Epic Restaurant, Funie Japanese, Pai, Los Colibris and Luckee.

According to Toronto Life, the best new restaurants in Toronto 2014 include: The Chase, which serves surf and turf; Bar Isabel, a tapas bar; THR & Co, a gastropub. Drake One Fifty, where you can find steaks and burgers; and Electric Mud BBQ, which is self-explanatory.

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For a more uniquely Toronto theatre experience, you could check out Rob Ford the Musical: Birth of a Nation at the Factory Theatre, which opens this week. “From alleged Gawker ‘crack videos’ to Youtube ‘stupor’ videos to his appearance on

perceptions, leaving you to wonder: ‘Is it real, or just a fig- ment of my imagination?’”

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The Toronto Congress marks the end of an era for two of AIPPI’s long-serving volunteers. Secretary General Stephan Freischem of Germany will be standing down after eight years on the Bureau, while Reporter General Thierry Calame has served 13 years.

That time has seen some big developments in the association, says Freischem: “It’s changed where it needed to change. Bureau members have tried to be more accessible. Communication has become less formal and faster, while we have tried to maintain a high level of accuracy and an integrative approach.” The strategy report provided by Robin Rolfe in 2012 showed that AIPPI had to become more flexible, he adds, given that its structure dates back to the late nineteenth century when worldwide communication took days or even weeks. “The most significant change is we now look to the future rather than dwelling on the past,” says Freischem.

Calame, who has served four years as Reporter General, as well as five years as assistant and four years as deputy, adds that one area where structures have been improved is the collaboration between the research side of the association and the programming: “The selection of the working questions and how we address them has improved.” He said AIPPI has also improved in responding to topical IP issues while maintaining its thorough research processes.

Freischem says a highlight during his term has been “the positive interaction with those who define the rules for IP protection”. He cites the “rewarding” experience of engaging with offices including the EPO and JPO, as well as WIPO and WTO. Calame says he welcomes some of the interesting educational sessions at the Congress, such as the mock trials and arbitration tribunal and the Pharma Day. He adds that, looking back over the past decade, there have been difficult discussions over issues such as plain packaging and the Unified Patent Court, but the results made the effort worthwhile: “Within the Reporter General team, we worked closely on these issues and really fought for them.” One challenging issue was injunctive relief, which was hotly debated at the ExCo in Hyderabad, but has led to valuable work on patents and standards in Committee.

Calame, whose office is five minutes away from AIPPI’s headquarters in Zurich, says AIPPI plays a different role to other associations: “What makes us unique is our thorough comparative legal process. It’s cumbersome, but it’s very effective. We collect the national reports and study them in detail.” He says that means its views are more balanced, citing a workshop on plain packaging held at the 2012 Congress in Seoul.

The international process also means that AIPPI can be a test run for negotiations at the international level, for example at WIPO. Freischem cites the recent work on the grace period, which led to a resolution at last year’s ExCo in Helsinki. “I think after the America Invents Act there is momentum building for tackling the remaining substantive harmonization issues, but it will take time.” he says, adding that the AIPPI resolution is “a clear statement of a simple and effective harmonized grace period to the benefit of inventors”.

Calame urged new members to get involved with the working questions through their national group and the Congress committee meetings: “It is a unique opportunity to work on interesting problems with colleagues from all over the world and that means it’s a unique networking opportunity too.”
Expansion of privilege in India called for

The issue of protecting confidential client-IP advisor communications from forced disclosure on a global scale is complicated.

In a panel discussion yesterday, Steven Garland of Smart & Biggar/Fetherstonhaugh said in reality there is a lack of coverage domestically in certain countries and a lack of coverage in cross-border scenarios. He said the solution may come from WIPO's Standing Committee on the Law of Patents and a Group B+ proposed multilateral agreement.

Talking about India, Anand and Anand's Pravin Anand said it is unfortunate that patent agents are not covered by privilege. "The need for privilege for intellectual property advisors stems from the fact there is increasing trade in IP rights and lawyers increasingly need technical advisers. Therefore the public interest dictates that what is available for lawyers should be available to patent agents," he said.

Privilege issues throw up problems for multijurisdictional litigation. Anand noted that in Eli Lilly v Pfizer in Australia and Canada there was no privilege for communication with patent advisors. "This has led to forum shopping," he said.

Reasons for the Indian government's opposition to expansion of privilege include: it will keep out prior art leading to defective patents; privilege norms need to be set on socio-economic conditions; information can be protected through non-disclosure agreements; respecting the privileges of other countries violates India's sovereignty; and TRIPS and the Paris Convention do not mandate such an expansion. Anand disagreed with these, noting among other things that making disclosure of prior art required by law would stop privilege being a problem and expanding privilege law would help India.

"There has been some effort since 2003 to try to change the law, to expand the definition of legal practitioner," Anand said. "He added there may be more hope with the new Indian government.

Private receptions

Making your votes count

Congress delegates have agreed three draft resolutions, with a fourth due to be debated this morning (see pages 6 to 7). All will be voted on at the General Assembly taking place today.

Second medical use patents backed

Following a debate on Sunday, delegates agreed a 14-point resolution on "Second medical use and other second indication claims" (Question 238), which states: "A second medical use should be patentable if it meets the patentability requirements of novelty, inventive step (non-obviousness), and utility or industrial applicability."

The detailed resolution goes on to say: "Exceptions to patent eligibility for methods of medical treatment of the human or animal body should not preclude the patentability of second medical uses. Where such exceptions exist, claim formats for the protection of second medical uses that are compatible with those exceptions should be available."

Copyright exhaustion defined

Finally, delegates voted yesterday on Exclusion issues in copyright law (Question 240), which has become an important issue in the light of recent cases such as Kirtsaeng in the US and UsedSoft v Oracle in Europe.

It was resolved that "exhaustion" should be defined as "the loss of the copyright holder's right to exercise control of a copy of a copyrighted work, following the first sale or other transfer of ownership of that copy, with the authority of the copyright holder."

The resolution further states that the legitimate first sale or other transfer of ownership of tangible copies should be subject to exhaustion, but only the right of distribution should be exhausted. It adds that there should be no exhaustion in the case of streaming.

The resolution also rejects international exhaustion of rights, while leaving it to jurisdictions to provide for regional exhaustion (such as exists in the EU).

Finally, the resolution states: "If distribution right is exhausted for goods which are copyrightable works, whether recycling or repair of such goods constitutes infringement of (i) the right of reproduction of the copyright holder, (ii) the right of adaptation, arrangement and other alteration of the copyright holder and (iii) the moral rights (right to integrity) of the author should be examined independently."

This year's fourth working question concerns IP licences and insolvency. A further question on prior user rights, which followed last year's resolution on a grace period, was debated on Sunday and will also be before the General Assembly today.
WHAT DO YOU MOST LIKE ABOUT TORONTO?

Sultan Ahmed Sheikh, Sheikh Brothers, Pakistan
I think that Toronto is a great city. It is such a well-organized and peaceful city with wonderful people.

Mohan Dewan, RK Dewan & Co, India
This is my third visit to Toronto. Yesterday I visited Niagara Falls, which was a humbling and awesome experience. The food at last night’s cultural event was incredibly varied; I enjoyed this more than any other AIPPI Congress.

Gustavo Fischer, Fischer Abogados, Uruguay
Toronto is an impressive city with impressive architecture and friendly people. The view from the top of the CN Tower was great. We also took the ferry to Toronto Island to see the skyline. That is a must for anyone visiting the city.

Richard Beem, Beem Patent Law Firm, USA
I was impressed with the fact that I was able to find a very good Indian restaurant on a Sunday night. The food was ‘top notch’, as good as Goa in India. Overall, very similar to Chicago, a comfortable place with nice people.

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Rajesh Acharya, HK Acharya & Company, India
Toronto is a great place to visit; everyone is friendly and willing to help out. The CN Tower is a must see. Make sure you try out the glass floor on the top level. I would also recommend the Aquarium for an enchanting experience.

Qingfen Hao, Dragon IP, China
Compared to Beijing the air and the environment of the city is very clean. We took a trip to the Blue Mountain on Saturday, definitely worth the two hour drive. I’m really enjoying it here!

Curtis B Behmann, Borden Ladner Gervais, Canada
The diversity of Toronto is very appealing. The different food, cultures and people really make the place feel special. If you get a chance take the ferry over to the Toronto Islands, it’s a pretty unique environment with lots of activities.

Evgeny G Ilmer, ARS-Patent, Russia
Toronto is a city made up of beautiful architecture. It has a modern almost brave feeling to it, especially compared to my home city of St Petersburg. This week has so far been pretty busy, but I’m hoping to visit the Art Gallery of Ontario when I get a chance.

Aimee Zhu, Keyue IP Law Office, China
I really enjoyed visiting Toronto University. It was a very calm peaceful environment, great for learning. I also really admire the residents’ attitude to the disabled. They really make an effort to be inclusive in all aspects of life.

Alla V Slobodyanyuk, Slobodyanyuk & Partners, Ukraine
I really enjoyed the contrast of the old and new architecture in the city, but most importantly I found it fascinating to see so many cultures and people from different backgrounds living harmoniously. It really is something special.
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<td>Workshop V: Patenting computer implemented inventions</td>
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