ZenTech concludes employee data battle

B ioinformatics industry darling ZenTech has won a battle to protect its trade secrets, following a data breach of unknown proportions in its Silicon Valley research centre. Following a trial yesterday in front of a large audience of AIPPI members, the company succeeded in its third attempt to obtain an injunction to restrain an employee who, it alleged, took valuable information from its servers and fled the country in a bid to obtain a generous salary from a rival.

ZenTech has grown dramatically in the decade since its formation – over the last five years it has obtained patents for more drugs than any competitor and, despite its young age, is listed on the NASDAQ. A large part of this success is built on innovative algorithms that use drug discovery pathways and big data analytics to identify biomarkers. It is for this reason that the company strictly imposes security measures on employees, such as monitoring its electronic devices, keeping printing logs, digital monitoring and AI activity system reports.

The employee under scrutiny is Emilia Reilly, a decorated MIT alumni who gained several years of experience on the trading floors of Wall Street before moving to California to research life sciences for ZenTech. Reilly logged into the network remotely after 11pm on the day of the breach, accessing 30 files that were above her security level and deleting a further 50. ZenTech’s AI security system automatically flagged this activity, and the next morning she did not come to work.

Reilly was also found to be sending emails from her personal account, and activity on this server rose by 300%. It was at this point that ZenTech made its first, unsuccessful, attempt to bring an injunction against Reilly. Judge Kleinberg in California, who took the case, outlined why this application failed the initial application. “The application in and of itself is not unusual, however it seems to me to be quite general and speculative, there isn’t enough meat on the bones, it isn’t filled with enough facts, to make a decision.”

On this basis of insufficient information, the California court rejected the plaintiff’s call for injunction, but requested that the company come back with further information – especially requesting that it find out if the files in question were indeed trade secrets that could be used to damage the company.

“One of the areas that I would consider giving relief on an ex parte basis, is allowing the party who is seeking recovery here to take discovery,” he said. “Normally the plaintiff on a case in California can’t take discovery right away, but in this instance I will permit ZenTech to go ahead and issue subpoenas and make the deposition for Ms Reilly.”

Trade secrets are defined in TRIPs as protection for information that “is secret in the sense that it is not, as a body or in the precise configuration and assembly of its...”

Continued on page 2
AIPPI offers guidance on gene patents

AIPPI delegates tackled the sensitive subject of gene patenting in a resolution debated yesterday. Introducing the debate, Claire Baldock of Boult Wade Tennant in the UK said that recent court decisions, notably the Myriad judgments in the US and Australia, have called into question the patentability of isolated genes and genetic material. In addition, there is a lack of harmonisation between jurisdictions regarding the patentability of genetic materials, demonstrated by the inconsistent implementation of the EU Biotech Directive.

She added that blanket exclusions from patentability may be contrary to Article 17 of the EU Biotech Directive.

Great leaps have been made to improve existing laws, including the fourth amendment to the Patent Law, third amendment to the Trademark Law and the third amendment to the Copyright Law. For patents, proposed changes call for more international cooperation, an increase in punitive damages and protection targeting the internet and industrial designs.

Amendments to the Trade Mark Law passed on May 1 2014 include an improvement to the registration system and standardisation of the substantial criteria for trade mark registration. Proposed changes to the Copyright Act focus on the enlargement of scope of rights and punitive damages.

Yuefeng He, deputy director general of legal affairs at SIPO, outlined the proposed changes to the Patent Law covering protection, implementation, procedures, international participation and civil litigation law adoption. One of the changes is to perfect the rules of evidence for determining damages compensation by transferring the burden of proof for determining the amount of compensation.

“It will move away from the principle of who claims-who proves, which is sometimes impossible for the patentee, to one where the People’s Court could order the accused infringer to hand in account books and materials related to the infringement to determine the amount of compensation,” said He.

Other changes include the rise in the amount of damages from RMB1 million ($150,000) to RMB3 million. The amount of punitive damages for international patent infringement may increase by two- to three-fold according to the seriousness, level and result of the infringement. To enhance the execution of binding judgments and decisions, additional fines will be in place for failing to comply with administrative actions.

Enforcement is key to policy implementation. Increasing damages, transparency and efficiency are priority items for China.

“China has a comprehensive matrix network with horizontal and vertical synergies that are using top-down and bottom-up approaches in enforcement,” said He. At the horizontal level, IP administration coordination is taking place between SIPO and the State Administration for Industry & Commerce, Ministry of Agriculture and other governmental agencies in charge of public security and Customs. At the vertical level, governments at the central, provincial, municipal and county levels are also cooperating.

“Comprehensive, fast, equal and strict protection is the aim and will be done through various protection channels of administrative and judicial enforcement, and efficient coordination in verification and examination with all enterprises receiving equal protection,” said He.

As China embarks on ambitious projects such as the Belt and Road Initiative, its connections with the world will only continue to grow, as evidenced by its cooperation with WIPO, IFS, ID5 and of course AIPPI.
A resolution on requirements for protection of geographical indications (GIs) and appellations of origin (AOs) was approved in a Plenary Session yesterday, and will now go forward to Tuesday’s ExCo meeting to be adopted.

The resolution defines GI and AO and establishes the requirements for a registration procedure. It also sets out the scope of protection, who can enforce GI/AO rights, what remedies should be available and the grounds for refusing or invalidating a GI/AO. But a paragraph on the burden of proof in invalidity/revocation proceedings was deleted following a vote.

There was extensive discussion, initiated by a proposal from the French group, about the relationship between GIs/AOs and trade mark rights, and in particular whether a trade mark should ever be granted for a product protected by a GI/AO.

The proposal to include a paragraph addressing this issue was rejected, after several groups argued that it was outside of the scope of the question and required further study. Another paragraph regarding the inclusion of a GI/AO in a domain name was also deleted following a vote.

The French group also proposed including a sentence in the background to the resolution stating: “This resolution does not deal with the relationship between GIs/AOs and trade marks and domain names.” This was approved.

The relationship between trade marks and GIs was the subject of AIPPI resolution 191, passed at the Gothenburg Congress in 2006.

Resolution on GIs and AOs passed

What’s the difference?

According to the resolution, a GI is defined as “an indication which identifies a good as originating in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.”

An AO is a special kind of GI which is defined as “a geographical denomination of a country, region or locality, which serves to designate a product originating therein, the quality or other characteristics of which are due exclusively or essentially to the geographical environment, including natural or human factors.”
Getting to grips with GUIs

Abusive or creative?

Concerns about pay-for-delay agreements in the pharmaceutical industry and FRAND licensing in the telecoms industry have led to scrutiny and litigation concerning the intersection between competition and IP law. Where do you draw the line between encouraging creativity and limiting competition? This was the question discussed yesterday in the second session of the conference.

The business of IP and competition

Annabelle Bennett, chancellor of Bond University and former judge of the Federal Court of Australia, kicked off the discussion by talking about Australia’s competition policy review. The report found that IP inhibits access to knowledge and is bad for competition. “It’s much more difficult to reach consensus about specific requirements for GUIS,” Bennett said.

The groups were asked to comment on whether GUIS should be protected by patents, design rights, copyright, trade marks or sui generis rights.

Of these options, design rights seem to be regarded as the most appropriate, says Inui: “The current trend is that the appearance of a product should be protected by design rights. Some countries have not yet adapted but that is the general trend.” About 90% of groups believe that screen movements or transitions in a GUI should be protectable by design rights.

Regarding patents, there was consensus that GUIS as such should not be protectable, but that aspects of GUIS may be protectable. As Inui says: “Each group had a different expression as to how GUIS should be patent- ed.” About 70% of groups said that the criteria should be whether there is a technical effect, or a technical solution to a technical problem. There was no majority view on whether and how involvement of user’s mental activities should affect patentability; half the groups said it should not be affected.

Copyright and trade marks also have a role to play: 90% of groups thought GUIS should be protectable by the former, and 80% by the latter. However, there was less agreement on the details, such as whether the overall look and feel should be protected by copyright, or whether trade marks for GUIS require secondary meaning to be shown.

Finally, there was a consensus that there should not be a sui generis right for protecting GUIS, said Inui: “It’s quite difficult to imagine what would be appropriate. And why would we need another right?”

G UIS require secondary meaning to be shown.

“T he devil is in the detail,” said Bennett.

As adopted technology becomes more popular and widespread, the terms of licensing may be too creative. “There has been some soul searching on patents issued to improve the quality of patents,” said Damian Wasserbauer, of Wasserbauer Law. “The real problem people are still struggling with the patent ownership issue is that the fundamental right of a patent is under extreme stress.” New companies that become popular have the market power and do creative things. However, there is push back from popular sentiment as people change their minds on what they think should be regulated.

“When substantial amounts of money are paid to people, it smells fishy to a regulator,” said Christian Vollrath of the EU Commission. “Innovation can go in various ways and in merger control cases where industries are more concentrated and if in the end, there are very few big fish in the pond, the incentive to innovate is just not as pronounced.”

“The devil is in the detail,” said Bennett. “Many licences only have one licence [agreement] for the whole world. This is a problem for judges trying to determine the issues where different laws apply and it is impossible to enforce a judgment. People do forum shop.”

Awareness raising and programmes on building respect for IP will be essential in an increasingly globalised world. Technology adds another layer of complexity to the IP and competition conversation, especially in policy-making. The internet of things and forced interoperability is an example of how the threshold of dominance may be triggered. “As long as there’s no dominance, you can do as you like for competition law,” said Bennett. “The challenge is drafting a piece of law that is fixed in time and you find that as soon as it is set in stone, the technology changes. You think you’ve got brand new terminology but it’s become old hat in 12 months. How does law keep up with technology?”

“In the US, we still haven’t got data privacy laws that have much teeth,” said Wasserbauer. “The government is going to give some thought to the man-machine interface because the laws just aren’t there.”

Abusive or creative? Continued from bottom of page 1 components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information involved in the case.

Following this initial request being turned down, ZenTech made a second attempt, but quickly discovered that Reilly, an Australian national, had moved to the US and made her way through Germany and back to her native country. IT forensics also discovered that the deleted files were way beyond the scope of her research, and that she had been using her personal account to contact head hunters.

This was exposed by using ‘key logs’ to monitor activity, something the company had not previously disclosed to the court.

President Judge Matthias Ziegelm goalkeeper of the Regional Court of Munich, who heard ZenTech’s case in Germany, said that this meant that Reilly must be informed she was under suspicion.

“The key log is a major problem because we were not informed in the first application, and we have a clear case that using key logs is only permissible if you have complete suspicion that the employee has committed a crime,” he said. “This will outlaw any decision ex parte, because the plaintiff has unclean hands and presents non-permissibly and illegally obtained evidence.”

Following the second case being dismissed on this ground, Reilly was informed of the motion to get an injunction and the case went to trial in Australia, focusing on trade secrets. In the trial, Reilly confirmed she had left ZenTech to join life sciences company RBS in Sydney for a significantly higher salary, and that she had shared certain information with the scientific team in the process.

ZenTech claimed that Reilly accessed files not within the scope of her work, with the aim of knowing information not already known that was not already in the public domain. The company sought a further injunction to restrain Reilly from using any of the information related to the specific research techniques or identified criminal targets.

The response from Reilly was that she was using the information to improve her own skillset, that the information had been known, that it was not confidential, and that it was in the public interest. A combination of known parts cannot be sufficiently confiden- tial to warrant an injunction, she said.

Justice David Yates of the Federal Court of Australia, who presided over the trial, stressed the importance of asking whether the combination is confidential. “The fact that the confidential information consists only of a combination of things that are individually within the public domain is relevant, but for me the central question is whether the combination is confidential,” he said to the court.

“I don’t think anyone’s focus should be diverted from the fact that she has dishonestly used that information for her own benefit, and for the benefit of her new employer,” said Yates. “That is an unconsci- entious use of confidential information that should be restrained.”

The case of ZenTech vs Reilly is fictional. It was debated in yesterday’s panel session “The best kept (trade) secret: a real life scenario...”
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Calling for consensus on computers

Video sharing company YouTube should stop taking advantage of safe harbour laws and pay its fair share to the music industry, if it is to successfully close the value gap between those making money and those providing the content. That was the message given by panellists in yesterday’s second session “On a different note – copyright and music”.

Panelist Ingrida Veiksa presented one of the conclusions of a recent IFPI Survey highlighting the gulf in revenue that the music industry receives from its two biggest contributors Spotify and YouTube. Statistics suggest that YouTube is the world’s largest on demand music service with 900 million users, but returns are only around $550 million per year. Compared to that Spotify, Deezer and Apple Music are much smaller, with only 212 million combined users, but return to rights holders is around $3.9 billion.

This is calculated as $20 per user for Spotify et al, while YouTube pays less than $1 per user. “It creates a value gap, defined as ‘the value of the mismatch between the value of users of those services and the revenue of an invention should not be denied purely on the basis that it involves the use of a computer.’” said Lisa Margolis of Warner Bros.

Safe harbour is a defence to a claim of infringement of copyright, and was meant to reflect, like the telephone services, that if someone does something illegal over your network that you should not be held responsible,” said Dan Rosen, CEO of the Australian Recording Industry Association (ARIA). Safe harbour provisions are part of the Digital Millennium Copyright Act of 1998, which aimed to encourage the development of the internet while also protecting rights holders.

“YouTube is different because it is essentially a business now that is selling advertising against this content,” she said. “YouTube should increase the rates that is paying, there is a lot of pressure on them in the US to do that.”

Lisa Margolis of Warner Bros said that YouTube claims that payments are more than the IRS claims. “Hopefully somebody can find a solution,” she said. “YouTube is a different business, they agreed to dismantle that site completely: “There has been some progress, but there still needs to be more.”

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A decade of change for AIPPI

Laurent Thibon is stepping down this week after serving for four years as Deputy Secretary General and three years as Secretary General of AIPPI. He reflects on the changes he has seen in conversation with James Nutton.

Anyone who has attended an AIPPI event for at least the past decade knows Laurent Thibon. His calming presence at the podium during ExCo meetings, combined with his distinctive laugh and famous moustache (first grown, he says, nearly 30 years ago) ensure that even if you have never spoken to him, you almost certainly know who he is.

After seven years on the Bureau, though, Thibon says he is looking forward to returning to “anonymity” at the next AIPPI Congress. His role as Secretary General – a voluntary position, but one that takes up many hours time – comes to an end this week.

Over the past three years in particular, Thibon has overseen big changes in the way AIPPI is run. “We have helped the General Secretariat to double in size since 2015 and to take on more and more operational duties, particularly concerning the Congress,” he says. “Once we moved to annual Congresses it became very clear that the workload is too heavy for one person to bear.”

While the changes approved at the Rio Congress in 2015 have now mostly been implemented, Thibon says “there is still more work to be done” by his successor and other members of the Bureau, in particular regarding how the Bureau, Executive Director and General Secretariat work together, and the role played by the statutory committees. “My period as Secretary General was mainly one of transition,” he says. “The role is now very clear to focus on the members and national groups, while the Executive Director and his staff take care of the operation of the association.”

But Thibon will leave his successors to decide exactly how future changes will be implemented. “It’s good to have rotation, and I think new people will bring in new ideas and will be positive for the organisation,” he says. Meanwhile, he hopes he will have a bit more time for “other activities, such as gardening”.

New national groups
As well as the internal improvements, the past few years have seen further growth for AIPPI. On Saturday the ExCo approved the creation of a national group for the UAE, which followed the launch of a Jordan group last year. “It is important for AIPPI to be present throughout the world,” says Thibon. “We have grown significantly in Asia, and now we are seeing very positive developments in the Middle East. I think the next step should be to raise our profile in Africa.”

“It is complex to launch these new groups, and it has been a great source of satisfaction for me to see them grow,” says Thibon. “As a principle, I think it’s important for AIPPI to be present everywhere to fulfil our global representative role.”

This is demonstrated in the locations of the Congresses, with more new venues being proposed by national groups to host AIPPI Congresses in the coming years. Thibon views this as a positive result of the recent rule changes in the responsibilities related to organising the Congress.

Australians citizens used to suffer from culinary stereotyping: lazily peddled assumptions of Fosters swilling, Vegemite devouring masses were de rigueur for much of the twentieth century.

But some point around the turn of the millennium, attitudes started to change. And it’s easy to see why. Spend a few days in Sydney and it is clear that this is a city that takes its food seriously. Its close proximity to Asia means delegates can find some of the world’s best dishes here, and the local chefs love to cater to their own tastes on such fusion dishes.

We asked a couple of locals what they would recommend, what the most Sydney-esque culinary experience that someone in town for a few days could have. The consensus was a beachside brunch on the wonderful Bondi Beach; throw on some boardies and a pair of thongs, and head to Speedo’s Café or The Depot for a great cup of coffee and breakfast at lunchtime.

For those that like to wear more pedestrian shoes while they eat, Sydney still has plenty to offer. A few of the more upmarket restaurants for those looking to try something special are ARIA, Quay and Tetsuya’s, all of which come highly recommended. Alternatively head to Sepia in Darling Harbour for a nine course meal with offerings including sancho roasted duck breast and seared Rottnest Island scallops.

Not everyone’s expense account will stretch to scallops. Besides, you might simply want an Aussie meat pie and a sampling of one of Australia’s best-selling beers, Victoria Bitter. For this, find your way down to Harry’s Café de Wheels at Woolloomooloo (yes, that’s eight Os), where your pie comes complete with mash and peas.

Head to Potts Point for some excellent Asian fusion food. For Japanese, Cho Cho San comes highly recommended, Mr G’s offers a wonderful modern experience, and Billy Kwong is Chinese-Australian fusion brought to you by renowned head chef Kylie Kwong.

Hipsters among the delegation looking for a taste of what Sydney has to offer need look no further than Surry Hills’ stylish café scene. Just south of Hyde Park is reminiscent of Williamsburg in Brooklyn – and has food to match. There is plenty of choice: Via Napoli provides some of the best pizza in town, and the wagyu skirt steak at Porteño is legendary in its own right.
## TODAY’S SCHEDULE
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