

June 2005
Newsletter

Intellectual Property

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This newsletter is written in general terms and its application in specific circumstances will depend on the particular facts.

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Copyright and designs

A disappointing decision for the classical musical industry

In our August 2004 edition, we reported on the first instance decision in *Sawkins v Hyperion Records Ltd*¹, where the High Court held that edited versions of works that have fallen out of copyright may attract their own copyright protection. The claimant, Dr Sawkins, was a musicological scholar and the composer of modern performing editions of three works originally composed by Michel-Richard de Lalande (court composer for Louis XIV). Without the claimant's permission the defendant record company produced a sound recording of a performance, which relied on the claimant's modern performing editions and, in accordance with MCPS² guidance, paid no royalties to the claimant.

The judge at first instance, Patten J, acknowledged that there was no clear and obvious authority to help him decide whether copyright (in respect of a musical work) could exist in an edition of existing scores in the absence of new music in the form of notes on the score (other than correction of wrong and unsatisfactory notes). However, he applied the test that, where the material produced was based on an existing score, the question to ask was whether the new work was sufficiently original in terms of the skill and labour used to produce it. He held that sufficient skill and labour had been expended for copyright to arise in the claimant's modern editions (he had spent over 300 hours on each piece and made 3,000 editorial interventions) and that the defendant had infringed the claimant's copyright. The defendant appealed on the basis that the claimant's modern editions were neither 'original' nor 'musical' and therefore did not satisfy the statutory definition of 'original musical works' under s1 Copyright, Designs and Patents Act 1988 (CDPA).

In the recent decision³, the Court of Appeal held that Patten J had applied the right test and that the effort, skill and time which the claimant had spent in making the modern editions were sufficient to satisfy the requirement that they were 'original' works under the CDPA. The Court also held that the modern editions were 'musical' works under the CDPA. In addition, the Lord Justices agreed with Patten J that "the real issue which divides the parties is whether a musical work includes items such as the figuring of the bass, ornamentation and performance directions or is limited to the score."

The Court of Appeal decided that the fixation in the written score or on a record was not in itself the music in which copyright subsisted. It was, held the Court,

"wrong in principle to single out the notes as uniquely significant for copyright purposes and to proceed to deny copyright to the other elements that made some contribution to the sound of music when performed, such as performing indications, tempo and performance practice indicators, if they were the product of a person's effort, skill and time, bearing in mind the relatively modest level of the threshold for a work to qualify for protection. The claimant had sufficient aural and musical significance to attract copyright protection."

The decision is a disappointing one for the classical music industry, which may find that, where previously record companies did not have to pay royalties in relation to performances of compositions that have fallen out of copyright, they now have to pay royalties to editors of those original works where they have expended a sufficient amount of effort, skill and labour.

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¹ [2004] EWHC 1530

² Mechanical Copyright Protection Society

³ [2005] EWCA Civ 565

New decision on the "fair dealing" defence

The High Court has recently⁴ looked in some detail at the ambit of the "fair dealing" defence under s30(1) Copyright, Designs and Patents Act 1988. This section provides that "fair dealing" with a work for the "purpose of criticism or review, of that or another work"...does not infringe any copyright in the work, provided that it is accompanied by a sufficient acknowledgement..."

FRASER-WOODWARD LTD V BRITISH BROADCASTING CORPORATION

This decision concerns the use of photographs in a television series. A television production company made a series of programmes entitled "Tabloid Tales", which set out to criticise tabloid journalism, the methods used by the tabloid press to obtain stories, and the way in which certain celebrities exploited the press to increase their fame. The programmes contained images of tabloid newspaper pages, some of which included photographs of celebrities. These shots were on screen for a few seconds.

One programme in the series looked at the way in which Victoria, the wife of the footballer, David Beckham, manipulated the press to her advantage. The programme's presenter noted the way in which many photographs of the Beckhams, which had ostensibly been taken when they were off guard, had been taken by the same photographer. He suggested that this was because Victoria sometimes alerted the photographer to the couple's impending movements to enable him to be on hand to take these ostensibly "off guard" pictures.

The claimant, the photographer, sued the company and the BBC (which had broadcast the series) for infringement of copyright in fourteen of the photographs used in this programme. The defendants relied (inter alia) on s 30(1).

Mann J gave the following guidance on the interpretation of s 30(1):

- (i) "Criticism" was not restricted to criticism of the style of the work but could extend to, for example, the ideas and philosophy underlying the work.
- (ii) The works being criticised/reviewed did not need to be specifically referred to, nor did the "sufficient acknowledgement" need to be contemporaneous.
- (iii) "Fairness" referred to the manner and purpose for which a work was being used, rather than, for example, the relationship between the parties.

The judge held that the defendants had used the claimants' photographs for the purpose of criticising a certain style of journalism: the coverage of celebrity. In several cases, they had also criticised the photos themselves, ie the fact that they had not been unstaged, as they purported to be. He rejected the claim that the defendants had made excessive use of the photos. Any legitimate use of a photograph for the purposes of criticism or review was likely to require display of a large part of the photograph in order to make the point that was being made. Equally the defendants had not devalued the photographs, nor had they had any ulterior motive in using them. Their use had therefore been fair for the purposes of s30(1).

Mann J went on to hold that the fact that the defendants had acknowledged the claimant as author of the photographs at some stage in the programme was enough for there to have been a "sufficient acknowledgement" of the claimant's rights for the purposes of s30(1). They did not need to have identified him every time the photo appeared in the programme.

Finally, the judge held that the defendants could, in relation to the 14th photo, rely on the defence under s 31(1) of the Act, which provides that "copyright in a work is not infringed by its incidental inclusion in an artistic work, sound recording, film or broadcast." He ruled that the focus of the filmed shot in the programme had been the headline of the newspaper, and the accompanying photo had been included incidentally for the purposes of s31(1).

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⁴ The Times, 15 April 2005

Guidance on recovery of additional damages for breach of injunction in copyright

The recent High Court decision in *Phonographic Performance Ltd v Reader*⁵ provides guidance on the extent to which a claimant may be awarded additional damages under s97(2) Copyright, Designs and Patents Act 1988 where a defendant has breached the terms of an injunction or undertaking restraining it from infringing infringement of copyright.

The defendant, who owned and ran a club in Brighton, applied for a licence from the claimant (the body which authorises the playing of sound recordings in public and exploits copyright in sound recordings assigned to it by the granting of licences for a fee). When the defendant failed to pay the licence fee, the claimant obtained a court order preventing him from playing in his club any music subject to copyright that was managed by the claimant. The defendant then obtained a PPL licence but failed to renew it in August 2001.

In March 2004 the claimant obtained evidence from enquiry agents that the defendant had played a number of sound recordings which were the subject of the injunction. On the basis of this evidence the defendant was found to be in breach of the terms of the injunction and in contempt of court. He was ordered to pay the claimant's costs and the claimant sought additional damages under s97 CDPA. Under s97,

"the court may, in an action for infringement of copyright, having regard to all the circumstances, and in particular to: (a) the flagrancy of the infringement, and (b) any benefit accruing to the defendant by reason of the infringement, award such additional damages as the justice of the case may require."

The Court had to decide whether damages could be awarded on a successful application for committal for contempt. The claimant argued that the defendant's deliberate refusal to obtain a licence had caused it substantial expense in inducing the defendant to obtain a licence and in policing his activities and that

such losses could be recovered as additional damages because they were a reasonably foreseeable consequence of the defendant's failure to obtain a licence.⁶

Pumfrey J held that, where the underlying infringement was established to the standard required to support an application to commit for breach of an injunction, there was no arguable defence to a claim for copyright infringement. The fact that the infringements complained of had been committed in breach of a court order justified either an enquiry as to additional damages or a summary award of additional damages.

He applied the decision in *Sony Computer Entertainment Inc v Owen*⁷ where Jacob J (as he then was) held that s 97 required the court to have regard to all the circumstances, including whether the infringement was in breach of a court order. He went on to say that copyright differed from many other rights precisely because there was a statutory right to additional damages if the Court, in all the circumstances, considered it right to grant them.

The judge also held that expenses incurred which could not be recovered as part of the costs of the action but which were reasonably foreseeable consequences of the defendant's acts of infringement were recoverable. This decision is useful for copyright owners who may not always consider claiming for the costs of monitoring infringers of copyright.

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UK extends protection of rights to other countries

New regulations⁸ came into force on 1 May 2005, which will extend protection under the UK's Copyright, Designs and Patents Act 1988 to certain types of works created in specified countries outside the UK. The new rules will not affect works in which

⁶ the transcript is in fact incomplete at this point and we have had to guess the missing word!

⁷ [2002] EMLR 34

⁸ The Copyright and Performances (Application to Other Countries) Order 2005, SI 2005 No. 852

⁵ unreported, 22 March 2005

copyright *already* subsists, only to works created after 1 May 2005.

The new rules work on the basis of reciprocity, ie the various countries listed are all deemed to provide adequate protection for British copyright works.

By way of example, Britain now protects the copyright in sound recordings made in India, New Zealand, Pakistan, Taiwan, Thailand and the United States of America.

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UK: New Labour Government promises copyright reform

In its pre-election manifesto, the UK's Labour Party committed itself to "modernise copyright and other forms of protection of intellectual property rights so that they are appropriate for the digital age." No further details were given of Labour's plans if (as it did) it won the election on 6 May 2005, beyond its intention to (i) use Britain's forthcoming Presidency of the European Union to "ensure content-creators could protect their innovations in a digital age" and (ii) work with industry to counter the problem of piracy.

Judging by the contents of the first "Queen's Speech" after the election, the modernisation of copyright is obviously not high on the Government's agenda. No mention was made of copyright or any other intellectual property right in the list of the forty new Bills that the Government intends to introduce in the current Parliament.

Neither of Labour's main opposition parties, the Conservatives or the Liberal Democrats, included any specific IP-related policies in their manifestos.

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Patents

New decision on entitlement

The Court of Appeal recently gave judgment in a dispute over entitlement to patents between two rival printer manufacturers, Markem Corporation and Zipher Ltd⁹. The key employees of Zipher had, until 2000, worked for Markem. The patents related to printing technology, specifically a printing machine for printing barcodes on a moving production line. Before leaving Markem, the employees had discussed the need for such a machine. However, the "clever idea" of how to realise such a machine only came after their move to Zipher.

Markem launched proceedings in High Court, claiming to be entitled to a number of patents (and applications) which had been filed by Zipher. HHJ Michael Fysh QC partly upheld Markem's claim and, in his judgment, recorded that he had found Zipher's witnesses to be less than ideal. Zipher appealed.

AN ENTITLEMENT CASE NEEDS MORE

On appeal to the Court of Appeal, Jacob LJ gave the leading judgment. Markem's case had been based on the provisions contained in the Patents Act 1997. Markem had not advanced a case based on breach of confidence, contract, fiduciary duty or any other wrong. The Court of Appeal stated that, in entitlement proceedings, the question was about "title", which involved determining legal rights. The person claiming entitlement must show that, in some way the present patentee had not been entitled to apply for the patent, either at all or alone. Markem contended that this was not what was envisaged by the Act as it placed the Patent Office in the position of having to determine questions of law outside the scope of patent law. The Court rejected this argument. However, the Court accepted that the Comptroller's jurisdiction might be limited under the statutory provisions and, in certain complicated situations such as where an invention was made partly using information in breach of confidence and partly

information provided by the applicant, then the Comptroller might not have jurisdiction.

LIARS?

HHJ Michael Fysh QC had been critical of Zipher's witnesses, three of whom were the inventors, and had found them to be liars. The Court of Appeal found that in doing so, he had erred in two respects. The witnesses had not been given a fair opportunity to deal with an allegation that their evidence was untrue, indeed this was not even part of Markem's case and secondly, the Judge's reasons for the adverse findings were inadequate.

VALIDITY AS AN ISSUE IN ENTITLEMENT PROCEEDINGS

Markem contended that a number of claims in dispute were invalid but belonged to Markem anyway. Markem, relying on section 8 of the Patents Act, submitted that validity was irrelevant to entitlement proceedings. The Court disagreed - where an attack on validity was clear and unarguable, then the Comptroller should take that into account in determining what was the inventive concept and "*only when there is self-evidently no bone should the dogs be prevented from fighting over it*".

RELEVANCE OF THE CLAIMS

HHJ Michael Fysh QC's judgment had proceeded on a claim by claim basis, having taken the granted claims as encapsulating accurately the invention. The Court rejected this approach, preferring to seek out the heart (or hearts) of the invention from the document as a whole. Only once that exercise had been performed should the enquiry determine who contributed what.

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⁹ unreported, 22 March 2005

Trade marks and passing off

New Registry Practice on registration of surnames

The Trade Mark Registry has changed the rules on registering names as trade marks. The changes have made it easier for applicants to obtain trade marks for names.

The Registry changed its rules following a ruling by the European Court of Justice in *Nichols Plc v Registrar of Trade Marks*¹⁰. Prior to this ruling the Registry had a strict policy whereby any trade mark application for a surname that appeared more than 200 times in a London telephone directory would be rejected. However, in *Nichols*, the ECJ said that surnames should be treated like any other trade mark application.

Now, therefore, in assessing whether applications for names are distinctive enough to be registered, the Registrar will examine applications on a case-by-case basis, taking into account the name that the applicant wishes to register, the sector of the market, how common the name is and the likelihood of confusion.

On that basis it is likely that more names will be deemed registrable unless there is a real risk of non-distinctiveness which would lead to confusion in the marketplace.

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LINKIN PARK trade mark application

The US rock band, LINKIN PARK, has failed in an attempt to register its own name as a UK trade mark in relation to posters. A recent appeal¹¹ to the Appointed Person (Richard Arnold QC) failed to overturn the original objection by the Trade Mark Registry that the mark had no distinctive character and was descriptive of the goods.

The band had applied to register the mark LINKIN PARK in respect of a wide range of goods and services. The stumbling block came with regard to their application for trade mark registration for posters. The Trade Mark Registry raised an objection because it held that for posters the mark LINKIN PARK was descriptive and lacked distinctive character on the following basis:

- the name LINKIN PARK appearing on posters is the subject matter and therefore an essential characteristic of that poster and therefore is descriptive.
- a consumer would be aware that it is common practice for third parties to trade in posters. The use of LINKIN PARK on a poster would not identify the poster as originating from the rock band as compared with other third party traders.

The Appointed Person agreed and said that a person asking "do you have any LINKIN PARK posters?" would be referring to a characteristic of the goods being sought rather than referring to the origin of the goods. It would be very difficult for a third party trader to market any type of competing posters without using the mark to describe them.

Linkin Park is not the only rock group to fail in recent days in its attempt to register its name as a trade mark (although for different reasons from the LINKIN PARK decision). On 4 May 2005, the European Court of Justice held that "Westlife" could not be registered as a Community trade mark because it was confusingly similar to an existing registration for the word "West". A German company had registered "West" as a trade mark in relation not only to its "West" cigarettes but also music festivals, t-shirts and other merchandise and the ECJ held that:

"The relevant public might think that the origin of the goods and services marketed under the Westlife mark is the same as that of the goods and services marketed under the West mark, or at least that there is an economic link between the various companies or undertakings which market them."

¹⁰ [2005] 1 WLR 1418

¹¹ unreported, 7 February 2005

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Privacy and confidential information

Douglas v Hello! Ltd - a victory for spoilers?

The Court of Appeal¹² has controversially reversed Mr Justice Lindsay's decision in favour of OK! magazine that Hello! magazine breached a duty of confidence by publishing unauthorised photographs of the wedding of Catherine Zeta-Jones and Michael Douglas. The Court upheld the Douglases' claim for breach of confidence and concluded that the interlocutory injunction originally granted should have been maintained.

THE BACKGROUND

The Douglases sold to OK! the exclusive right to publish photographs of their wedding reception for a period of nine months. An official photographer was hired and no other photographs were permitted. Although there were tight security arrangements, a paparazzo infiltrated the reception and took a series of unflattering photographs. These were published in Hello! in the UK. Mr Justice Lindsay held that the Douglases were entitled to damages against Hello! on the grounds that the reception was a private event and the publication by Hello! was a breach of confidence. OK! was also awarded over £1million in damages against Hello! on the basis that a confidence was owed to them in the nature of a trade secret. Mr Justice Lindsay rejected OK!'s case against Hello! to the extent that it was based on various economic torts such as interference with the business of OK! or intention to injure.

THE GROUNDS OF APPEAL

The parties appealed. Hello! argued that the Douglases and OK! had no cause of action based on confidence. OK! argued that Hello! was also liable on the basis of one or more economic torts. Both Hello! and OK! contested the Judge's assessment of damages.

The Douglases had originally claimed damages under two heads: (1) for invasion of privacy and (2) for damage to their commercial interests in information about their wedding. The issues in relation to their claim were:

- Did the law of confidence protect information about the wedding in the nature of (a) a privacy right and (b) a commercial interest?
- Did the Douglases lose the privacy right when they entered into the OK! contract?

The issues in relation to OK!'s claim were:

- Did the OK! contract extend the protection of the law of confidence to OK!?
- If so, was that protection lost when OK! published the authorised photographs?

THE COURT OF APPEAL'S DECISION

The law of confidence in the context of the protection of privacy is a rapidly developing area of English law. The Court of Appeal reviewed the history of the law of confidence, what constitutes private information and the special considerations which attach to photographs. (Photographs are recognised by the Courts to be a particularly intrusive means of invading privacy.)

The Court concluded that applying the House of Lords test in *Campbell v MGN* photographs of the wedding fell within the law of confidence as extended to cover private information. Hello! argued that the effect of the OK! contract was that the Douglases could not advance a claim that their wedding was a private occasion. The Court disagreed. The Douglases were entitled to complain about unauthorised photographs as infringing their privacy on the basis that these detracted from the favourable picture of them conveyed by the authorised photographs.

¹² unreported, 18 May 2005

The Court also broke new ground by recognising the right of celebrities to profit commercially from publicising private information about themselves. However, they concluded that this did not mean that confidential information of this nature could be treated as property which could be owned and transferred. Thus OK!'s claim against Hello! failed. Any right that OK! had to information about the wedding was no more than an exclusive licence to exploit the photographs for a limited period. The licence did not carry with it any right to claim the benefit of any other confidential information vested in the Douglases.

OK!'s complaint was not that Hello! published images which OK! had the exclusive right to publish, but that they published other photographs that no one had the right to publish. These photographs invaded the privacy right which the Douglases had retained. It was the Douglases and not OK! who had the right to protect this confidence and the Court concluded that OK! had no right to commercial confidence in relation to the wedding to invoke against Hello!.

The Court also dismissed OK!'s claim based on economic torts on the basis that Hello! did not have the requisite intention. The trial Judge had found on the facts that Hello! acted out of self interest rather than intent to cause economic harm to OK!.

REMEDIES

Two issues were raised on damages. Although the Court had reversed the Judge's decision on liability in favour of OK! it commented that the Judge's original assessment of damages on the basis of loss of profit was right to include the loss caused by the further publication of some of the photographs in two national newspapers. This was sufficiently consequential and foreseeable to make Hello! liable for them. The argument that the Douglases were entitled to more substantial damages on the basis of a notional licence fee was rejected for several reasons. The most important of these was said to be that having sold the exclusive right to publish photographs to OK! the Douglases could not then grant a further licence to Hello!.

The Court then considered the discharge of the interlocutory injunction. It held that in the light of the law as it now stands following *Campbell v MGN*

and *von Hannover v Germany*, the Douglases had a virtually unanswerable case that publication of the unauthorised photographs infringed their privacy. The couple had met the House of Lords' test for grant of an interlocutory injunction in *Cream Holdings v Banerjee* that they would probably succeed at trial - in fact their case was so strong that it may have justified summary judgment. Furthermore the Douglases' rights could only have been satisfactorily protected by the grant of an injunction. The relatively small damages awarded to the couple could not represent any real deterrent to a publisher contemplating publishing photographs which infringed an individual's privacy. The refusal to grant an injunction represented a strong potential disincentive to respect for private life which should be respected under the Convention on Human Rights.

CONCLUSIONS

A pyrrhic victory for the Douglases will be welcomed by other individuals seeking to protect their privacy from the lenses of the paparazzi. However, it leaves publishers anxiously waiting for the House of Lords to determine whether they can rely on the law of confidence to protect the "exclusives" on which they often rely to boost circulation figures. If the House of Lords agrees with the Court of Appeal the decision will allow rival publishers to run "spoilers" without fear of legal redress.

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Beckhams fail to restrain nanny's breach of confidence

In an 11th hour attempt by the Beckhams to prevent publication of their nanny's allegations in the *News of the World* the following morning, Langley J ruled that it was in the public's interest to read the story, despite the existence of a confidentiality agreement between the parties.

Since the House of Lords decision in *Cream Holdings Ltd v Banerjee*¹³ it has been decided that, in most cases where an injunction might affect a defendant's

¹³ [2004] UKHL 44

right to freedom of expression then the court must be satisfied that the claimant is "more likely than not" to succeed at trial. The freedom of expression of the press and the individual's right to privacy under the Human Rights Act are now to be balanced equally.

However, this case is unusual because the nanny, Abbie Gibson, had signed a confidentiality agreement and, for example, the Blairs succeeded in obtaining an injunction to prevent their former nanny from publishing a book about them due to the confidentiality undertaking she had given them¹⁴ as did Lady Archer in a similar case against her PA.

The Beckhams appear to have suffered in this case from having striven to present themselves to the public as the fairytale couple (and arguably several of David's lucrative sponsorship deals rely on his clean living family man image 'Brand Beckham'). In the face of revelations about David's affair with Rebecca Loos, the couple are desperately trying to maintain this 'happy family' image and for these reasons the judge was persuaded by the *News of the World* that the public's interest in hearing further revelations of the Beckhams' hypocrisy outweighed the couple's contractual right to enforce the confidentiality agreement.

However, the extent to which this case is a significant victory for the freedom of the press remains to be seen. The application was made in haste with little available information and a feeling that much of the detail in Abbie Gibson's story was already in the public domain. A few days after the publication of the story the Beckhams initiated a claim for breach of contract and breach of confidence against Gibson herself. Eady J in the High Court ruled that Gibson is barred from revealing any further 'confidential information' about the Beckhams until trial (although she was not prevented from repeating or commenting on what had already been made public because, in this case, it would be futile as publication had taken place on such a wide scale). The nanny has also been ordered to hold the money she received from the *News of the World* until trial or further order.

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¹⁴ Blair v Associated Newspapers (5 March 2000), unreported.

Miscellaneous

A new Intellectual Property Charter?

The Royal Society of Arts ("the RSA") has launched a new project to consider whether or not current intellectual property laws maintain the appropriate balance between what should be in the public domain and what should be protected.

It is proposed that the Charter on Intellectual Property will "promote a new, fair, user friendly and efficient way of handing out intellectual property rights in the 21st century".

Details as to who is involved in writing the charter can be found on the RSA website - www.rsa.org.uk.

At a meeting at the RSA on 17 March 2005, there was a debate as to whether or not the UK's current patent laws provided an adequate balance between the needs of the pharmaceutical industry and the needs of the developing world. David Rosenberg of GSK spoke in support of the current arrangements, and James Love of the Consumer Project on Technology, a US non-governmental organisation, spoke of the need for change, and proposals for a new Treaty on IP rights. Details of the presentations appear on the RSA website and are well worth reading.

Anyone interested in the future of protection of intellectual property rights should be aware of the RSA's initiative, and also of the proposals for the new Treaty. The debate was lively with Mr Love expressing very negative views about the patent system and its use in protecting innovation and helping to finance pharmaceutical companies. Mr Rosenberg gave a spirited defence of the patent system as it exists today.

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Special IP High Court set up in Tokyo

In our December 2004 issue, we reviewed the Japanese government's IP strategic policy, which is aimed at boosting the Japanese economy and competitiveness of Japanese companies through a series of wide ranging reforms and initiatives concerning intellectual property. As part of those changes, on 1 April 2005, the Intellectual Property High Court was set up as a special unit within the High Court in Tokyo. Its stated purpose is to: (i) allow IP rights owners to effectively enforce their IP rights; (ii) effectively deal with the increasing number of IP cases in Japan; and (iii) set standard precedents for similar cases.

The IP High Court will hear appeals against Japan Patent Office decisions and IP-related appeals from either the Tokyo or Osaka district courts. The IP High Court is comprised of four divisions and 18 specialist IP judges. The Court also has its own IP researchers who will assist the judges by researching technical matters for complex IP cases.

One of the notable features of the IP High Court is the introduction of expert commissioners. About 100 technical experts have been appointed by the Supreme Court as IP expert commissioners. The expert commissioners are made up of university professors, patent attorneys and researchers at private companies. The IP High Court can instruct expert commissioners for complex IP cases. In normal cases, three judges will hear the appeal, and for particularly important cases, five judges will hear the appeal.

The introduction of the IP High Court, as with many other aspects of the recent changes to the intellectual property system in Japan, has been favourably received by IP owners and lawyers.

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