

**DID YOU KNOW WIPO COULD DO THAT?****Author: Jill N Link, PharmD, JD**

Patent Offices around the world - including the U.S. Patent and Trademark Office - are continually improving websites through enhanced user interfaces and also providing new tools. The World Intellectual Property Organization (WIPO) is no exception. WIPO has long been a reference for searching and downloading international applications, namely Patent Cooperation Treaty (PCT) patent applications. However, WIPO provides many other useful tools that people may not be well aware of. In the last few months a few very interesting upgrades have been made that provide more readily available information on international patent applications. A few of the available resources from WIPO are outlined here:

**Translations.** WIPO is now using AI or “artificial intelligence” in its instant translational tool for certain patent documents. Even more existing is that it is a free translation. This unique technology employs what is referred to as neural translation, which is a translation tool that is trained to provide patent translations in a natural language fashion. This is achieved by direct comparison of the same patent document between two different patent offices in distinct languages (and comparing over 60 million sentences). Currently WIPO’s AI tool is aimed at translating Chinese, Japanese, Korean, French, German, Russian, Spanish and Portuguese patent documents into English (and visa versa). The version available on the website provides Chinese-to-English translations and initial comment on the program are quite favorable and indicates the accuracy far exceeds what is available from other translation programs, such as Google translate. More information on this tool is available at <http://www.wipo.int/patentscope/en/wipo-translate/index.html>, including a User Manual providing options on translating entire documents or smaller portions. In particular, a user can copy and paste portions of a text for translate into the program, or click on the “WIPO Translate” button within a PATENTSCOPE search result.

**Dossier Content.** WIPO now provides access to dossier content from participating patent offices through the PATENTSCOPE tab in PCT application or family (such as a National Phase filing), including patent applications from the European, Japanese and Canadian national/regional collections. The goal is to extend this to also include US, Korean, Chinese and Australian applications (although no time frames are available on these additional countries at this time). Notably only published documents are available that relate to the substantive search and examination of applications in each office. This information is often referred

to as a “file wrapper” in the US. The WIPO dossier content is largely up-to-date information on the particular patent and includes search reports, office actions, and any correspondence between the applicant and the patent office. English versions of documents from China, Japan and Korea are available through automated machine translations.

**Multilingual Terminology Tool.** A program called “WIPO Pearl” was developed by WIPO language experts and terminologists to provide a terminology database after studying 10 languages (Arabic, Chinese, English, French, German, Japanese, Korean, Portuguese, Russian and Spanish). The tool provides scientific and technical terms across languages based on their use in patent documents. The intent is to increase consistency within patent documents across different languages and provide terms and equivalent definitions in other languages. More information on this tool is available at <http://www.wipo.int/reference/en/wipopearl/>.

**Patent Landscapes.** A very interesting tool available is through patent landscape reports (PLRs) from WIPO. These are meant to provide a “snapshot of the patent situation of a specific technology, either within a given country or region, or globally.” The PLRs provide a search of patent databases and then an analysis of patenting activity, including a visual assessment. Landscapes are available on a number of areas and step-by-step instructions on generating a PLR are also available. The most recently issued PLR available include technologies of Palm Oil Production and Waste Treatment Technologies, Microalgae-Related Technologies, and Assistive Devices for Visually and Hearing Impaired Persons. Landscape reports are available at [http://www.wipo.int/patentscope/en/programs/patent\\_landscapes/](http://www.wipo.int/patentscope/en/programs/patent_landscapes/).

**Patent Searching.** We can’t forget to mention one of the original useful tools of the WIPO website which was patent searching. The site boasts that users can search “59 million patent documents including 3.1 million published” PCT applications. An interesting new feature is the ability to conduct chemical structure searches. A user must be logged into the WIPO site to use this tool (which is available free of charge) and the selection criteria of chemical compounds is used to then search a compound. This can be done by drawing a structure, searching by a name, CAS name, or other proprietary names, or even uploading a structure (e.g. png, gif, tiff, jpeg formats). Unfortunately the searching is not able to be done on genetic formulae for polymers. All searches, including chemical structures, can be done at <https://patentscope.wipo.int/search/en/search.jsf>.

# USPTO TO IMPLEMENT NEW AUDIT PROGRAM

Author: Nicholas J. Krob

Effective February 17, 2017, the United State Patent and Trademark Office (“USPTO”) will begin implementing a new audit program that will impact many trademark owners. This program, proposed on June 22, 2016 and enacted as a final rule on January 19, 2017, seeks to “assess and promote the accuracy and integrity of the trademark register” and will require certain trademark owners to provide “additional proof of use to verify the accuracy of claims that a trademark is in use in connection with particular goods/services identified in the registration.”

## How the Program Will Work

**What will be audited?:** As owners of federally registered trademarks are likely aware, maintaining federal registration for a U.S. trademark requires the owner to file an affidavit of use and a specimen proving such use at various times following registration. These affidavits or declarations of use/continued use (or, as applicable, appropriate nonuse) are required pursuant to sections 8 and 71 of the Trademark Act. The new program is designed to serve as an audit for such filings.

**Which affidavits are subject to the audit?:** Under the new program, the USPTO will not conduct an audit of every section 8 or section 71 filing. Instead, the USPTO will only look to trademark registrations with more than one good or service per class (meaning registrations that only identify one good or service in a single class will not be subject to an audit). Of these affidavits, the USPTO will randomly select which to audit.

**How many affidavits will be audited?:** The new rule states that, once implemented, the USPTO anticipates conducting random audits of 10% of relevant affidavits. However, the rule specifically provides that the USPTO “may increase the percentage going forward, depending on results and as resources allow.”

**What are the audits looking for?:** Put simply, the USPTO’s random auditing will be looking to make sure trademark owners are using their mark with all of the goods and services the registration claims.

**How will the audits be conducted?:** If an affidavit is selected for an audit, the USPTO will issue its request to the trademark owner in the form of an Office Action. This Office Action will specify the goods or services for which the additional proof of use is required. The USPTO indicates it will “require the submission of information, exhibits, affidavits or declarations, and such additional specimens of use as may be reasonably necessary for the USPTO to ensure that the register accurately reflects marks that are in use in the United States for all the goods/services identified in the registrations . . . .” Upon receiving this notice, the trademark owner will have six months, or, if later, until the end of the statutory filing period, to respond. If the trademark owner fails to respond in this time, the USPTO will cancel the registration in its entirety. If the trademark owner responds, he/she may simply submit the required proof of use or, if the mark is indeed not being used for the stated goods or services and the requisite proof thus doesn’t exist, can ask the USPTO to delete those goods or services from the registration.

## Basis for the Program

Implementation of this new program stems from an earlier USPTO pilot program.

On May 22, 2012, the USPTO announced a two-year pilot program wherein it would randomly select 500 registrations for which section 8 and 71 affidavits were filed “to determine the actual use of the marks in connection with the goods/services identified in the registrations” by requiring trademark owners to submit proof thereof. Each of the affidavits selected for review included a sworn statement that all the goods or services identified in the registration (or otherwise set forth in the filing) were presently in use in commerce. Despite this, 51% of the trademark owners failed to supply additional proof of use for the specified goods or services. This portion was comprised of the trademark owners who requested the improper goods or services to be deleted from the registration (35%) and those who didn’t respond at all, thus having the registration deleted in its entirety (16%).

The USPTO noted that the results of this program supported the need for “ongoing efforts” to ensure the accuracy and integrity of the trademark register. Following a roundtable discussion on December 12, 2014 and further discussion at later outreach sessions, the USPTO proposed the permanent implementation of the program.

## Why the Program Matters

As explained by the USPTO, “[t]he purpose of the program is to substantiate claims of use and discourage inaccuracies within these maintenance filings and continued registration of marks that are no longer in use for the listed goods/services.” Accordingly, if you are the owner of trademark registrations with more than one good or service identified in a single class, you may be required to, and should thus be ready to, prove use for all such goods or services. It is thus worth reviewing your trademark portfolio to consider whether each federal registration accurately reflects the use in commerce of each mark. Furthermore, the program serves as a reminder for future filings to only claim use in commerce with certain goods or services when a mark is actually being used as such.

# WHEN THE UNTHINKABLE HAPPENS: IP CONSIDERATIONS FOR BANKRUPTCY

Author: Caitlin M. Andersen

In the event that the unthinkable happens and bankruptcy becomes the only course of action for a business, having not only a good bankruptcy attorney, but also having an involved IP attorney is vital to ensure that rights in valuable intellectual property are appropriately addressed and maintained.

A basic understanding of Chapter 7 and Chapter 11 commercial bankruptcy options can help IP owners to evaluate at the outset which bankruptcy option may best protect continued IP rights.

## Chapter 7: Liquidation

Applying for Chapter 7 bankruptcy is an option for companies who make the choice to completely dissolve the business. In its most basic terms, Chapter 7 creates a bankruptcy estate that on filing owns all of the property of the business and the trustee of this estate gathers and sells the debtor's assets and distributes the proceeds to creditors. Filing a Chapter 7 bankruptcy stays any collection actions and the sale of assets proceeds until all valuable assets of the bankruptcy estate, often including its intellectual property, are liquidated and all viable legal claims of the debtor against others are fully prosecuted. By the end, the business is an empty shell, all assets have been liquidated, and the business ceases to exist.

## Chapter 11: Reorganization

In contrast, Chapter 11 has two major differences from a Chapter 7 liquidation. Unless replaced by a trustee for cause, in a Chapter 11, the debtor remains in control of its reorganization process, acting with the same powers as a trustee. Additionally, to complete a Chapter 11 case, a negotiated plan of reorganization must be confirmed. At the outset, the Debtor is given a limited exclusive period to propose and confirm its plan of reorganization. In complex cases, Chapter 11 provides for the formation of a committee of creditors selected by the Office of the United States Trustee to maintain oversight and approval of the debtor's handling of its bankruptcy case, and this committee acts on behalf of all creditors. Discharge and a final decree are entered when the estate has been fully administered according to the plan and business can continue as normal.

At this juncture, it is important to note that the Bankruptcy code, 11 U.S.C. § 101 (35A), defines "intellectual property" to include trade secrets, patent (including utility, plant, and design), patent applications, plant variety, copyrights, and semiconductor chip products. Notably, trademarks and trade dress are missing for the statutory definition, but they are included in the schedule of assets required in filing under either Chapter and should be considered as property of the bankruptcy estate.

## Which Chapter is Best for Me?

When considering which Chapter is most favorable, treatment of patents, trade secrets, and copyright are all nearly identical. Chapter 7 bankruptcy may be the best option when the intellectual property has value, but the business is no longer a viable. In that instance, the trustee will likely transfer rights to the party providing the highest and best price and the necessary assignment documents will be required. On the other hand, Chapter 11 may be appropriate if the intellectual property is central to the business and the plan is one of reorganization rather than liquidation. Of course, with trade secrets, care should be exercised by the trustee to protect the subject matter through the necessary protective order.

Trademarks present interesting issues with regard to bankruptcy and should be carefully considered during any liquidation or reorganization filed under either Chapter. Issues of trademark abandonment may arise in situations where the business ceases to operate either before or after filing for bankruptcy. To help avoid issues of abandonment, the trustee should be advised to sell the trademark assets first to prevent any potential loss of goodwill.

Should you or your business find yourself in this situation, don't forget to consider of the value of intellectual property. However, this is just one of many factors in determining which bankruptcy filing is most appropriate for your business and all should be carefully weighed with the advice of both your bankruptcy and intellectual property counsel.

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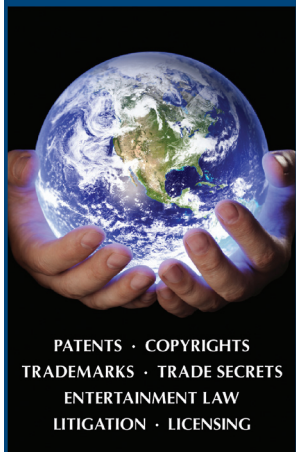


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801 GRAND AVE SUITE 3200  
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### WE'RE THERE

#### **December 6 - 9, 2016**

Heidi S. Nebel, Jill N. Link, and Patricia A. Sweeney attended the American Seed Trade Association Conference in Chicago, Illinois.

#### **January 27 - 29, 2017**

Jonathan L. Kennedy attended the American Chemical Society Leadership Institute in Dallas, Texas.

#### **February 12, 2017**

Brandon W. Clark attended the Grammy Awards in Los Angeles, CA.

#### **February 24, 2017**

Brandon W. Clark was honored by the Des Moines Music Coalition as Industry Supporter of the Year at the 2017 Backstage Ball.

#### **March 10, 2017**

Kirk M. Hartung is attending the Spring LEGUS Meeting in Haarlem, The Netherlands.

#### **March 12 - 15, 2017**

Jonathan L. Kennedy and Brett J. Roberts (Patent Agent) are attending the AUTM Annual Meeting in Hollywood, Florida.

#### **March 21 - 22, 2017**

Patent Agent, Brett J. Roberts and Technology Specialist, Brian D. Keppler are attending the Iowa Bio Partnering for Growth Forum in Ankeny, Iowa.

#### **April 2 - 6, 2017**

Jonathan L. Kennedy and Jill N. Link are attending the 253rd American Chemical Society National Meeting & Exposition in San Francisco, California and presenting a symposium of three presentations regarding protecting and capitalizing on your intellectual property.

*If you're interested to learn about what our MVS attorneys attend and learn, please contact them through [www.ipmvs.com](http://www.ipmvs.com) or by calling 515-288-3667.*

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