

## **Report: 2022 AIPPI World Congress - San Francisco – Copyright resolution**

The purpose of this report is to provide an overview of the most relevant discussions that took place at the 2022 AIPPI World Congress in San Francisco (the « San Francisco Congress »), more specifically as to the general topics of the Congress (**Section 1**) and as to the copyright study question and adopted resolution (**Section 2**).

I would like to thank the AIPPI Belgian Group for the opportunity to attend the Congress and for their trust in having me write this report.

### **1. General theme(s) of the Congress: IP in a post-pandemic world and the central role of platforms, social media and the metaverse**

#### **1.1. IP in a post-pandemic world**

The San Francisco Congress was the second in-person AIPPI event since the two-year break caused by the Covid-19 pandemic. Indeed, on May 13, 2022, the Belgian group was the first national AIPPI group to organize an in-person conference to celebrate AIPPI's 125<sup>th</sup> anniversary (the "Brussels Congress").

While the program of the San Francisco Congress did not mention a common general theme that would transpire in all study questions and resolutions, the topic that dominated the Brussels Congress in May 2022 helps identify a **first underlying motive** of the San Francisco Congress.

The Brussels Congress indeed focused on the interplay between intellectual property (in all its aspects) and common welfare, the latter being divided into healthcare and environment. From a healthcare perspective, the traditional opposition between patentees and generics companies in the pharmaceutical industry was supplemented by the debate stemming from the Covid-19 pandemic. The environmental aspect of the Brussels Congress combined the pandemic-related issues with global sustainability concerns.

Similar to the healthcare debate of the Brussels Congress, the San Francisco Congress became the stage of balanced exchanges as to the perceived drawbacks and benefits of intellectual property protection in a pandemic context.

To avoid repetition as to this first motive of the San Francisco Congress, I refer to the report of my colleague Romain Meys in which the main elements and considerations of the debate are accurately summarized, and to which I only add the following clarification: *the pandemic-IP interface debated at the San Francisco Congress related primarily to patents, trade secrets, and data.*

#### **1.2. The increasingly central role of platforms, social media and the new frontiers opened by the metaverse**

The **second underlying motive** of the San Francisco Congress was, in my opinion, the issues and opportunities of the *Internet anno 2022* as it relates to intellectual property, and more specifically as it relates to trade marks, designs, and copyright. This second main theme was composed of two interrelated and overlapping parts: (i) the steadily increasing importance of *platforms* and social media for the commercialization of products and services in the physical world, and (ii) *virtual worlds and NFTs* as additional and parallel marketing and commercialization channels.

The steadily increasing importance of platforms and social media for the commercialization of products and services, and the intellectual property issues these outlets may create, were mainly discussed and



highlighted in the context of Study Question n° 281 “Trade Marks and the Internet and Social Media” and of Panel Session XI “Online Marketplaces: Best Practices in Trademarks, Copyrights, and Designs”.

The Resolution adopted following Study Question n°281 (“Resolution 281”) provides that use of a trade mark on the Internet or social media more generally should be considered as infringing if all national law requirements are met. More specifically, Resolution 281 defines the acts on the internet or social media which would constitute trade mark infringement (assuming other national law requirements are met). These acts include uses of the trade mark by social media influencer endorsing or promoting a party’s product or service, but also uses of a trade mark in an Internet context (as keywords, metatags, hashtags) which have often been found to be infringing by several jurisdictions in the world. Finally, Resolution 281 explicitly recognizes the central role online platforms (or “marketplaces”) ought to have in providing expedited procedures for trade mark holders to enforce their trade marks in an efficient manner.

Panel Session XI hosted a debate on the best practices that intellectual property rights holders should adopt to better protect and enforce their rights on the Internet, and specifically in online marketplaces. Experts examined recent case law and presented the current legal framework in different regions of the world, focusing in particular on legal test (if any) to assess whether an online marketplace can be found directly or indirectly liable of trade mark, design, or copyright infringement for products and/or services offered on its platform. Notice-and-takedown procedures and their effectiveness were also addressed, as were other effective non-civil procedures in some regions (such as administrative fines in China and Singapore).

The other part of this second motive of the San Francisco Congress prompted an intense and extensive debate on virtual worlds (collectively, the “metaverse”) and NFTs from an IP perspective. Panel Session IV (“NFTs: Blind Date?”) and Panel Session VII (“Metaverse: Real World IP issues”) respectively exposed threats and opportunities belonging to two sides of the same coin.

The NFTs market, mainly as it relates to artworks, is extremely fast paced and young NFT artists either are not fully aware of IP issues that they might have to face or are reluctant to take the time to seek legal advice as opportunities and transaction pop up, and disappear, in a short time span. This seems to show that the NFT world could benefit from IP legal advice but providers of legal services might have to adapt their offerings to this sector.

Similarly, the metaverse exposed IP issues in its early stages, with brand owners acting fast to benefit from first-mover advantage and to establish themselves as trailblazers in the metaverse environment. In this context, IP issues emerged at enforcement level but some IP offices around the world in the past year published guidelines to help IP holders (mainly as to the classification of goods and services). As far as patents are concerned, panel speakers and experts in the audience tended to agree on assessing inventions related to the metaverse as computer implemented inventions.

## **2. Study question and resolution n° 282 – Moral Rights**

At the San Francisco Congress, I had the opportunity to participate to the Study Committee and Plenary Session on copyright study question n°282 “*Moral Rights*”. It bears mentioning that Study Question n°282 marks the first occasion on which AIPPI has studied and adopted a resolution on moral rights. While all AIPPI resolutions aim to reunite groups on a common basis, resolutions addressing a topic for the first time tend to stay even more on a broad level in order to agree on a broad basis for harmonization.



The **goal** of Study Question 282 was therefore to agree on a broad, minimum basis of desired harmonization for a (civil law) moral rights regime, these rights being defined as any and all legal rights and concepts used to provide protection to the non-economic rights of authors. As a reminder, while the WIPO Berne Convention for the Protection of Literary and Artistic Works provides in its article 6*bis* a common framework for moral rights, not all groups of AIPPI come from jurisdictions that have signed or acceded to the Convention.

The **Summary Report** published on July 15, 2022 following the review of national reports indicated the following tendencies:

- A large majority of the groups considers that there should be harmonization in relation to moral rights
- All groups consider that moral rights should be recognized and that such recognition should be part of copyright law
- A large majority of the groups considers that all types of works should be protected by moral rights
- A majority of groups considers that moral rights should comprise the rights of attribution, integrity, disclosure, and withdrawal
- A majority of groups considers that moral rights should be subject to exceptions and/or limitations, be it in terms of specific categories of works, minor modifications to a work, abuse of rights, the owner of the moral rights
- No majority has emerged on a common duration as groups proposed the duration of economic rights, the life of the author, the life of author extended by a certain amount of years, and the absence of time limit for the right of attribution or for moral rights altogether
- A large majority of the groups considers that the initial owner of moral rights should be the author as natural person, regardless of the circumstances of the creation of the work, and that these rights should be inherited by the author's heirs
- A majority of the groups considers that the property rights of the owner of a tangible asset integrating a work and the moral rights of the author of such work should be put into balance
- A majority of the groups considers that it should be allowed to contract on moral rights, although it should not be allowed to transfer moral rights nor to override law relating to moral rights
- Most groups consider that the infringement of moral rights should qualify as copyright infringement and a majority considers that the only condition for finding infringement of moral rights should be a breach as defined by law and case law
- A majority of the groups considers that moral rights should be recognized for related rights and that the law should be identical to moral rights under copyright law

During the session of the **Study Committee**, it appeared that some groups were opposed to recognize moral rights in copyright law because some moral rights may breach the Constitution of such groups (specifically, free speech). More generally, the first broad principles of the contemplated Resolution uncovered a *philosophical and policy divide between groups coming from jurisdictions where copyright law mostly aims at protecting the person of the author and groups from jurisdictions where copyright law is used to promote science and arts*. This first point of debate was resolved by reminding of the prospective, non-binding nature of an AIPPI resolution as a tool proposing an ideal set of rules "*de lege ferenda*" (as supported by the use of the term "should"), regardless of the current or envisaged national law on the topic.

Further, a more substantive debate emerged when discussing the categories of moral rights that the Resolution should push forward. A national group proposed to include a specific *right of temporary*



access for tangible works, e.g., in order to give the author of a painting the right to access such painting wherever the tangible work is located. Other groups opposed such addition, arguing, *inter alia*, that this right would be an accessory of the economic right of reproduction and a necessary tool to control compliance with the right of integrity. Still in the context of categories of moral rights, a national group insisted on the *distinction between the right to publish a work anonymously or under a pseudonym and a right to be forgotten* in case the right of withdrawal would be exercised, the latter not being recognized by the final Resolution. A final point of debate concerning categories of moral rights was the addition, supported by several groups, of a requirement of prejudice to the author to the definition of the right of integrity: the discussion related to the most appropriate provision of the Resolution to insert this requirement, i.e., as an element of the definition or as a condition for a finding of infringement. As a compromise, the requirement of a prejudice was added to the Resolution both as part of the definition of the right of integrity and as a condition for a finding of infringement of such right. In addition, such requirement appears in the provision concerning exceptions and limitations to moral rights, as a minimum level of protection: minor modifications of the work are authorized unless they are prejudicial to the honor or reputation of the author.

Furthermore, the debate on broad principles relating to exceptions and limitations to moral rights was mostly focused on achieving a balance between types of works which would inherently give rise to no moral right or limited moral rights and types of use which would justify a limitation to moral rights of any type of work.

A fourth substantive discussion concerned the question of the ownership of moral rights, i.e., whether moral rights could be owned *ab initio* or as a result of a contract, *by legal entities* or whether only natural persons could be *owners* of moral rights. The majority of groups eventually accepted to limit ownership of moral rights to natural persons.

A final debate concerned the extent to which parties can contract on moral rights, and more specifically whether the owner of moral rights could renounce or waive moral rights. The final compromise language on this provision of the Resolution prohibits renouncing or *waiving* moral rights entirely, while allowing certain contractual arrangements related to the *exercise* of moral rights by legal persons (e.g., employers).

Last but not least, several groups considered that the proposed general provision on the recognition of moral rights for performers as a matter of principle largely identical to moral rights in copyright, too vague and unnuanced to be included in Resolution 282.

During the **Plenary Session** on Study Question 282, many the provisions that were heavily debated within the Study Committee were approved with very limited discussion.

Exceptions and limitations to moral rights were subject to several amendment proposals from national groups based on free speech concerns and drafting and semantic consistency.

The most extensive discussion during the Plenary Session concerned the concept of “(legal) author” (a legal or natural person) and the distinction with “creator” (a natural person) in relation to the provision on ownership of moral rights. While the debate seemed to stem from the confusion in some groups between ownership and exercise of moral rights, the Assembly voted, with a slight majority, in favor of *specifying in the background session of the Resolution that the concept of “author” refers to a natural person having created the work, regardless of who the “legal” author is* (i.e., legal or natural person).

Finally, some discussions arose in respect of the duration of moral rights, where some groups favored a duration identical to that of economic rights and others a duration equal to the life of the author. A



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majority of the Assembly favored the maintenance of the provision proposed in the draft resolution: the duration of moral rights ought to be not less than that of economic rights.

The final text of the Resolution as a whole was adopted with a broad majority of the groups.

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