


# IP Review

Autumn 2010



**The Patent Office thinks  
it's all over...it is now**

German company leads the field in  
patents for goal-line technology

**"Hot Yoga"...gets Indian  
Government in a steam**

Bikram Choudhury, self-styled Yogi to  
the stars, has created a stir in the usually  
calm yoga community

## Trade Marks & The Olympics

Stressing the importance of protecting the exclusivity of the Olympic  
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## IP News

An update from the intellectual property world

# The Patent Office thinks it's all over...it is now

Battle-weary English football fans will be delighted to hear that a German company leads the field in patents for goal-line technology.

England's crushing 4-1 defeat to Germany can (in part) be put down to a howler of an error in which the match officials failed to spot a goal by plucky English lion Frank Lampard. The ball crossed the line by some distance - over a yard, according to former England captain Alan Shearer - and has led to renewed calls for the introduction of goal-line technology. The idea has finally attracted some sympathy from Sepp Blatter, the FIFA president, who has agreed to put the matter back on the agenda for discussion.

A review of patents on the subject suggests that the market-leader (at least in terms of patent filings) is the German company Cairos Technology AG. The Cairos system was tested at the FIFA club world cup in Japan in 2007 but rejected by the International Football Association Board (IFAB) shortly before the 2010 World Cup in South Africa. It features a microchip embedded within the ball which is detected by a sensor as it crosses the goal line. Cairos Technology AG have a number of patent applications in this area, including WO2008/043443 and WO2008/104247, dating back to 2006 and 2007 respectively.

To add insult to injury, both of these patent applications had an earlier patent cited against them. Filed by...wait for it...you guessed it...plucky English lion Derek Huff and dating back to 1999, WO00/047291 claims a similar system but was abandoned in 2004 despite the fact that the application had been allowed by the European Patent Office. So not content with stuffing us on the football field, the Germans also seem to be leading the field in patents for goal-line technology!

The Lampard goal-that-never-was will surely prompt IFAB to reconsider the Cairos system. If their system is adopted as a "standard" then the patents will secure the market against competition, allowing Cairos to derive revenue from goal post installations and ball sales either directly or from licensing royalties. This is just one example of how patents can be particularly valuable in an industry where approvals or standards influence sales.

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# Bromley Technologies Limited

Bromley Technologies has a stronger claim than most for making engineering “sexy”.

**T**he small but perfectly formed team based at Sheffield’s prestigious Advanced Manufacturing Park (AMP) have a combined CV that includes being a world champion and Olympic athlete in the skeleton bob (possibly the most adrenaline fuelled of all winter sports), a Formula One engineer, Bomb Disposal Diving specialist, Retail Director, and a professor of engineering!

How is this expertise and experience applied? Well, the company’s core competency lies in the design, testing, and running of bobsleighs and skeleton bobs. If you think this is a pretty straightforward proposition, you’d be wrong.

To overcome the inherent disadvantage that UK athletes suffer through the lack of our own bob track to use for training, the Bromley team have become world leaders in aerodynamics, structural analysis, athlete-machine interfaces, athlete psychology and environmental testing. To this end their AMP facility includes a state-of-the-art environmental test chamber.

Despite supplying the leading UK skeleton and bobsleigh athletes (including Kristan Bromley, the company’s CEO, and his partner Shelley Rudman), and providing

previous generation technology to their competitors, the team have recognised revenues are too small to justify patent protection. The company relies instead on continuous development and trade secrets in their techniques to stay one step ahead. In addition, although their market share is large, the market itself is small, so they know business growth is limited if they stick solely to this arena.

To grow the business they are adopting a three-pronged strategy. One aspect of the business is in engineering consultancy, Bromley Performance Engineered Solutions (PES) [www.bromley-pes.com](http://www.bromley-pes.com); applying their unique performance engineering expertise to provide solutions to clients in industries outside of the sliding sports arena. To date projects have included: a light-weight high performance road car project in the US, aerospace, medical and automotive projects, wind energy and defence product design.

In addition, Bromley has developed an experience built around their unique, immersive skeleton bob simulator that is used to raise awareness and attractiveness of engineering as a career in schools, or for corporate training/hospitality events.

Finally, Bromley is bringing to market a wholly new wintersports product.

This is targeted at the consumer level but uses the expertise and kudos the company has achieved in the elite sports arena and knowledge in performance materials as a launchpad. It is in this area where W&R is proud to have helped the firm.

By spending time with Kristan and COO, Mike Maddock, we have reviewed this top-secret project and identified how IP protection can be used as part of the overall business strategy. The aim is for Bromley Technologies to be positioned as the exclusive provider of a complete solution to winter sports resorts. Resorts could add to their existing complement of leisure activities, and, in doing so develop a significant new revenue stream. Without using patents and other rights, Bromley would lose control of the technology and could end up being muscled out by larger players.

Whilst it remains early days, the Bromley team are hopeful that the UK’s (usual) lack of snow doesn’t mean we can’t tap into a huge growth area for savvy, knowledge based engineering companies.

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# IP on the starting blocks?

Companies are once again considering strategies for growth, and mergers and acquisitions are very much back on the agenda. But before embarking on strategic growth plans or selling assets to an interested trade buyer, it is important that companies invest time in making sure their intellectual property (IP) portfolio is in order.

It can be notoriously difficult to establish a valuation for IP rights. Businesses considering a sale or an acquisition could end up losing out if they fail to ensure that IP rights and schedules are well-presented and up to date. It is important that all the correct information is available when the due diligence team decides to turn its attention to IP matters, which usually occurs during the critical latter stages of negotiations.

Businesses should ensure that their IP portfolio is complete and presented in an orderly and saleable fashion. There should be clear and concise summaries of individual assets including relevant patents and trade mark registrations and, where necessary, it should be ensured that any required renewal fees have been paid.

While IP assets are rarely the sole motivation for a corporate transaction, issues can arise and escalate into potential deal-breakers if not properly managed. There is nothing more disconcerting for a potential buyer than to find that licence agreements have not been properly executed or that an assignment of a patent has not been recorded at the appropriate patent office. Uncovering such oversights could be sufficient to unsettle the buyer and cause a delay in negotiations, perhaps while further assurances in the form of warranties are sought.

On closer examination of a patent portfolio, potential buyers could find that patents are jointly owned, perhaps shared with a university or research institution. While this may not be a critical issue, it is important that the potential buyer understands the risks associated with joint ownership of IP rights before completing the deal.

Where non-employed inventors, such as consultants, have been used, it may be necessary to check the terms of consultancy contracts to make sure that all IP rights were automatically transferred to the company. Similarly, IP portfolios may be split between a number of different patent and trade mark firms, leading to inconsistencies in the way that the schedules are presented. If the portfolio cannot be consolidated, it would at least be worth ensuring that the different firms adopt a common standard of presentation of the information.

In the case of brand names and corporate identities, companies operating without registered trade marks are likely to be viewed as higher risk. While it is possible to rely on unregistered rights to some extent, the brand could be vulnerable to third party imitation and bringing in enforcement action in such circumstances is likely to be more difficult.

Rather than leaving IP matters to the last minute, there can be significant advantages in preparing relevant documentation at an early stage. This allows time to ensure that the protection in place meets the needs of the potential buyer's business, highlighting any gaps that may need to be addressed urgently on completion.

For example, trade mark or patent protection is often required in a number of territories and depending on the geographic reach of the potential buyer, such rights may need to be extended. The potential buyer may also consider the 'classes' of goods and services in the seller's trade mark portfolio to be insufficient and this may need to be increased

post completion. These alterations can take a long time to achieve – it takes about six months to register a trade mark in the UK, but in India, for example, it can take as long as four years.

Acting early on IP could bring other benefits too. Patent and trade mark strategies are becoming increasingly sophisticated, particularly in advanced engineering industries like aerospace and automotive design. Potential sellers in these sectors could enhance the immediate attractiveness of their IP by providing complementary technology and patent mapping information to demonstrate that key inventions have plenty of clear space around them, with few competitor products or third party patents in the same field. This additional information may give the buyer an extra sense of security by providing an insight into the commercial potential of an invention over the longer term.

Too often IP is treated as an afterthought in commercial transactions, when it could and should be regarded as a strategic asset. At the very least, time may be needed to resolve any issues that arise but there is also the potential to add value and provide enhanced deal security.

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# Trade Marks & The Olympics

Many companies view the Olympics as a golden opportunity to market their products and services. However, the International Olympic Committee (“IOC”) aggressively defends its rights in Olympic words and symbols because a large proportion of the cost of staging the Olympics is believed to be recouped by the conclusion of lucrative licensing deals with advertisers. It is therefore essential for the IOC to protect the exclusivity of the Olympic branding and prevent unlicensed companies from marketing their own products by reference to Olympic words and symbols, a practice known as “ambush marketing”.

**T**he IOC and their national partners, the London Organising Committee of the Games and Paralympic Games (“LOCOG”), are granted powers under the provisions of the London Olympic Games and Paralympic Games Act 2006 and the Olympic Symbol (Protection) Act 1995 to prevent use of the protected Olympic words and symbols in ambush marketing and under s.4(5) of the Trade Marks Act 1994 to prevent registration of trade marks which incorporate the Olympic branding, without the express consent of the IOC or LOCOG. The IOC has also secured trade mark registrations for many Olympic words and symbols and can rely on trade mark law in addition to copyright, design and passing off law to prevent unauthorised use and registration of Olympic words and symbols.

The relevant legislation is so restrictive that almost any use of Olympic related words and symbols is prohibited. In particular, the IOC can rely on the 2006 Act to prevent any unauthorised company from using combinations of the words “games, Two Thousand and Twelve, 2012, Twenty Twelve, London, Medals, Sponsor, Gold, Silver and



**The relevant legislation is so restrictive that almost any use of Olympic related words and symbols is prohibited**



Bronze”. It is also prohibited for any business to create an association between their brand and the Olympics without LOCOG’s consent.

The only defence available to users of Olympic words and symbols arises where their use predates the introduction of the relevant rights and legislation. Where a businesses has earlier use, they will not be prevented from continuing to use their trade mark but they will not be permitted to expand their use in any other ways. For example, Little Chef are permitted to sell and advertise their “Olympic Breakfast” because of their earlier use but they would not be able to introduce “Olympic Coffee” or call their existing breakfast “Olympic 2012 Breakfast”.

The defence is extremely limited in scope and can be relied upon by only very few companies. If you have any plans to market products or services using Olympic words or symbols, we strongly recommend that you seek advice from your trade mark attorney before doing so. In almost all circumstances it will not be permissible to do so.

Ambush marketing is becoming increasingly prevalent. It is estimated that top sponsors



pay up to £50 million to align their brand with the Games. Unlicensed brand owners often look for ways to circumvent the official channels and associate their brand with the Olympics without paying for the rights to become an official sponsor. One famous example is the 1996 Atlanta Olympic Games where Nike bought up billboard space around the venues, constructed a Nike Village next door to the athletes' village and handed out flags bearing Nike's logo. The official sponsor was Reebok, but a survey following the Games found that 22% of those surveyed believed that Nike was an official sponsor, failing to recall Reebok.

The recent FIFA 2010 World Cup was another example of the prevalence of ambush marketing and the steps that the organising authorities will go to in order to prevent unauthorised use of their rights.

### An Ambush Marketing Case Study: World Cup 2010.

The Fédération Internationale de Football Association ("FIFA") is the owner of the official World Cup trade marks, and licence their use to affiliated sponsors. As such, it heavily polices use of the World Cup trade marks in addition to preserving the exclusivity of the sponsors in the stadiums and surrounding areas.

#### Ambush marketing case study 1: Bavaria N.V.

Prior to the World Cup 2010, FIFA issued a statement in which it confirmed that it would

be taking a hard line approach to the practice of ambush marketing. This was clearly in evidence in its handling of the Bavaria brewery's attempt to ambush the official sponsor, Budweiser.

Bavaria arranged for a group of 36 women to attend the Netherlands v Denmark match, initially disguised as Danish supporters, to change into orange Bavaria dresses once inside the ground. FIFA took a dim view of this and the police were involved, resulting in the arrest of two of the women thought to be the organisers of the stunt - ambush marketing is a criminal offence in South Africa. The charges were later dropped following an out of court settlement handled by Bavaria.

The stunt bought Bavaria masses of free publicity but they paid a heavy financial price for the practice. It was not the first time the brewery had got into trouble for ambush marketing - they arranged for a group of 1,000 men to wear branded lederhosen during the Denmark v Ivory Coast match at the 2006 World Cup - FIFA's response was to order the men to remove the garments at once.



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#### Ambush marketing case study 2: Kulula Airlines

At the recent World Cup, the airline Kulula was ordered to amend its advertising to remove the slogan "the Unofficial Carrier of the You-Know-What". Although not going so far as using the words "WORLD CUP", the advert featured vuvuzelas, the words "SOUTH AFRICA", national flags and stadiums. In response to FIFA's request to cease use of its slogan, Kulula produced a second advert with carefully crafted wording and logos to get around the objection.

The above case studies highlight the message that ambush marketing will not be tolerated at high profile sporting events. The regulations in place for the forthcoming Olympic Games are the most rigorous yet and the IOC in combination with LOCOG will be stringently monitoring advertising for infringing use of their trade marks. The penalties for those who fall foul of the regulations include injunctions, delivery up and destruction of the offending materials as well as damages.

Withers & Rogers LLP advise that any brand owners who are unsure about the content of their advertising should seek legal advice to ensure that they do not fall foul of the restrictive provisions before spending time and money developing their advertising campaigns.

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# “Hot Yoga”

## ...gets Indian Government in a steam

Bikram Choudhury, self-styled Yogi to the stars and developer of the Bikram yoga style, has created a stir in the usually calm yoga community. Bikram is attempting to patent the sequence of 26 yoga poses central to his yoga technique, also known as “Hot Yoga” as it is practiced in hot and humid conditions.

In recent years Bikram has successfully enforced his copyright in this sequence of poses and owns numerous trade marks. However, it is his plan to patent his yoga style which has caused the currently raging storm.

To prevent the future patenting of yogic techniques the Traditional Knowledge Digital Library, a library which the Indian Government has set up to document Indian traditional knowledge, in particular in the area of healthcare, is being extended to include thousands of yoga poses, many of which have been known and practiced in India for thousands of years.




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**...it is generally accepted that in order to obtain patent protection the subject matter of the patent must be new and inventive**

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### So, what can and cannot be patented in this area?

Equipment for yoga, such as blocks, mats and clothing has been patented for years. Trade marks to branding styles are freely available as is copyright in the documentation associated with various yoga styles. However, Bikram Choudhury is not the only person to seek patent protection for methods of carrying out yoga itself.

The exact requirements of patent law differ from country to country; however, it is generally accepted that in order to obtain patent protection the subject matter of the patent must be new and inventive. As there are thousands of yoga postures, many of which have been known for thousands of years, it is difficult to see how combining these into a particular sequence could itself be new. Surely every combination of sequences has been carried out somewhere before?

The problem in this case would be proving the lack of novelty. Documentation of yoga techniques only really began in the 60's, when yoga was introduced to the West and books began to appear. As patent offices rely (for the most part) on written evidence, a strong suspicion of lack of novelty may not be enough.

If a sequence could be shown to be new, the Applicant would have to show that their particular sequence of postures offered some particular health benefit not available if the same, or a similar, set of postures were carried out in a different order. This could be difficult to do.

In the US, a method of teaching or practising yoga could perhaps be patented as a business method. It is possible to patent business methods in the US but not in most other countries. Alternatively, the yoga practice could be patented as a method of treatment, enhancing health in some way or preventing disease. Again, whilst methods of treatment are patentable in the US they are not in many other countries. In particular, the situation in Europe and the UK is such that it would be exceptionally difficult to obtain protection for a method of teaching or carrying out yoga.

And so, it seems likely that for now at least the yoga community can relax and continue their age old practice without fear of patent infringement.

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# PCC

## a level playing field for IP?

Changes to court procedures will encourage SMEs to rethink their view of IP litigation.

**R**ecent changes to the procedures that apply in the Patents County Court should encourage small and medium-sized businesses to rethink their view of IP protection.

The Patents County Court will be operating under amended procedural rules with effect from 1<sup>st</sup> October 2010 as part of a move to make it cheaper and easier for SMEs to enforce their IP rights. The changes are being introduced following publication of Lord Jackson's review of the cost of litigation last year that concluded that it was too expensive and not accessible to SMEs.

The current system is not conducive to encouraging SMEs to enforce or defend their IP rights. It is seen as too expensive and the costs involved in bringing an enforcement action, combined with the legal costs due to be paid to the winner if they fail, mean it is rarely considered a risk worth taking.

The rule changes will make it far easier and cheaper for SMEs to access justice and we expect this to lead to an increase in IP-related litigation and encourage more businesses to protect their IP.

Specifically, the new procedures involve:

- a requirement for much more detail in pleadings.
- a requirement for more evidence to be provided up front (including expert evidence).
- no obligation of "standard disclosure".
- longer period for filing defence and reply
- costs awarded on a scale and a cap on the costs recoverable from the losing party of £50k.
- a further cap on the amount of damages that can be awarded of £500K (not to be enforced until April 2011).

The new rules will give businesses a clear choice about how to defend their IP rights. The High Court will be used for larger claims, valued at over £500K, whereas the Patents County Court will provide a low-cost route for businesses bringing lower cost claims.

The cap on costs payable to the other side coupled with the new procedural rules mean that SMEs will have much greater control over the cost of litigation and a large company will find it difficult to intimidate a smaller party by outspending them.

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# Bilski ruling in US Supreme Court provides possibilities to patent business methods

The recent US Supreme Court decision on the case of Bilski allows the patenting of some business methods and could provide opportunities for software and financial companies with business in the US. The decision can be read here <http://www.supremecourt.gov/opinions/09pdf/08-964.pdf>

**B**ernard Bilski filed a patent application in 1997 for a method of deferring risk in the financial industry which was rejected by the USPTO in 1998. Bilski appealed through the US courts, ending with the Supreme Court hearing the case late last year. Giving its verdict on the case, the US Supreme Court upheld its previous rulings on the matter, i.e. that three specific exceptions to patentability exist, namely “laws of nature, physical phenomena, and abstract ideas”.

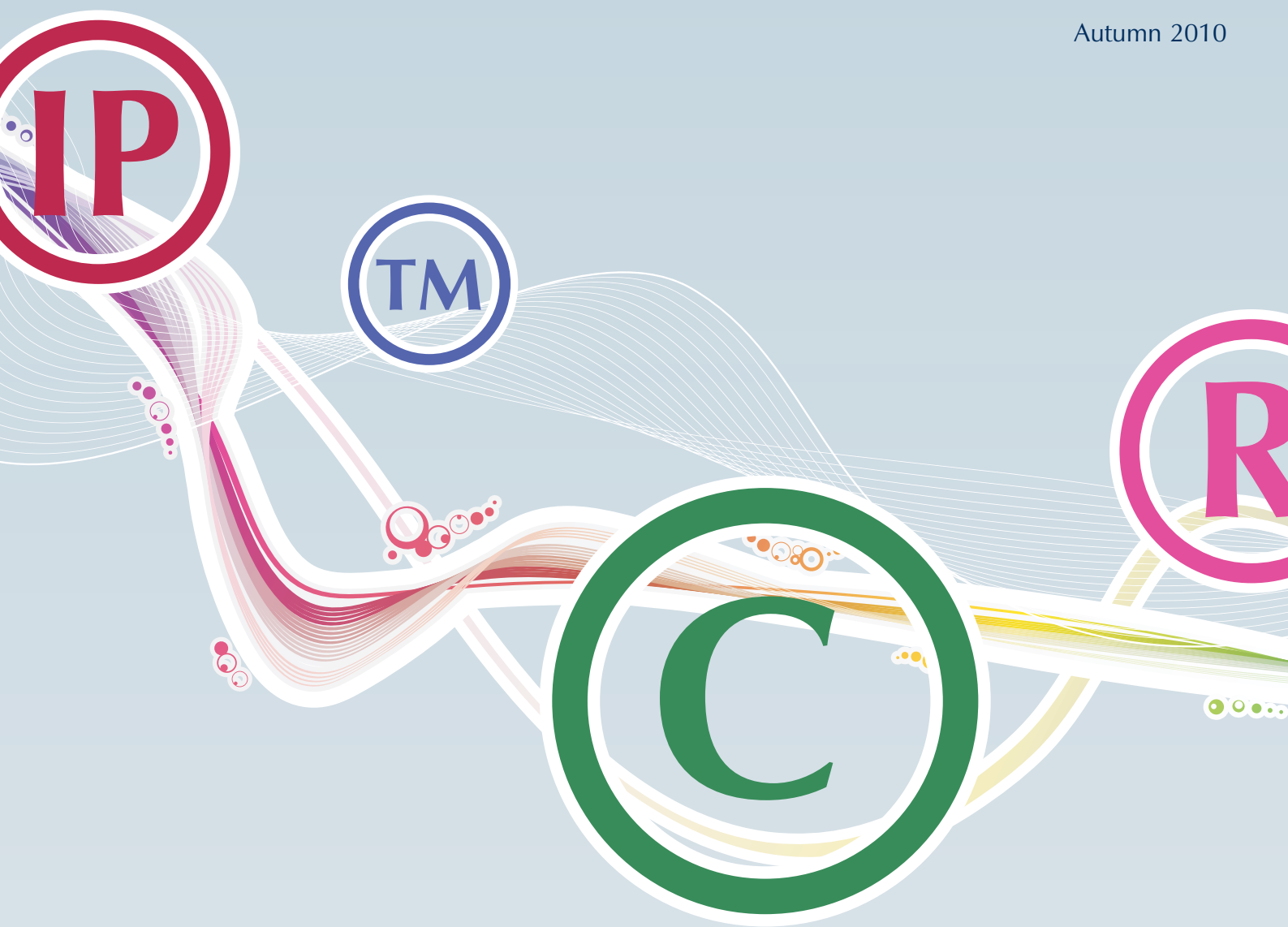
Although very little reasoning was given on the facts of the case, each of the Supreme Court justices agreed that Bilski’s invention was no more than a mathematical method for hedging risk, and hence fell within the abstract idea exception. Notably, however, based on statutory interpretation the Court held that “a business method” is simply one kind of “process” that is, at least in some circumstances, eligible for patenting”,



**...each of the Supreme Court justices agreed that Bilski’s invention was no more than a mathematical method for hedging risk, and hence fell within the abstract idea exception**

although then went on to say that broad patentability of such was not suggested.

Another aspect of the case was the so-called “machine or transformation” test”. This “machine or transformation” test required that for any series of steps to be patentable they must either be tied to a particular machine or operate to change articles or materials to a “different state or thing.” This “M or T”



test had been held by the lower Court of Appeal for the Federal Circuit to be the only test to be used in deciding whether a method was patentable subject matter.

The Supreme Court disagreed, and whilst acknowledging it as “a useful and important clue, and investigative tool” ruled that it not be the definitive test in every case. The task of developing any new tests and tools has been left to the lower courts through future decisions.



**This is a decisively pro-patent decision which should in particular embolden the European software sector**

This is a decisively pro-patent decision which should in particular embolden the European software sector. Any company involved in innovative business activity, which can commercially be tied to a computer, might now consider patenting such innovation.

The decision also highlights philosophical divides between the members of the Supreme Court. Whilst a majority of Justices held that business methods are patentable under some circumstances, they only did so by a single vote, with the other Justices unsuccessfully pushing for business methods to be excluded from patentable subject matter per se.

There was also a difference of opinion on the importance of historical trends in the case law of patentable subject matter. One set of Justices argued that it was important to note what types of activities have and have not been patented in the past, whilst another set argued that patent law is about

protecting the new and innovative and that following what has happened in the past may inhibit the ability of patent law to adequately protect new developing technologies. However, neither set was able to find enough votes to form a majority.

With the current Justices so divided and with the retirement of one of the prominent Justices occurring immediately after the *Bilski* decision, it will be interesting to see how the Supreme court decides on similar issues in the future - but that is likely not to be a for a number of years from now.

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## Patents Mean Prizes!

Although we have looked at the influence of intellectual property in sporting competition in this issue, our innovative clients are winning competitions of their own, in gaining valuable recognition from influential industry bodies.

**R**ichard Knight of Systematic Strategy Ltd won the Baby Products Association's Innovation award for his child safety harness, which prevents children from removing their arms from the straps of their harness.

Richard approached Withers & Rogers in July 2007, explaining that he had found an elegant, yet easy to copy, solution to the problem of children removing their arms from their harness on a car seat. The problem with the solution was that without intellectual property (IP) protection, there would be little hope of preventing competitors from using his idea. Having reviewed the product, Withers & Rogers advised Richard that patent protection would in fact be a very strong tool as a granted patent would allow him to prevent competitors from using the same approach. A UK patent application was filed in August 2008 and in August 2009, an international application was filed expanding potential patent coverage globally.

The product has now been launched and has attracted interest both nationally and internationally. See: <http://www.b-p-a.org/news/news-item-14-10-10>

Richard's patent application can be viewed here: [http://v3.espacenet.com/publicationDetails/originalDocument?CC=WO&NR=2010015842A1&KC=A1&FT=D&date=20100211&DB=EPODOC&locale=en\\_EP](http://v3.espacenet.com/publicationDetails/originalDocument?CC=WO&NR=2010015842A1&KC=A1&FT=D&date=20100211&DB=EPODOC&locale=en_EP)

Meanwhile, Withers & Rogers' client Zircotec Ltd. has been winning plaudits for its innovative plasma-sprayed zirconia-based coating which has found favour in Formula 1 this year, allowing hot exhaust gas to be routed over the carbon fibre rear diffuser without the risk of fire. The coating that enables engineers to specify lighter weight carbon composite materials for harsh applications in arduous environments has won the prestigious 2010 Plastic Industry Best Technology Application of the Year Award.

See: <http://www.plasticsawards.com/pia2010/winners-2010>

Zircotec is finding other applications for the coating in a broad range of other sectors from aerospace to carbon composite cycle wheels. This just goes to show that successful innovations in sport can win recognition in the business arena. By protecting the underlying concept Zircotec can explore these other opportunities knowing their market is secure.

Zircotec's patent application can be viewed here: [http://v3.espacenet.com/publicationDetails/originalDocument?FT=D&date=20091029&DB=EPODOC&locale=en\\_EP&CC=WO&NR=2009130229A2&KC=A2](http://v3.espacenet.com/publicationDetails/originalDocument?FT=D&date=20091029&DB=EPODOC&locale=en_EP&CC=WO&NR=2009130229A2&KC=A2)

## STOP PRESS!

The UK Intellectual Property Office (IPO) has recently been subject to a co-ordinated Distributed Denial of Service (DDoS) attack to its website by campaigners against the anti-piracy lobby. The attacks resulted in the organisation running a limited online service for a short time.

It came in the same week the Prime Minister, David Cameron, committed £650m on a new cyber security programme. This attack highlights a very real threat to the UK and its economic recovery.

Although the impact to the IPO's services was not as much as the group would have hoped for, it does highlight the threat of cyber attacks to the UK and demonstrates that the open source anti-intellectual property lobby is becoming more militant in its approach.

Our seminar series continues with:

### Intellectual Property in the Emerging Economies

25<sup>th</sup> November, 1<sup>st</sup> & 7<sup>th</sup> December  
London, Bristol, Leamington Spa

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