



September/October 1999

- [President's Corner](#)
 - [News from the Board of Directors](#)
 - [Recent Decisions of Interest](#)
 - [Notice](#)
 - [Classified Advertisements](#)
-

President's Corner

By Herbert F. Schwartz

On Tuesday, September 14, 1999, thirty-five officers, directors and chairs met to formulate plans for the forthcoming year. As you may know, the Association has reformulated its committee operations so that each chair holds his or her position for three years. Approximately one-third of the chairpersons are changed each year. This new system has already added continuity to the committee work of the organization. It also gives each chair a meaningful time period to make an imprint on his or her area of interest.

While listening to the committee chairs reports on their plans, I was struck by the energy and enthusiasm expressed. I am unaware of any other local or regional intellectual property law association that even remotely approaches the breadth and depth of committee work as is performed by members of the NYIPLA.

By way of preview, it is appropriate to mention briefly some of the activities planned in the forthcoming year.

Internet Law Committee

Eric Prager attended the meeting of the Intellectual Property Constituency ICANN on September 13 in London. In addition, the Internet Law Committee, directed by John Delehanty, plans to update and expand the NYIPLA web site at www.nyipla.org.

Continuing Legal Education

The CLE Committee, under the leadership of Anthony Giaccio, is planning an extensive program for the current year. The following events are already scheduled:

- "1999 Fall CLE Weekend" at the Tarrytown House on September 24-26, 1999 for 8 NYS CLE credits (2 of which are ethics CLE credits).
- "Dinner with European Patent Office Directors and Experienced Examiners" at Milbank Tweed on

September 28, 1999, 6:00 PM to 8:00 PM for 2 NYS CLE credits.

- Second Annual Interactive Multimedia Roundtable (tentative for February 16, 2000, 6:00 PM to 8:00 PM at Brooklyn Law School) for 2 NYS CLE credits.

Others are still in the planning stage. Unfortunately, the session on "Practical Tips on Enforcing and Defending Patents" on September 17, 1999 (Co-Sponsored with ABA (7 NYS CLE credits) was canceled because of Hurricane (and then tropical storm) Floyd.

Legislative Oversight and Amicus Briefs Committee

This Committee, headed by Bruce Wexler, has again planned an ambitious agenda for the forthcoming year. It has already filed a brief in *CSU v. Xerox*, which is now pending at the Federal Circuit and involves issues relating to antitrust and patent and copyright law. It is considering whether to draft an amicus brief in connection with the Federal Circuit's in banc consideration of *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*

Litigation Practice and Procedure Committee

At the urging of Judge Greisa, the Committee, under the direction of Doug Gilbert, is investigating suggestions concerning how the Southern District of New York might change some of its practices, so that it might be used more often in intellectual property disputes.

Meetings and Forums Committee

The monthly luncheon programs, spearheaded by Paul Garrity, are being planned for the forthcoming year. The first on October 29 will feature Nancy Hankin, a Senior Attorney at the PTO, who will discuss *In re International Flavors & Fragrances Inc.* (51 U.S.P.Q.2d 1513), a recent decision in which the Federal Circuit in a case of first impression considered the registerability of "phantom marks."

Young Lawyers Committee

Hoping to build on a recent success, the Young Lawyers Committee, chaired by Beth Oliak, plans to hold another evening for only young lawyers this fall.

By simply selecting these few committees, I do not mean to neglect the hard work by the other active committees of our Association. Rather, I mean to just give a preview as to what you can expect during the forthcoming year.

We look forward to seeing you at some or all of these events.

News from the Board of Directors

By Melvin C. Garner

April Board Meeting

The Board of Directors met at the Yale Club on Tuesday, April 20, 1999. Howard Barnaby presided. Melvin Garner presented the minutes of the meeting of March 16, 1999. No changes were proposed to the minutes and they were approved.

A Treasurer's Report dated April 20, 1999 was distributed by John Murnane. The Report is in the usual format and shows that the net worth of the Association as of the Report was about \$428,000. This is actually a decrease over the same period from last year. Mr. Murnane speculated that the decrease was due to increased expenses for the Judges' Dinner and increased expenses for CLE Programs. However, he

agreed to check into the decrease and report on it at the next meeting.

Mr. Murnane noted that the Association is in the process of reimbursing judges who attended the Judges' Dinner, but we have yet to pay the Waldorf bill. The Treasurer's Report was approved. A brief discussion was held concerning the cost of printing and distributing notices, bulletins, etc. Alternative methods of distribution was discussed. No decision was reached.

A membership report was given by Edward Blocker. He indicated that membership has increased by 200 members this year. This is a doubling of the increase in past years. Mr. Blocker also noted that there appeared to be a breakdown in the procedures set up for sending out acknowledgment letters to new members. A procedure for avoiding this difficulty was discussed and approved.

Mr. Garner reported that he had been contacted by member John Pegram who has ten boxes of documents relating to the Association. Mr. Pegram wants to know what he should do with the documents. It was suggested that some permanent file space for the Association documents be secured, but no decision was reached.

Mr. Barnaby reported that the Judges' Dinner appeared to be a success. Many of the Judges commented on how they liked the dinner and the new format. He has also received a number of letters of thanks from the Judges.

In Robert Neuner's absence, Mr. Murnane reported on the plans for the Annual Meeting. He handed out an announcement that was being mailed to Association members. The Honorable Shira A. Scheindlin, a U.S. District Court Judge, will be the speaker at the Annual Meeting. Judge Connor will also attend and hand out the prizes for the Connor Writing Competition.

A discussion was held about the submissions for the Connor Writing Competition. John Daniel offered a form for use in judging the briefs. After discussion, it was determined that the briefs by Mr. Ayazi and Mr. Hanna were the best.

The report of the Nominating Committee was given by Mr. Barnaby. He indicated that two people who were on the Committee were nominated to positions. These two members of the Nominating Committee resigned, and Mr. Barnaby and Mr. Schwartz replaced them. A Bylaw to preclude the Nominating Committee from nominating its members to positions was discussed. Mr. Schwartz noted that serving on the Nominating Committee is for only one year and that the Association is large. Thus, the Committee should be able to nominate people who are not on the Committee. The Board approved a Bylaw change to this affect, which will be voted on at the Annual Meeting.

The Board then considered old business. Copies of the Amicus Brief in the *College Savings Bank* were distributed. Mr. Barnaby also reported that the Association's application for a trademark in its logo was filed in classes 16, 41 and 42.

It was further reported by Mr. Barnaby that Tom Beck of the Litigation Committee is in the process of preparing a survey about patent cases in the Southern District of New York. Herbert Schwartz asked to see it before it is sent out.

Mr. Barnaby also reported further on the idea of a foundation for patent law which was proposed by Past President, John Reilly. One concept is that donations to the foundation would be used to fund a chair at a local law school on IP law. It could also fund prizes for moot court and writing competitions. Further discussion was deferred until the next meeting.

Mr. Schwartz reported on his meeting with Anthony Giaccio, Chairman of the CLE Committee. He reported that Mr. Giaccio has well thought out views of how the Association should provide CLE credits for members, including videotaping of Association programs and providing package rates for courses.

Mr. Barnaby expressed his thanks to Past President Edward Filardi and retiring Board members Richard DeLucia, Theresa Gillis, and Edward Vassallo for their service to the Association during the past year.

Annual Meeting

The Annual Meeting of The New York Intellectual Property Law Association, Inc. was held on Wednesday, May 12, 1999 at the Yale Club. The Meeting was called to order by the President, Howard Barnaby.

The Secretary, Melvin C. Garner, reported that a quorum was present. He noted that a hundred votes are needed for a quorum and he had 108 proxies. Mr. Barnaby asked for a motion to waive the reading of the Minutes of the prior annual meeting of May, 1998. The motion was approved.

Mr. Barnaby gave the Report of the President. In the report, Mr. Barnaby noted the efforts of the Association to implement programs to meet New York State's new mandatory Continuing Education requirements. He also reported that the Association has a new logo and that an application has been filed to register it with the U.S. Trademark Office. Mr. Barnaby also stated that the 77th Annual Dinner in honor of the Federal Judiciary had again been a success.

Mr. Barnaby thanked John Murnane for maintaining the books of the Association as Treasurer, and for improved dues collection. He also thanked Mr. Garner and his secretary, Eva Knight, for their efforts in carrying out the duties of the Secretary of the Association. In addition, he expressed his appreciation to John Sweeney for making the Judge's Dinner a success and to Robert Neuner for coordinating the Annual meeting. All of the Board members were thanked, especially for their liaison work to the committees of the Association. He awarded plaques to retiring Board members Richard DeLucia, Theresa Gillis and Edward Vassallo. Mr. Barnaby further thanked Edward Filardi as the immediate Past President.

The efforts of several Committee chairpersons were also recognized, particularly Leon Bechet, for his work with the Young Lawyers Committee, Paul Garrity for the Meetings and Forums Committee, Eric Prager for the Trademark Law and Practice Committee, Fred Dorchak for the Patent Law and Practice Committee, Mark Abate for the Public Information, Education and Awards Committee, Bruce Wexler for the Legislation Oversight and Amicus Brief Committee, Thomas Beck for the Committee on Litigation Practice and Procedure, Anthony Giaccio for the CLE Committee and Thomas A. O'Rourke for his work on the Publications Committee.

The names of deceased members Albert C. Johnston (Past President 1966-67), George P. Hoare, George B. Finnegan, Edward J. Fitzpatrick, Charles G. Mueller and Gerald Singer were read. A moment of silence was held in their honor, and in honor of other former members of the Association who died in the past year.

Mr. Murnane gave the annual Treasurer's Report and the Auditors Report. He noted that the Association posted a net loss of income after expenses of \$92,836. The current assets of the Association are \$428,225. The net of income after expenses for the Judges' Dinner was \$7,869, which was less than previous years because of a shift in when expense were paid. The net loss of income over expenses for all other meetings was \$10,042. A motion to adopt the reports was unanimously approval.

Melvin Garner read the List of Committees. As each Committee was called, the Chairperson of that Committee or a designated representative gave a summary of the Committee activities for the year. In the absence of a Committee representative, Mr. Garner summarized the activities of the Committee as presented in its written report.

A resolution was submitted to prohibit the Nominating Committee from making nominations for the positions of Officers or members of the Board from among the members of the Nominating Committee. The resolution was adopted by a unanimous vote of all voting members in attendance, and the proxy vote of 108 members.

Mr. Filardi presented a report of the Nominating Committee. The Nominating Committee proposed John F. Sweeney as President-Elect, Robert Neuner as First Vice President, Richard DeLucia as Second Vice President, John D. Murnane as Treasurer, and Melvin C. Garner as Secretary. For the Board of Directors, Marylee Jenkins, Ira J. Levy and Mark J. Abate were nominated for three-year terms. Howard Barnaby, Edward V. Filardi, Pasquale A. Razzano, Susan E. McHale and Eric Prager were nominated for the next Nominating Committee. There were no other nominations for any office or for the Board of Directors. Upon a unanimous vote of the proxies and the members in attendance, the persons nominated by the Nominating Committee were elected.

The past Presidents in attendance escorted the new President, Herbert Schwartz to the podium. Mr. Barnaby congratulated him and presented him with a gavel. Mr. Schwartz thanked the Association for his election. Mr. Schwartz noted a lack of civility in the practice of law and promised to work in a non-contentious environment for the common good. Then Mr. Schwartz presented a plaque of gratitude to Mr. Barnaby on behalf of the Association.

Mr. Schwartz entertained a motion to adjourn the Meeting and it was so adjourned.

May Board Meeting

The Board of Directors met after the Annual Meeting of the Association. Herbert Schwartz presided. In attendance were several of the Past Presidents of the Association, including Al Robin, David Kane, John Tramontine, Tom Creel, Andrea Ryan, Pat Razzano and Al Haffner. Anthony Giaccio, Chair of the Committee on Continuing Legal Education was in attendance at the invitation of the President. Mr. Schwartz welcomed the new members of the Board of Directors and distributed a schedule of upcoming meetings, which will be held at the New York Yacht Club, 37 West 44th Street, New York, NY 10036.

Mr. Schwartz then asked Mr. Giaccio to give a report on the Association's CLE program. Mr. Giaccio explained that the Association's CLE program would allow the membership to meet their entire CLE credit requirement through Association sponsored events. This would include video tapes of these events, which members could view for credit. A discussion was held concerning an increase in the price for the luncheon meetings of the Association. The current cost to the Association for the lunch meetings is about \$65.00 per person. Currently, members are charged \$40.00 when they pre-register and the proposal is increase that to \$55.00. Non-members currently pay \$45.00 for advance registration and the proposal is to raise that to \$65.00 to cover the cost. Finally, when tickets are purchased at the door, the current price is \$50.00 and the proposal is to raise this to \$70.00.

In response to a question from Mark Abate, Mr. Giaccio stated that there would be a registration fee for the Fall CLE Program. He also noted that the Association cannot yet advertise the videos that are being prepared because the Association has not yet been accredited by the state. Even then, the Association would still need special permission for the video tapes.

Mr. Schwartz reported that he had secured Calvin Trillin, a humorist, author and writer for the *New Yorker* magazine, as a speaker for the Judge's Dinner.

Presentation and acceptance of the minutes of the meeting of April 1999 were differed. There being no further business, the meeting was adjourned.

Recent Decisions of Interest

By Thomas A. O'Rourke

Patents

Claim Construction

In *Elkay Manufacturing Company v. Ebco Manufacturing Company and Ebtech Corporation*, 98-1596r (Fed. Cir. September 15, 1999) (Gajarsa, C. J.), Ebco appealed the district court's decision that Elkay's patents were valid and infringed by Ebco, literally and under the doctrine of equivalents.

The infringement question turned primarily on claim construction. The plaintiff contended that the normal, accepted meaning of the articles "a" and "an" limited the claims of the patents to a single feed tube with a single path for both air and water while surrendering coverage of devices using separate feed tubes/flow paths. The CAFC rejected the plaintiff's contention holding that the use of the article "an" in conjunction with the term "comprising" in the claim suggested that "an" carried the meaning of "one or more" rather than limiting the claim construction to mean strictly "one." Moreover, the CAFC concluded that the fact that the written description of the patents never showed but a single flow path apparatus was not conclusive by itself in confirming the plaintiff's claim construction. Where the claims expressly described a "preferred" embodiment of the invention, they were not limited to the preferred embodiment unless by their own language. On the contrary, the Federal Circuit agreed with the plaintiff that, during prosecution of the patents and in order to obtain claim allowance, the defendant gave up a potential construction of the feed tube limitation encompassing an apparatus with separate flow paths by distinguishing prior art specifically on the basis of the prior art's use of separate flow paths.

Therefore, the CAFC reversed the district court decision and found no literal infringement on the ground that the plaintiff's accused devices using separate feed tubes did not meet every limitation of the defendant's properly construed claims. The CAFC also found no infringement under the doctrine of equivalents because of prosecution history estoppel. The defendant's amendments distinguishing prior art made to secure allowance of its claim estopped it from claiming plaintiff's separate tubes/flow paths devices as substantially equivalent.

In *K-2 Corporation v. Salomon/North America, Inc.*, 98-1552 (Fed. Cir. September 13, 1999) (Clevenger, C. J.), K-2 appealed the grant of summary judgment of patent noninfringement granted by the district court to Salomon on both literal ground and under the doctrine of equivalents.

In this claim construction case, the CAFC rejected the plaintiff's interpretation of the "permanently affixed" claim limitation contained in its patent for a roller skate as synonymous with "affixed," "secured," or "firmly held" to the base of the skate. The Federal Circuit, instead, turned to the ordinary and accustomed meaning of the term "permanently" deciding that it could not encompass affixation via the removable screw used in the defendant's skate. The CAFC also rejected the evidence offered by the plaintiff to alter the ordinary meaning. In particular, the Federal Circuit decided that functional language in the claim could not be used to compel a limitation of "permanently affixed" as "affixed to prevent horizontal [sliding]" via either a permanent or removable device. Since the claimed function could be performed by either device, it was more natural to conclude that "permanently affixed" independently required an unremovable attachment. Moreover, the plaintiff's amendments distinguishing prior art during prosecution offered too little support to a finding of unaccustomed meaning. The CAFC also relied on the written description of the "rivet-made permanent connection" chosen by the patentee as opposed to removable screws to support its interpretation and concluded that because the defendant's skate was missing the "permanently affixed"/unremovable element of plaintiff's patent claims, it could not, as a matter of law, literally infringe those claims.

As to the issue of infringement under the doctrine of equivalents, the plaintiff argued that the defendant's removable screw was substantially equivalent to the "permanently affixed" fastening in its patent. The Federal Circuit rejected the argument relying on prior art and prosecution history. Prior art using "detachable" devices would have barred patentability of a removable screw device and the doctrine of equivalents could not allow a patent to cover subject matter that could not have been legally patented in

the first instance. Moreover, the prosecution history showed that the plaintiff made amendments and statements to avoid that prior art reference which would lead a reasonable competitor to objectively conclude that the subject matter of removable screw attachments was relinquished. Therefore, the Federal Circuit affirmed the district court's holding of noninfringement on the ground that the doctrine of equivalents could not, as a matter of law, be used to expand the plaintiff's patent claim to cover the defendant's skate. On the other hand, over the defendant's suggestion to the contrary, the CAFC held that the *Warner-Jenkinson* presumption in favor of prosecution history estoppel and the consequent bar against the doctrine of equivalents under *Sextant Avionique* was inapplicable to this case because the prosecution history clearly showed the reason for the amendments, i.e., "patentability," since the patent would not have been (re)issued without them. See *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 33, 41 (1997), and *Sextant Avionique*, 172 F.3d 817, 832 (Fed. Cir. 1999), and, e.g., *Bai v. L & L Wings, Inc.*, 160 F.3d 1350, 1355 (Fed. Cir. 1998).

Settlement Agreement Interpretation

In *Diversey Lever, Inc., v. Ecolab, Inc.*, 98-1380 (Fed. Cir. September 10, 1999) (Mayer, C. J.) Ecolab appealed the district court's grant of summary judgment of patent infringement to Diversey Lever.

The question of infringement turned on the interpretation of the terms of the parties' settlement agreement and accompanying consent judgment providing that the patents were "valid and enforceable" and that Ecolab would not "directly or indirectly aid, assist or participate in any action contesting the validity" of the patents. In addition, Ecolab agreed to refrain from making or selling products according to a Defined Products clause. Ecolab interpreted the agreement to mean that it was free to develop products outside the scope of the Defined Products clause without fear of further action by Diversey and so it did. The appellant argued that the settlement agreement merely precluded it from voluntarily assisting third parties accused of infringement by Diversey Lever in contesting the validity of the patents.

The Federal Circuit disagreed, holding that the agreement used the broadest possible language in describing the prohibited activity therefore manifesting the parties' intent that Ecolab surrendered its right to challenge the validity of the patents in any context. To this end, the Federal Circuit distinguished from *Foster* in which the CAFC had concluded that the consent judgment had not surrendered the invalidity defense as to future accused products. See *Foster v. Hallco Mfg. Co.*, 947 F.2d 469, 481 20 USPQ2d 1241, 1250 (Fed. Cir. 1991). Moreover, the Federal Circuit saw no merit to the appellant's argument that the Defined Products clause tacitly granted it permission to infringe the patents by manufacturing products outside of the scope of the clause against the properly construed consent judgment of validity of the patents. Finally, the CAFC held that the appellant waived its affirmative defense of equitable estoppel when it failed to raise it in opposition to Diversey Lever's summary judgment motion, regardless of whether estoppel qualified under section 282 as either an "unenforceability" or an "absence of validity" defense. Accordingly, the Federal Circuit affirmed the summary judgment of infringement in favor of Diversey Lever.

Enablement

In *Enzo Biochem, Inc., v. Calgene, Inc.*, 98-1438 (Fed. Cir. September 24, 1999) (Lourie, C. J.) Enzo appealed the District Court's decision that its patents were invalid as not enabled because undue experimentation was necessary to make use of the invention by those skilled in the art. Enzo further appealed two district court's orders denying its post-trial evidentiary motions. Calgene cross-appealed the District Court's dismissal of its declaratory judgment counterclaim for want of proof of nonenablement relating to a third patent. Calgene also cross-appealed the district court's decision that this case was not exceptional as to warrant an award of attorney's fees to the prevailing party.

On the issue of enablement, the CAFC reviewed the applicability of the factors elaborated in the *Wands* test to *inter partes* litigation concluding that, in both the *ex parte* prosecution and *inter partes* litigation, "an enablement determination is made *retrospectively*, i.e., by looking back to the filing date of the patent

application and determining whether undue experimentation *would have been* required to make and use the claimed invention at that time." The Federal Circuit found no "prediction" occurring in either context, and therefore, the *Wands* test applicable in both. Then, the CAFC reexamined the actual application of the test and affirmed the District Court's finding of nonenablement because the level of required experimentation was undue. In doing so, the CAFC used the inventor's testimony, Calgene expert's testimony, and a test on cell biology introduced into evidence by Enzo to support a finding of high unpredictability of the claimed technology. Moreover, evidence of the inventor's failed experiments following the methodology in specification evidenced the need for a very high amount of experimentation. Further, the CAFC held that the assessment of the required skill in the art was rightly based on the background of the witnesses at trial whose experience was accordingly within one of "a junior faculty member with one or two years of relevant experience or a postdoctoral student with several years of experience." The CAFC also found that mere "plans" or "invitations" for those with skills in the art to use the methodology did not constitute enabling disclosure and offered little guidance on how to execute the plan. In responding to other Enzo's attempts to escape nonenablement, the CAFC made clear that the inventor's disclosure of practicing the claimed technology in one type of cell did not suffice to enable the practice of the same technology in all types of cells. Moreover, the Federal Circuit refused to place on the accused infringer the burden to explain why the invention did not work following the specification in order to defeat enablement, just as it noted that the inventor is not required to know how or why his invention does work in order to obtain a patent. Finally, the CAFC deemed PTO and EPO conclusions of enablement inconclusive to disprove nonenablement.

As to Calgene's cross-appeal, the CAFC affirmed the district court's dismissal of Calgene's declaratory judgment counterclaim because Calgene failed to prove lack of enablement of a third Enzo's patent independently although this patent shared the same specification of the ones above. The CAFC also affirmed the district court's decision on Enzo's post-trial evidentiary motions holding that the district court did not abuse its discretion in denying Enzo's motions to reopen the record to admit additional evidence since a district court is not under a duty to make findings or articulate reasons for a denial of a motion to reopen, and lack of findings and conclusions were no evidence that the district court did not review and consider the evidence in motion.

On the contrary, as to the other issue introduced by Calgene's cross-appeal about when one party's inequitable conduct during prosecution of the patent renders the case exceptional as to warrant an award of attorney's fees to the other party, the CAFC vacated the district court determination that the case was not exceptional as erroneously based on the parties' conduct during litigation rather than prosecution and remanded it for further consideration.

Notice

To: All members

Re: E-Mail Address

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If you would also like to have your e-mail address listed in the 2000-2001 issue of the *Greenbook*, please indicate as such by placing a check on the appropriate line below. If you forward your e-mail address but do not indicate a desire to have it listed in the *Greenbook*, it will not be listed.

Please note, recognizing that all members may not have an e-mail address, the NYIPLA intends to continue communicating with its members via U.S. mail as well.

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