

NYIPLA

March/April 2008

Bulletin

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Bone of Fido Parody – Louis Vuitton v. Chewy Vuiton

By Jonathan Moskin¹

Abiting satire it may not have been, but *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252 (4th Cir. 2007), nonetheless concluded that canine chew toys fashioned after Louis Vuitton handbags were a permitted parody that did not infringe or dilute Louis Vuitton's admittedly well-known marks. Although the decision scratches little new ground in the trademark jurisprudence of parody and infringement, it was a first opportunity for an appellate court to assess parody under the new Trademark Dilution Revision Act. The court here squarely rejected a concerted, if not to say dogged, effort by Vuitton and its amicus, the International Trademark Association, together urging a position that, in the words of the court, would "automatically" have made parodies unlawful. *Id.* at 264.

1. No Infringement

The Fourth Circuit, in affirming the district court's grant of summary judgment, fully applied the multi-factor test of likelihood of confusion, yet its application of the infringement test was shaped entirely by its initial assessment of what might be called the parody paradox; namely, that the parodist, to be effective, must make his or her rendering readily recognizable *as* the original yet just as readily distinguishable as a commentary *upon* the original. *Louis Vuitton* explains: "A parody must convey two simultaneous – and contradictory – messages: that

it is the original, but also that it is not the original and is instead a parody.' [Citation omitted.] This second message must not only differentiate the alleged parody from the original but must also communicate some articulable element of satire, ridicule, joking or amusement." 507 F.3d at 260. [Citation omitted.] Under this standard, the court had little difficulty articulating the necessary element of satire, ridicule, joking or amusement despite (or because of) the fetching likeness of the two products: "The furry little 'Chewy Vuitton' imitation, as something to be *chewed by a dog*, pokes fun at the elegance and expensiveness of a LOUIS VUITTON handbag, which must *not* be chewed by a dog." *Id.* at 261.

To be sure, one might be hard pressed to find a claimed parody that does NOT satisfy this "some articulable element" standard – at least for products principally likely to be hounded by parodists: namely, those holding some place of esteem in culture or commerce. Nor has it ever been any great secret how daunting a task is the line-drawing required by parody cases. Indeed, one might simply compare *Louis Vuitton* with *Grey v. Campbell Soup Co.*, 650 F. Supp. 1166, 1175 (C.D.Cal. 1986), *aff'd*, 830 F.2d 197 (9th Cir. 1987), where the products were DOGIVA and CATIVA pet food in purported parody of GODIVA chocolate. Although *Grey* seems plainly on all fours with *Louis Vuitton*, the outcome was just the opposite.

April 2008

PRESIDENT'S CORNER

Dear Fellow Members:

As President of your Association, it was the ultimate honor and privilege to preside over our Association's 86th Annual Dinner In Honor of The Federal Judiciary, culminating in the presentation of our Annual Outstanding Public Service Award to the Honorable Howard T. Markey, the first Chief Judge of the United States Court of Appeals for the Federal Circuit (posthumously).

The day's activities began earlier that afternoon with our "Day-of-Dinner" CLE Lunch and Program in the Starlight Roof of the Waldorf-Astoria. This year's topic was very timely and informative – the changing landscape in the litigation and trial of patent cases following the recent Supreme Court and Federal Circuit decisions in *KSR*, *eBay* and *Seagate*.

We were very fortunate to have an active and experienced panel which included one Federal Circuit Judge – Judge Richard Linn – two U.S. District Court Judges – Judge Patti Saris (D. Mass.) and Judge Joseph Greenaway, Jr. (D. NJ) – along with two seasoned patent litigators – John Flock and Jesse Jenner. The discussion was lively and informative, with over 170 registrations, including 20 judges.

By all accounts, the Dinner itself appears to have been a wonderful success. We had over 140 judges and representatives from various U.S. Federal Courts. Chief Judge Paul R. Michel enhanced the presentation of the Outstanding Public Service Award by adding some personal remarks about the influence Judge Markey has had on the Bench and Bar. Receiving the award for his father, Chris Markey gave some touching insight into a man who was a tower of public service.

The evening's festivities blossomed even further with a unique keynote address – given by the political strategist couple of Mary Matalin and James Carville. Mary and James brought the Hotel alive with their insightful and humorous political observations about the current and some past presidential contests.



The evening's formal program concluded with the awarding – by Immediate Past President Marylee Jenkins – of the NYIPLA Diversity Scholarship which is given as part of the Sidney B. Williams, Jr. Intellectual Property Law Scholarship of the American Intellectual Property Law Educational Foundation. This year's award went to Ms. Veronica Wong who has an outstanding academic record and is attending Columbia University School of Law.

Although the calendar suggests my term is winding down, we still have much to accomplish. Our committees are working feverishly to complete their work for the 2007-2008 year; there are several CLE programs in the works; and, we are planning for our Annual Dinner where we will present the Inventor of The Year Award and the Conner Writing Competition Award on May 21, 2008.

In closing, I extend my deepest appreciation to the Dinner Committee and to the NYIPLA Executive Staff for planning and overseeing the Herculean task of serving and entertaining over 3,600 guests at our 86th Dinner. I look forward to seeing you at the Annual Dinner on May 21st.

Sincerely,

Christopher A. Hughes

Some parody cases would appear to turn on the expressive nature (or not) of the accused work, and the gravity (or levity) of the First Amendment values in issue. For instance, the motion picture character “Spa’am” was a permitted parody in *Hormel Foods Corp. v. Jim Henson Productions, Inc.*, 73 F.3d 497, 503 (2d Cir. 1996). Yet, *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997), enjoined a book satirizing Dr. Seuss’ literary style. And although defendant’s “Garbage Pail Kids” children’s stickers parodying Cabbage Patch Kids were enjoined in *Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc.*, 642 F.Supp. 1031 (N.D. Ga. 1988), the same company’s “Wacky Packages” stickers were permitted in *Tetley, Inc. v. Topps Chewing Gum, Inc.*, 556 F.Supp. 785 (E.D.N.Y. 1983). Likewise, although an “Enjoy Cocaine” poster playfully mocking Coca Cola’s logo was enjoined in *Coca-Cola Co. v. Gemini Rising, Inc.*, 346 F.Supp. 1183 (E.D.N.Y. 1972), a pregnant Girl Scout poster - under the heading “Be Prepared” - satirizing the group’s chaste image was permitted in *Girl Scouts of USA v. Personality Posters Mfg. Co.*, 304 F.Supp. 1228, 1233 (S.D.N.Y. 1969).

On the other hand, although parodic consumer products, such as the Chewy Vuitton pet toy, have at times been permitted, *see, e.g., Jordache Enter. v. Hogg Wyld, Ltd.*, 625 F.Supp. 48 (D.N.M. 1985), *aff’d*, 828 F.2d 1482 (10th Cir. 1987) (“Lardashe” jeans with pig insignia not an infringement of “Jordache” jeans with horse logo); *Eveready Battery Co., Inc. v. Adolph Coors Co.*, 765 F.Supp. 440 (N.D. Ill. 1991) (brewer permitted to spoof “Energizer Bunny” in purely commercial promotion of its beer); products often have been deemed unfair. *Campbell Soup Co.*, *supra*, makes clear (as soup) the many possible shades of grey and absence of clear black and white rules.

Nor is poor taste or the prurience of the parody any sure guide to permissibility. *Compare LL Bean, Inc. v. Drake Publishers*, 811 F.2d 26, 27 (1st Cir. 1987) (allowing a “crudely humorous,” “prurient parody” of plaintiff’s product catalog), with *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema Ltd.*, 604 F.2d (2d Cir. 1979). *American Express Co. v. Vibra Approved, Labs Corp.*, 87 Civ. 8840, 1989 WL 39679 (S.D.N.Y. April 19, 1989), amply demonstrates how paradoxical parody - even plainly prurient parody - can be. There, a replica of an American Express card containing a condom and sold as a “sex toy” under the tag line “Never leave home without it” was *not* an infringement - but *was* deemed likely to dilute or tarnish plaintiff’s marks.

As this author has argued elsewhere, *Frankenlaw: The Supreme Court’s Fair and Balanced Look At Fair Use*, 95 Trademark Rptr. 848 (2005), parody appears to fall on a spectrum of fair use. Following *KP Permanent Make-Up, Inc. v. Lasting Impression, Inc.*, 543 U.S. 111

(2004), where an alleged fair use is in issue, it should, perhaps be less relevant (if not entirely beside the point) to assess the use under a traditional infringement analysis. Instead, the primary if not sole question should be whether the use is fair. If it is, there may be no need to assess infringement. How such an approach might be applied in trademark parody cases is hard to say, because courts rarely try. Although *Cliffs Notes, Inc. v. Bantam Doubleday Dell Pub. Group, Inc.*, 886 F.2d 490 (2d Cir. 1989), noted, for instance, that the likelihood of confusion test is “at best awkward in the context of parody”, *id.* at 495 n.3, *Louis Vuitton* concluded that “the finding of a successful parody only influences the way in which the [likelihood of confusion] factors are applied.” 507 F.3d at 261. It is not alone. *See Hard Rock Café Licensing Corp. v. Pacific Graphics, Inc.*, 776 F.Supp. 1454, 1462 (W.D. Wash. 1991) (“Parody is not a defense to trademark infringement, but rather is another factor to be considered in the likelihood of confusion equation.”) Yet, the Fourth Circuit’s own application of the multi-factor infringement analysis shows how thoroughly its threshold finding of permissible parody determined application of the test. Indeed, had the court doubted the use was a parody, its assessment of virtually all factors could have been flipped (strong mark; almost exact copy of that mark, selected with intent to copy; some overlap in trade channels as both products were sold at least in one store, Macys, and so forth). The tail thus wags the dog.

Although copyright fair use is itself notoriously uncertain, the Copyright Act does articulate specific factors, 17 U.S.C. § 107, and often there is enough substance (or the lack thereof is itself revealing) to permit some informed judgment whether an accused work advances the purposes of the Copyright Act of encouraging creativity - most critically by being genuinely transformative. Not so in trademark law, where neither the Lanham Act nor applicable case law provides many pointers how to determine when the purposes of trademark law are or are not advanced by a parody; what it means for a parody to be “effective”, or when, by contrast, a party simply out to make a quick buck has gone too far (or not far enough).

2. No Dilution

Regarding dilution, the Fourth Circuit acknowledged the Louis Vuitton trademarks were famous and that Chewy Vuiton pet toys created an association with the marks, albeit a parodic one. This much conceded, the focus turned squarely to the issue no dilution case has ever explained, namely how some associations cause (or are likely to cause) an impairment of the distinctiveness of a famous mark. 507 F.3d at 265. Resolving this bone of contention, *Louis Vuitton* concluded likelihood of

dilution must in all instances be proven, based on full consideration of the six enumerated statutory factors (namely, degree of inherent or acquired distinctiveness of the famous mark, exclusivity of use of the mark; recognition level of the famous mark; similarity between the marks, intent and evidence of actual associations).

In so holding, the court rejected Louis Vuitton's proposed broad reading of the TDRA, under which "any use by a third person of an imitation of its famous marks dilutes the famous marks as a matter of law." 507 F.3d at 265. Plaintiff's argument that the chew toys were necessarily unlawful was by reverse logic from the TDRA's specification that parody can be a "fair use" only when the use is "*other than as a designation of source for the person's own goods or services*, including use in connection with ... parodying...the famous mark owner or the goods or services of the famous mark owner." 15 U.S.C. § 1125(c)(3)(A)(ii). By Vuitton's and its amicus INTA's reasoning, that the *name* of the defendant's product, CHEWY VUITON, was a designation of source was dispositive. Giving this statutory language only a short tether, however, the Fourth Circuit said it still did not trump the broader requirement of proving likelihood of dilution. Put differently, even if employing the parody as a brand name precluded a finding of fair use, the parodic nature of the use created associations *unlikely* to dilute the Vuitton trademark. "In sum," said the court, "while a defendant's use of a parody as a mark does not support a 'fair use' defense, it may be considered in determining whether the plaintiff-owner of a famous mark has proved its claim that the defendant's use of a parody mark is likely to impair the distinctiveness of the famous mark." 507 F.3d at 267. On this score, recognizing the puzzling nature of what, if anything, causes (or is likely to cause) dilution, the court explained that "by making the famous mark an object of the parody, a successful parody might actually enhance the famous mark's distinctiveness by making it an icon." *Id.*

Although not framed in terms of fair use (deliberately so), the Fourth Circuit's dilution analysis, like its infringement analysis, turned entirely on the effectiveness or not of the parody. In finding no likelihood of dilution, *Louis Vuitton* thus notes that "[w]hile a parody intentionally creates an association with the famous mark in order to be a parody, it also intentionally communicates, if it is successful, that it is *not* the famous mark, but rather a satire of the famous mark." 507 F.3d at 267. The court did acknowledge that "if the parody is so similar to the famous mark that it likely could be construed as actual use of the famous mark itself", *id.* at 268, it might cause dilution. However, the analysis went no deeper in elucidating when a claimed parody indeed furthers the purposes of the Lanham Act or where or how the line between effective and failed parody is to be drawn.

* * *

Just as part of the fair use analysis asks whether the defendant has used no more than necessary to invoke the original, *New Kids on the Block v. News America Publishing, Inc.*, 971 F.2d 302, 308 (9th Cir. 1992), it may be that to the extent legal lines can be drawn, certain parodic uses coming too close to the original might simply be treated as failed parodies and hence infringements. *Louis Vuitton* does not purport to go further than most trademark parody cases in demarcating these boundaries of fairness, and does not even acknowledge the line sometimes drawn between core First Amendment parodies and ordinary consumer products. However, *Louis Vuitton* does establish that the new TDRA does *not* provide any such bright line barring all plays on famous marks in naming parodic products. How long a leash parodists *should* be allowed will no doubt always be elusive, but some such legal boundary lines surely would be preferable to what is in effect an invisible fence on the current legal landscape.

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NYIPLA Calendar

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|----------------------------------|---|
| Wednesday, April 30, 2008 | 24th Annual Joint Patent Practice Seminar, Hilton, New York
See page 6 for details |
| Friday, May 16, 2008 | "Engaging Outside Counsel on IP Matters - In-House Attorneys' Perspective"
The Harvard Club, See page 9 for details |
| Wednesday, May 21, 2008 | Annual Meeting and Awards Dinner, University Club at 1 West 54th St, NYC |
| Tuesday, June 17, 2008 | CLE Spring Half-Day Luncheon & Program, Hot Topics in Trademark Law
The Harvard Club, 27 West 44th St., New York, NY |

Report on Annual Meeting of U.S. Bar – JPO Liaison Council

by John B. Pegram¹ & Marylee Jenkins²

The U.S. Bar-JPO Liaison Council had its annual meeting with officials of the Japan Patent Office on October 15, 2007 in Washington, DC. The JPO delegation was led by Deputy Commissioner Toshimichi Moriya, its senior career officer and a long-time participant in Council meetings. The U.S. delegation was led by Council Chair Jeffrey Navon. A number of NYIPLA members and other IP attorneys from around the country participated as delegates of various U.S. IP bar groups.

The meeting consisted of presentations from each side concerning patent law and practice developments in Japan and the United States, followed by discussion. Presentations provided by the JPO during the Council meeting are posted on the NYIPLA website at <http://www.nyipla.org/Articles/JPOLiaisonCouncil.htm>.

This unofficial report will focus primarily on the Japan side. In addition, AIPLA Deputy Director Vince Garlock made a presentation regarding the status of patent law reform legislation. Sam Helfgott and John Pegram described the USPTO continuation and claim limit rule proposals, and the preliminary injunction that has stayed their implementation.

Obviousness & Inventive Step

The subject of obviousness and inventive step was introduced by Uwe Szipl. He noted the recent *KSR* decision of the U.S. Supreme Court and the USPTO's October 10, 2007 *KSR* guidelines. Then, Mr. Moriya made a presentation regarding inventive step in Japan and discussing a study by the AIPPI – Japan Group, which considered the examination results in corresponding applications in the European, Japanese and U.S. offices, and conducted interviews in each jurisdiction. Most significantly, all three offices allowed corresponding claims in 66% of the cases and all three offices finally rejected corresponding claims in 6% of the cases. In 28% of the cases, the results diverged. The U.S. granted claims in more cases than Europe and Japan.

In response to a question regarding a study indicating the inadequacy in some cases of the reasons for refusal by the JPO, Mr. Moriya reported that the JPO is now addressing that issue and later he stated that the JPO is trying to improve examiner-applicant communication.

Japan Patent Law Amendments

Mr. Moriya described the April 2007 amendments to the Japanese patent law. In particular, he noted the limitation on amendment of claims to address a different subject (rather than narrowing) after a first refusal. Under the new

law, divisional applications are now more freely permitted, in particular, after allowance of a parent application.

The JPO reported on the statistics of JPO decisions and the JPO's efforts to reduce inconsistencies between examiner's actions, Board of Appeals decisions and the results in the IP High Court in both appeals of invalidation proceeding and appeals of invalidity defenses in infringement litigations. Mr. Moriya reported that, from the year 2000 to 2006, JPO decisions to grant patents as a result of examination had declined from 60% to 52%. The rate of reversal by the Board of examiners' refusals of patents declined over the same period from 69% to 43%, and the rate of invalidations had increased from 32% to 62%. From 2003 to 2006, the IP High Court's rate of reversals of JPO refusal decisions fluctuated as follows: 17.4%, 8.8%, 7.2% and 14.5%. Its reversal rate on invalidations was more consistent, declining steadily from 25.2% in 2003 to 20.0% in 2006.

Proposed Common Application Format

The JPO made a presentation on the plan by the Trilateral patent offices to develop a Common Application Format ("CAF"), based on the PCT standards. In particular, the JPO described the advantages of applications in XML format, in terms of efficiency, data exploitation and savings, and described what it is doing to assist other Trilateral offices in using the XML format, including the development of an XML converter and auto-formatting macros. At the time of our meeting, the JPO expected that the 6th Trilateral Working Group meeting in November 2007 would adopt the Agreement on CAF. (It did. <http://www1.uspto.gov/go/com/speeches/07-47.htm>).

Patent Prosecution Highway & Proposed "New Route"

Mr. Moriya reported on the progress of the JPO's Patent Prosecution Highway ("PPH") pilot programs with other offices, including the United States. The PPH program permits applicants in one patent office to obtain expedited examination following allowance of a corresponding application in another office. (See http://www.uspto.gov/web/patents/pph/pph_index.html and http://www.jpo.go.jp/torikumi_e/t_torikumi_e/highway_pilot_program_e.htm). As of October 1, 2007, he said, there had been 142 PPH requests to the JPO from US applicants and 172 PPH requests to the USPTO from US applicants. At the time of our meeting, the Japan-U.S. PPH pilot program had been extended to January 8, 2008.

cont. on page 6

The JPO discussed its “New Route” proposal, as an alternative for filing foreign priority applications in major patent offices by the normal Paris Convention or PCT route. The proposal was described by Mr. Tsuyoshi Isozumi, Deputy Director of the JPO’s International Affairs Division. The main features are (1) the original application filing would be considered a filing in all offices, (2) the Office of First Filing (“OFF”) would conduct the first examination and the Offices of Second Filing (“OSF”) would defer examination, and (3) the OSFs would use the search and examination results of the OFF (but would not automatically adopt the OFF examination results). The JPO points out that the New Route would permit delaying translations for 30 months, would enable work-sharing between major offices and would avoid fees payable to WIPO in PCT applications. U.S. delegates pointed out that the EPO has expressed concerns over potential conflict with the PCT and undermining WIPO funding, and that—without EPO participation—the New Route is not likely to move ahead.

Japan Declines to Participate in PCT Supplemental Searches

Sam Helfgott presented the subject of a supplemental PCT search, the “SIS,” to be available in some patent offices beginning in January, 2009. PCT applicants would be permitted to request an additional search by another office in the International Stage, which might address additional literature and languages. Mr. Moriya

described three resolutions on search reports that were adopted by a WIPO PCT working group in September 2007: (1) that each ISP should produce a comprehensive report, (2) that the financial impact of the SIS should be reported to the PCT Assembly, and (3) the effect of the SIS should be reviewed after three years. He expressed hope that the PCT system will continue to improve, but confirmed that the JPO does not plan to participate in the SIS program. While the JPO does not deny that multiple searches might improve the results; he said that the JPO believes a single, quality search is preferable, to reduce the cost for applicants and to reduce the burden on offices.

Harmonization

The meeting concluded with a discussion of the status of international patent law harmonization efforts. Japan has been supportive of the U.S. first applicant to file and grace period initiatives; however, Mr. Isozumi noted that some European countries appear unwilling to accept the U.S. grace period proposal. U.S. delegates described the possibility that the patent legislation now pending in Congress will tie U.S. adoption of the first applicant to file procedure to adoption of a grace period acceptable to the U.S. in major foreign countries, the so-called “trigger” provision.

¹ John B. Pegram is an NYIPLA Delegate & Past President, and Senior Counsel at Fish & Richardson P.C., New York.

² Marylee Jenkins is an NYIPLA Delegate & Past President and Partner at Arent Fox LLP, New York.

JPPCLE

24th Annual Joint Patent Practice Seminar

Wednesday, April 30, 2008

24th Annual Joint Patent Practice Seminar

The Hilton New York Grand Ballroom • 1335 Avenue of the Americas, NYC

Keynote Speaker



Hon. Timothy B. Dyk
Circuit Judge,
U.S. Court of Appeals, Federal Circuit

This full-day program will have five panels of experts

presenting current developments in:

Litigation • Biotechnology/Pharmaceuticals

Supreme Court – Big IP Cases

Foreign Patent Practice • USPTO Practice

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This program is brought to you by the Joint Patent Practice Continuing Legal Education, Inc. and co-sponsored by:
New York Intellectual Property Law Association, Connecticut Intellectual Property Law Association,
New Jersey Intellectual Property Law Association and Philadelphia Intellectual Property Law Association

Details will be posted on the website as they become available: www.JPPCLE.org

"As Time Goes By - Learning Patent Law from Players Past"

by Dale Carlson

There is much to learn from our predecessors in our profession. This is especially so to the extent we can see and touch artifacts from our "past" that were part-and-parcel of their "present". Thanks to the good graces of our Association's Board member, Phil Shannon, we have an opportunity to do a virtual Star Trek-ean Mind Meld with members of our Association who are long gone, including one who practiced patent law way back in the late 1880s.

During his tenure at Pennie & Edmonds, Phil inherited various pamphlets published in the 1930s and 1940s under the auspices of our Association, then called the "New York Patent Law Association" (NYPLA). Although somewhat yellowed by time, the pamphlets are in excellent condition. They serve to enliven our understanding of the problems and proposed solutions affecting patent law that were being bantered about back then.

Prof. John Lienhard, of NPR's "Engines of our Ingenuity" fame, put the learning to be derived from artifacts, such as the NYPLA pamphlets, thusly: "So, think about ghosts. If we visit the original place, or we hold the artifact in our hand, and, if we find the right frame of mind, then something happens. Combine knowledge of the past with the physical object, and we can get much more than the sum of two parts. If the circumstances are right, we share something with those who once touched -- or who saw -- what we now touch or see."

One of the NYPLA pamphlets is entitled "Sore Spots in the Patent System" and was written by W. Houston Kenyon, Jr. in 1942. Mr. Kenyon is a Past President of our Association. One of the "sore spots" he identifies is that the "majority of issued patents are for petty details of routine improvement and not true inventions". If this criticism of the patent system has a familiar ring to it, consider Jaffe & Lerner's finger-wagging against

"patents on inventions that are trivially obvious" in their 2004 tome tediously titled "Innovation and its Discontents: How Our Broken Patent System is Endangering Innovation and Progress, and What to Do About It".

While attempting to point blame at the Federal Circuit, Jaffe & Lerner's book reveals their lack of understanding of the patent system as we know it. Moreover, to the extent that there is an analogy to be drawn between the "trivially obvious" inventions that they allude to, and the "petty" inventions that Mr. Kenyon refers to, the Federal Circuit cannot possibly be the culprit. The reason is that the Federal Circuit didn't exist at the time of Mr. Kenyon's article. Indeed, it took another four decades before the Court came into being.

That is not to say that a glimmer of hope in favor of the Federal Circuit's creation wasn't in some practitioners' minds early on. Apropos of this, another of the NYPLA pamphlets is entitled "Discussion of the Single Court of Appeals at Dinner Meeting of the New York Patent Law Association". The discussion took place on December 9, 1936 at the Hotel Roosevelt. The presentations of several speakers, including Judge Augustus Hand, are reproduced in the pamphlet.

One speaker at the 1936 event, Mr. Henry D. Williams, pointed out that he began his practice at Winter & Kenyon, a predecessor of Kenyon & Kenyon, in 1888. Reflecting a forceful yet pragmatic tone, Mr. Williams declared: "Now, our clients want a single Court of Patent Appeals, and we are going to get it whether we want it or not. That you may be assured of. And the question is whether this Association is open-minded enough and broad-minded enough to consider the thing from the proper standpoint."

Mr. Williams' remarks presaged an event that would take place a half-century later. His comments, together with those of Mr. Kenyon, offer a sense of perspective on the ebb-and-flow that takes place when it comes to changes being considered for our nation's patent system.

In order for our Association to help insure that future changes are forward-thinking, it may be helpful to reflect on what our "elders" might think of our plans. This will bring insight that is not constricted by the time-span of our individual careers, and will allow us to be thinking in time-frames of half-centuries and more. To do that, we can continue to Mind Meld with our predecessors. Hopefully, Mr. Spock will be there when we need him.



Dale Carlson, a partner at Wiggin & Dana, serves as the NYIPLA Historian, and as a member of the Board of Directors.

Reduced European Patent Translation Costs Under the London Agreement

By Thomas Spath and Charles S. Stein¹

The European Patent Convention (“EPC”) permits applicants from all over the world to file a single patent application that has the effect of establishing a right of priority in all of the EPC member countries. Applicants that have previously filed an application in a country that is a member of the Paris Convention can also claim the benefit of that earlier priority date if their application to the European Patent Office is filed within the year.

Under the European Patent Convention, an applicant can file and prosecute an application in one of the three official languages of English, French or German. This obviously provides a significant advantage to English-speaking applicants from the United States, since no translations are required during the examination stage. Thus, a U.S. applicant can avoid all translation expenses until the end of the process when the scope of the claims and the potential commercial value of the invention has been finally determined.

Once the European Patent Office has indicated its intention to grant a European patent for the allowed claims, the applicant must then have all of the claims translated into the other two official languages. In the case of English-language prosecution, the claims will have to be translated into French and German as a condition of the grant. The patent is then issued with the specification in English and the claims in English, French and German.

It is also up to the applicant to decide in which of the EPC member countries the granted European patent will be validated. Because the overall expenses incurred for each country of validation include translation and annual maintenance fees, even large corporations are selective and limit the number of countries in which a granted European patent is validated.

Under the practice that has prevailed since the inception of the EPC, member countries have required applicants to have the entire European patent translated into the local language as part of the validation process. The theory and practice has been that the validation of a

European patent grant in, e.g., France is to be treated as a French national patent for the purposes of determining the scope of the claims, liability for infringement, and the like. The high cost of translating the patent has been raised as a problem for patent owners under the EPC.

Lessening the Burden of Translation Costs

Almost a decade ago representatives from a group of EPC member countries met and eventually formulated the Agreement dated 17 October 2000 on the application of Article 65 of the Convention on the Grant of European Patents (“the London Agreement”). The London Agreement will take effect on May 1, 2008, and promises to greatly reduce translation costs for applicants who seek patent protection in the participating nations.

As noted above, in the past, an applicant who obtained a European Patent under the European Patent Convention and proceeded to validate it in member states was generally required to translate the entire patent into each state’s national language. The London Agreement will eliminate or at least reduce this requirement for many nations.

Nations that ratify or accede to the London Agreement will fall into one of two categories, which will determine the revised procedure that will be followed in each nation.

The first category is those nations that recognize English, French or German as an official language. Nations in this category will accept patents in any one of those three languages, without any translation being required. This means that an application in English can, beginning May 1st, be validated without any translation, not only in the U.K., but also in France, Germany, Liechtenstein, Luxembourg, Monaco, and Switzerland.

The second category is those nations in which English, French or German is not an official language. These nations must select at least one of those languages as a prescribed language. An application written in a prescribed language would be acceptable for validation of a European Patent

ARTICLES

The Association welcomes articles of interest to the IP bar.

Please direct all submissions by e-mail to:

Ashe P. Puri, Bulletin Editor, at apuri@sidley.com

in the adopting nation. However, each of those signatory nations also has the right to require that the claims be translated into its official language. In this category:

- Croatia will accept patents written in English, with the claims translated into Croatian.
- Denmark will accept patents written in English, with the claims translated into Danish.
- Iceland will accept patents written in English, with the claims translated into Icelandic.
- Latvia will accept patents written in English, French or German, with the claims translated into Latvian.
- The Netherlands will accept patents written in English, with the claims translated into Dutch.
- Slovenia will accept patents written in English, French or German, with the claims translated into Slovenian.
- Sweden is expected to ratify the London Agreement, though it has not yet done so. It will accept patents written in English, with the claims translated into Swedish. Alternatively, it would accept patents written in French or German, with the claims translated into Swedish and the description translated into either English or Swedish.

If the London Agreement proves popular, other contracting and extension states of the European Patent Convention may accede to it. Of those nations, Austria, Belgium, Ireland and Malta would fall into the first category, while the remaining EPC-member nations and extension states of Albania, Bosnia and Herzegovina, Bulgaria, Cyprus, Czech Republic, Estonia, Finland, Greece, Hungary, Italy, Lithuania, Macedonia, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Spain and Turkey would fall into the second category.

As noted the European patent process presently requires that the claims of the allowed application be translated for publication into English, French and German prior to grant of the patent, and this requirement remains in place. Furthermore, in the event of a dispute relating to a European patent, a London Agreement nation may require that the patent proprietor provide a full translation of the patent into an official language of that nation. However, the London Agreement will greatly reduce the translation expenses for the typical multi-country validation process.

Applicants who already have had mention of the grant published in the European Patents Bulletin may wish to delay the grant procedure until after May 1st, in order to take advantage of the London Agreement. This may be accomplished by paying the grant and renewal fees now, and withholding the submission of the claims in English, French or German versions. The European Patent Office will then set a deadline three or four months in the future for submitting the translated claims (and paying an additional fee). By the time that deadline is reached, the London Agreement will be in force.

For applicants whose pending applications have not yet had mention of the grant published in the European Patents Bulletin, there is no need to delay prosecution. An applicant presently has three months from the date of such publication to provide the costly full translation into the official language of each validated nation. Therefore, for any mention of the grant published after February 1st, the London Agreement will come into force before the three months runs its course, superseding the full translation requirement for participating nations.

¹ *Thomas E. Spath is of counsel and Charles S. Stein is an associate to the New York City firm of Abelman, Frayne and Schwab.*

Friday, May 16, 2008

*"Engaging Outside Counsel on IP Matters -
In-House Attorneys' Perspective"*

Course is 1.5 NYS Professional Practice CLE Credits

Moderator: Mark Schildkraut

Panel Speakers: Jeff Zachmann, Esq., Scott Rittman, Esq.,
George Romanik, Esq. and Kathy Card Beckles, Esq.

Details on website (www.nyipla.org).

US BAR/EPO LIAISON COUNCIL REPORT

By Samson Helfgott¹

23RD MEETING • WASHINGTON, DC • NOVEMBER 12, 2007

The US Bar/EPO Liaison Council is a group that includes for representatives of US Patent Bar Associations who meet directly with the heads of the European Patent Organization on an annual basis for discussions on prosecution of patent applications before the European Patent Office. The Council meets alternately between the US and Europe and includes representatives from both US national and local bar associations. The EPO typically sends their top officials to such meetings.

The 23rd meeting of the Council took place in Washington D.C. on November 12th, 2007. Representing the EPO was Alison Brimelow, the newly elected President of the European Patent Office. She was accompanied by Aidan Kendrick, Head of the President's office, Colin Philpott, Principal Director of DG2, Wim Van Der Eijk, Principal Director, DG5, Mark Weaver, Director of DG2 and Panagiotis Rigopoulos, Lawyer, DG 5. From the United States, there were representatives from all of the National Bar Associations including AIPLA, IPO and ABA IPL Section, as well as representatives from over 15 State Bar Associations. Samson Helfgott represented the New York Intellectual Law Association at this meeting.

The President of the European Patent Office gave an overview of the developments that took place over the last year. In connection with workload and productivity, the current figures indicate that the number of filings for European Patents increased by about 4% over the corresponding figures for 2006. So far direct European filings are about 3% over last year while the number of Euro PCT applications increased by almost 5% over last year. Of the anticipated 220,000 applications to be filed in 2007, it is expected that at least 150,000 of them will be via PCT.

By the end of July, 83,000 applications entered into the grant procedure of which 56% were PCT applications entering the regional phase. It was anticipated that at the end of 2007, almost 150,000 European patent applications should be recorded in the grant procedure representing a growth of over 5% of the previous year.

As a result of the increase in PCT filings, by the end of September 2007, over 145,000 search requests had been received which is 9% above last year's figure. As anticipated, PCT Chapter II demands have continued to fall.

The rate of patent oppositions was 5.5% in 2006. While the percentage in 2007 was about the same, the absolute number of oppositions increased as a result of the higher number of patents granted.

By the end of September the number of technical appeals had increased by 11% over the previous year and

is expected to reach 2100 by the end of 2007. The goal for achieving a processing time of 36 months remains a key objective. However, following the introduction of the European Extent Search Report (EESR), the first communication was sent on an average of 23.8 months after the receipt of the applications. On average, during the first quarter of 2007, this average delay was reduced to 21.3 months.

In 2006, the grant rate for European patents was 56%, while the withdrawal rate after the search phase was 17% with the remainder refused or withdrawn after the substantive examination phase.

There are continuing ongoing, as well as new activities, relating to quality management in order to improve the quality of products and services provided by the EPO. There are a number of external quality procedures in place including The European Quality System, the Partnership for Quality and others. Internally, there is an internal quality board, cluster level reviews, and other procedures in place.

In connection with the European Quality Management System, a standard was drafted by a working party and adopted by the Administrative Council in March 2007. This would govern the work done by any of the patent offices within Europe.

The European Patent Organization continues to grow. With the accession of Malta on March 1, 2007, the EPO now has 32 members and including the 5 extension states results in a total of 37 countries. Norway will become an EPC Contracting State as of January 1, 2008. Further ratification proceedings are in progress in Croatia and the former Yugoslav Republic of Macedonia.

The EPC 2000 will enter into force on December 13, 2007. Most of EPC 2000 serves to adapt and harmonize with various international laws that have gone into effect, including TRIPS, and the Patent Law Treaty. While there are no major changes in substantive law, there are some new features that are provided. One is the use of a central limitation/revocation proceeding with a petition for review, whereby the patent can be challenged at the EPO in a central proceeding. Additionally, in conformity with the PLT, the restoration of the right of priority is being provided form. Likewise for the purposes of determining the extent of protection, Article 69 has been changed to take into account of an element which is equivalent to an element claimed.

The ongoing discussions referred to as the "Strategy Debate" between centralization of European activities in

EPO and further work to be done by the national patent offices has further progressed. A report on the results should follow in the middle of 2008. However, it appears that very few applicants are interested in making use of the national patent offices as a first search authority. However, ongoing work continues to create synergies among the participating national patent offices.

The London Agreement relating to languages has been approved by France and is expected to enter into force in the first half of 2008. This will permit the signatories of the Agreement to accept a second language within their countries in addition to their primary home country language. It is anticipated that those participants of the London Agreement will all accept English, whereby English will be an accepted language for signatory countries. As such, the claims will be the only part necessary for translation, while the rest of the specification can remain in the English language in all Member States of the London Agreement.

The issue of the Community Patent and the establishment of a centralized litigation system continues to be discussed but it does not appear that progress is being made in either of these areas.

The EPO continues to be a major player in the Trilateral discussions. The Trilateral Patent Offices continue to recognize the need for work sharing and have suggested numerous work sharing opportunities to explore. One project referred to as the SHARE project would have the Office of First Filing give priority to searches for those applications claiming priority in their countries while awaiting the search results from the other offices doing the primary search where such patent office is the Office of Second Filing.

Other discussions for work sharing include the Patent Prosecution Highway project wherein Europe plans to enter into an agreement with the US at the beginning of 2008 to extend the PPH system between US and European filers.

The Trilateral Patent Offices working with Industry Trilateral participants have concluded a Common Format Application whereby applicants adhering to the common format agreed to by the Trilateral would have their applications accepted by all three patent offices, without

the need for any procedural changes throughout the prosecution. It is recognized that additional work is needed in this area to address various additional substantive changes and ongoing discussions are continuing through a Working Group within the Trilateral.

In order to increase the use of PCT work between the Trilateral governments, a Working Group has also been established to address various areas of PCT in order to permit the Trilateral to make better use of the physical infrastructure and "usability" of the treaty.

The EPO further discussed changes in their fee policy that will be going into effect in 2008, as well as potential future changes still being discussed. As a result of EPC 2000, with the introduction of new procedures such as the limitation procedure and the petition for review, charges have been instituted for such procedures. Additionally, a general fee increase of 5% effective April 1, 2008, will be instituted based upon inflation.

The EPO is also contemplating behavior modification fees and in 2008, it is proposed to increase the claims fee substantially for claims above 10 and each subsequent claim thereafter. They are also proposing to fix European renewal fees which are payable during the prosecution phase before the EPO, and base it upon an average of 6 European countries rather than 3 European countries as has been calculated in the past. Late fee payments will also be substantially increased from their current 10% to a 50% increase.

In the future they are likewise considering a per page fee on filing, further increases in large number of claims, and a possible single designation fee with automatic designation of all European countries.

It was generally found that the EPO is very interested in working with US applicants, addressing our needs, and continuing to make better use of PCT which is a growing main portion of their work.

Presentations during the Council meeting are posted on the NYIPLA website at <http://www.nyipla.org/Articles/EPOLiaisonCouncil.htm>

Any comments or questions can be directed to Samson Helfgott at samson.helfgott@kattenlaw.com

Nineteen Hundred and Twenty-two

NYIPLA

Wednesday, May 21, 2008

~ **SAVE THE DATE** ~

Annual Meeting and Awards Dinner

University Club, 1 West 54th Street, New York, NY

Join us as we recognize the winners of the

Connor Writing Competition and the Inventor of the Year

February 15, 2008 CLE Luncheon Program

TOPIC: OBSERVATIONS ON THE U.S.
 GOVERNMENT'S POSITION IN QUANTA V. LG

On February 15, 2008, the NYIPLA Committee on Meetings and Forums presented a Continuing Legal Education ("CLE") luncheon program at the Yale Club featuring Deputy Solicitor General Thomas Hungar, Esq. The topic of the CLE program was "Observations on the U.S. Government's Position in Quanta v. LG." Angie M. Hankins, Esq. of Stroock & Stroock & Lavan LLP, hosted the CLE program.

On January 16, 2008, Mr. Hungar argued before the U.S. Supreme Court on behalf of the Office of the Solicitor General and in support of the petitioners in Quanta Computer, Inc., et al., v. LG Electronics, Inc., No. 06-0937 (filed Nov. 30, 2006). Mr. Hungar discussed the Office of Solicitor General's process for responding to a request from the Supreme Court and determining whether to submit an amicus curie brief. He reviewed the facts in Quanta, and discussed the following question presented to the Supreme Court:

Whether a patentee, having authorized the sale of the particular article at issue, can nonetheless invoke patent law to remedy a violation of a purported restriction on the purchaser's right to use the article for its only reasonable use. Mr. Hungar was asked numerous questions from a well-informed audience, discussing the government's position and underlying analysis.

The Quanta case is waiting the Supreme Court's decision, which is expected no later than June 2008.



Deputy Solicitor General Thomas Hungar, Esq. & Angie M. Hankins, Esq

March 28, 2008 CLE Day-of-Dinner Program and Luncheon

TOPIC: TRYING A PATENT CASE IN VIEW
 OF RECENT SUPREME COURT CASES

On March 28, 2008, the NYIPLA hosted a CLE luncheon program in the Starlight Roof of the Waldorf=Astoria. The topic was "Trying a Patent Case in View of Recent Supreme Court Cases."

The topic concerned the changing landscape in the litigation and trial of patent cases following the recent Supreme Court and Federal Circuit decisions in *KSR*, *eBay* and *Seagate*. The distinguished panel included Hon. Richard Linn of the U.S. Court of Appeals for the Federal Circuit, Hon. Joseph A. Greenaway, Jr. of the U.S. District Court for the District of New Jersey, Hon. Patti B. Saris of the U.S. District Court for the District of Massachusetts, John Flock, Esq. of Kenyon & Kenyon LLP, and Jesse J. Jenner, Esq. of Ropes & Gray. There were over 170 attendees, including 20 judges.

Photos of Program on next page

June 17, 2008
CLE Spring Half-Day
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&
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27 West 44th Street
New York, NY

CLE Day-of-Dinner Program and Luncheon, March 28, 2008



The 86th Annual Dinner in Honor of the Federal Judiciary, March 28, 2008

On March 28, 2008 the New York Intellectual Property Law Association celebrated its 86th Annual Dinner in Honor of the Federal Judiciary. The Dinner was held at the Waldorf=Astoria Hotel. Over 3600 guests attended.

President Christopher Hughes welcomed the honored guests, members of the NYIPLA and their guests before introducing a trio of Juilliard graduates who opened the evening's events with an amazing rendition of the National Anthem.

The Association's Sixth Annual Outstanding Public Service Award was presented posthumously to the Honorable Howard T. Markey, the first Chief Judge of the United States Court of Appeals for the Federal Circuit. Judge Markey's son, Christopher Markey, accepted the award at the dinner. The Honorable Paul R. Michel, Chief Judge of the Federal Circuit made introductory remarks before the award presentation. The Association is honored that the award will be displayed in the Howard T. Markey National Courts Building in Washington, D.C.

The keynote speakers were James Carville and Mary Matalin, who provided the audience with humorous anecdotes revolving around their life together and, of course, the 2008 presidential campaign.



This year's recipient of the NYIPLA Diversity Scholarship, as part of the Sidney B. Williams, Jr. Minority Scholarship Program of the American Intellectual Property Law Education Foundation (AIPLEF), was Veronica Wong, a law student at Columbia University Law School. The presentation of the \$10,000 NYIPLA check was made by the Association's Immediate Past President, Marylee Jenkins.

Please Save the Date: The 87th Annual Dinner in Honor of the Federal Judiciary, Friday, March 27, 2009



The 86th Annual Dinner in Honor of the Federal Judiciary, March 28, 2008



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