

NYIPLA[®]

The Report

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IN MEMORIAM DAVID F. RYAN 1942-2016

It is with a profound sadness that the NYIPLA shares the news that David F. Ryan, a long-time dedicated member of the Association, passed away on January 4, 2016 at the age of 73. Dave served the Association in many capacities, including as a member of the Board of Directors, but he will forever be associated with the Association's Amicus Brief Committee (or the ABC, as he liked to call it), which he chaired and co-chaired at various times.



Dave obtained his LL.B. from Columbia Law School and had a degree in Physics from College of the Holy Cross. After graduation from Columbia, Dave clerked for the Hon. Marvin E. Frankel

(S.D.N.Y.) and then joined Kaye, Scholer, Fierman, Hays & Handler, where he became a partner. He always considered himself an antitrust disciple of the late Professor Handler. In 1981, Dave became a partner at Fitzpatrick, Cella, Harper & Scinto, from which he retired in 2004.

Those who worked closely with Dave, whether at his firms or on Association amicus briefs, came to appreciate his keen insights, identification of

complex relationships between seemingly unrelated cases, historical knowledge of how cases and the law developed, and his amusing analogies, as well as hidden purple prose. Dave will be sorely missed.

Tributes

Dave was a brilliant advocate who loved the practice of law. He was also a kind friend who knew how to find joy in life. He will be missed.

—Ed Vassallo

Although I never met Dave Ryan in person, his phone conversations always left the most vivid impressions on me. His spirited contributions to our monthly Amicus Brief Committee meetings were invaluable. His lively and informed comments on patent case

law and his vast knowledge of patent prosecution and litigation procedure made it crystal clear that Dave had a rare and encyclopedic intellect in his chosen field. Yet he was never dry or pedantic. And, although his health issues restricted his mobility in the last years of his life, they did not dull his zest for living. He shared his wry opinions and good humor on a wide variety of issues, such as tennis and beer, with all who came in contact with him. He will be greatly missed.

—David Goldberg

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I first met David Ryan shortly after I attended my first Supreme Court oral argument in *Quanta*. I wrote a few pieces on that argument and the subsequent decision. For those who knew Dave, they will not be surprised that these articles caught his eye. I subsequently learned that Dave had a fond passion for the law of patent exhaustion, and it would be the subject of many spirited discussions in the years to come.

Thereafter, I was recruited to join the Amicus Brief Committee or “ABC,” which Dave was quick to point out was not merely the “Amicus Committee.” After working on my first brief for the Association, I quickly learned that Dave was a great source of legal precedent knowledge, Association history, and the ABC’s historical positions. His tutelage on Supreme Court practice has been firmly ingrained in me. Whenever it is time to consider timing for a petition, his reminders of the rules ring loudly in my head.

Later, when I became a co-chair with Dave on the ABC, I got to know Dave better, and to truly enjoy his wit, knowledge, and at times sass. He told us stories about the sometimes outlandish activities he undertook when he was still practicing at a firm. He taught me to read carefully any last minute edits that he might make, because who knows what “nuggets” he might sneak into the brief.

His years of service to the Association and to the ABC will be sorely missed.

—Charley Macedo

Dave Ryan will always be for me a certain voice on the phone, delivering reason (his, at least) with support and challenges, offering counterpoint and vigorous debate, and delivering points of information and correction. I came to know Dave late in his life through the Amicus Brief Committee. So I never had the opportunity to meet him in person, look him in his eyes, shake his hand, and thank him for being there and doing what he did. This I deeply regret. I did get to work with him on several briefs, and this I cherish. Regardless of my client workload, I always looked forward to our ABC conference calls because inevitably Dave would say something witty, insightful, or combative (in the finest legal tradition), or point out a flaw (in his mind, at least) in someone’s position that would make the call all the more worthwhile. And yes, entertaining. Dave was a resource and a prime reason why I continued on the

ABC; he helped make the ABC the most intellectually interesting activity one could hope to participate in, even if it was a constant, generally losing battle to keep up with him. I will miss our long-running joust over the meaning of certain Supreme Court dicta, and Dave’s ability to cite some arcane case or brief to make his point, as well as his wise counsel, collegiality, and his voice on the phone.

—Robert M. Isackson

I first met Dave in 1985 when I was a law clerk at Fitzpatrick Cella, not yet admitted to the bar and fresh from my fellowship at the Federal Circuit. He scared me (I was not alone in this, by the way) — he didn’t scare in a mean way, it’s just that how much the man knew was overwhelming. Every time he called me on the telephone or, “worse,” stopped into my office (I was a very junior associate after all), I knew that I was going to feel this sense that there was so much to learn and that it was impossible to do so. But learn I did, assisting Dave with client briefs, amicus briefs, articles, speeches, etc.

After a few years I changed firms and went to Kaye, Scholer — Dave’s prior firm! There I met even more people who were overwhelmed by Dave’s encyclopedic knowledge of cases, and antitrust law. And while this was all true, where Dave truly excelled was sharing trivia about judges (particularly Supreme Court justices and Second Circuit judges) and Solicitors General, as well as the history of cases and legislation.

Using this broad knowledge, Dave had this ability to pull together the most diverse sets of facts and law to somehow cobble together a new way of constructing an antitrust or licensing issue. (I will admit that I didn’t always follow his logic, but often he waited for me to catch up to him when sharing the fifth or sixth explanation.) When I again changed firms Dave yet again followed me, this time with frequent phone calls starting with one that announced “Since you’re partner now Jeff, you should start writing amicus briefs for the NYIPLA.”

Over these 30 years I have had the privilege of serving as a member of Dave’s “kitchen cabinet” on dozens of projects for the NYIPLA (primarily amicus briefs, some of which I actually appeared on), debating recent Supreme Court and appellate rulings with him, and even using Dave as my sounding board on issues. Most recently, Dave provided comments and debated critical issues in an article

Tributes continued

that I published this summer about the intersection of patent and antitrust law. I am glad that I had the chance to send him a reprint so he could see the thank you footnote naming him before he passed away. I, for one, am going to miss his calls to either shout about what those “people down on First Street did” every time the Supreme Court issued a patent or antitrust opinion he disagreed with or once again tell me that “Polly understands” when Judge Newman penned a patent licensing dissent. But I’m not the only one who will miss Dave; we all learned so much from him, and we will miss him and his contributions.

—Jeffrey I. D. Lewis

There are few benefits in our profession that compare with the resonance of working together with someone passionately devoted to the law and committed to reaching the correct outcome. Dave Ryan is/was one such person. Dave has had an indelible impact on the NYIPLA, our profession, and on those of us who had the pleasure and privilege of knowing him, working with him, and witnessing his skillful mastery of legal concepts and arguments practiced at the highest levels of the profession.

Although I never had the privilege of practicing alongside Dave Ryan, I have been truly fortunate to have met him, gained immeasurable knowledge and insight from him, and enjoyed the pleasure of every interaction we had during my twelve years serving and working with him on the Amicus Brief Committee (“ABC”). Dave’s encyclopedic knowledge of patent and antitrust law issues, and his ability to navigate the nuances of argument before the Federal Circuit and the Supreme Court, is an irreplaceable resource that will be sorely missed. Thanks to Dave’s mentoring and unique guidance, his is a voice that so many of us on the ABC will continue to hear in our heads and repeat on behalf of the NYIPLA and in our own practice. In that way, he may continue to speak through us on the critical patent law issues of the day to be decided in the courtrooms and chambers at every level of the Federal Judiciary. But, try as we might, as with all great thinkers and leaders, Dave may be imitated but he will never be duplicated. RIP our mentor, good buddy, and colleague, Dave Ryan.

—Rob Rando

NYIPLA Calendar

www.nyipla.org

Biosimilar Panel

NYIPLA Women in IP Law Committee

➤ MONDAY, FEBRUARY 29, 2016 ◀

Axinn, Veltrop & Harkrider LLP, 114 West 47th Street, New York, NY 10036

The 94th Annual Dinner in Honor of the Federal Judiciary

➤ FRIDAY, APRIL 1, 2016 ◀

Waldorf Astoria New York Hotel, 301 Park Avenue, New York, NY 10022

Challenges to the Growth Mindset:

Current Barriers to Innovation

NYIPLA Women in IP Law Committee

➤ WEDNESDAY, MAY 4, 2016 ◀

Lipton Hall, NYU School of Law, 40 Washington Square South, New York, NY 10012

Annual Meeting

➤ TUESDAY, MAY 17, 2016 ◀

The Princeton Club, 15 West 43rd Street, New York, NY 10036

Happy New Year to all NYIPLA members! The new year holds so much promise for new endeavors in intellectual property law. Through its members, the NYIPLA will provide constructive discussion and interpretation throughout the year concerning current IP law as it evolves. My new year's column focuses on the benefits of membership in our organization. We live in a time when many firms and companies are reluctant to support membership in bar associations. My personal resolution is to convince you that membership in the NYIPLA provides real value to you and your career in IP law.

The richness of the NYIPLA derives from the diversity of its members. Our membership includes IP attorneys and agents of all types, e.g., from patent prosecutors and litigators to trademark, cybersecurity, and copyright specialists. Our patent specialists work in high tech and biotech, and our trademark specialists address cutting-edge issues in social media and electronic communication. It is the contributions of each of these diverse specialists that delivers the unique value of the NYIPLA.

The NYIPLA focuses on teaching and shaping intellectual property law using its generalist "output" committees, which organize CLE programs, submit amicus briefs, take legislative action, and publish *The Report*. Our substantive law specialty committees focus on particular areas of IP law, such as patent litigation, patent, copyright and trademark law (to name a few), and collaborate with the output committees to provide the latest thinking in IP specialty areas to our members. Our organization has become a thought leader in the nation in cutting-edge IP issues.

All of the NYIPLA's work requires one additional—and key—ingredient, i.e., working together. The members of each committee work together to consider issues particular to each committee's mandate, both in person and by conference call. In addition, a committee member can meet practitioners in other practice areas through the regular collaborations that occur among committees. In this way, a practitioner can gain contacts working in the intellectual property field outside his or her firm or company and thereby gain a broader sense of intellectual property practice.

Our activities within the bar and the friendships made within the NYIPLA are influential and long-lasting. In the years I have been involved with the NYIPLA, I have seen members find new jobs through other NYIPLA members, start new practices based on NYIPLA contacts, and seek judicial appointments through their contacts in the NYIPLA.

In addition, the NYIPLA is a great way for members to gain new experiences that may open new areas of practice for them in

their current positions. For example, I know an attorney who is interested in learning more about cybersecurity law but has, thus far in his career, only worked in patent law. Our newly formed Privacy, Big Data and Cybersecurity Committee is the perfect forum for him to gain a sufficient foundation in this growing area of law to begin his practice in this area. I recommended that he join this Committee and attend the NYIPLA CLE events focused on this area of law. Through our programs and committees, our members meet new people and network in a functional manner, by collaborating on a project or discussion dealing with a topic familiar or new to them. In this way, both the committee and the individual benefit from the interaction.

This year will bring new energy and opportunities within the NYIPLA. We are planning numerous events and are preparing to take action on several legislative fronts. We have a Law Clerks' Panel planned for January 13, 2016, a Biosimilar Panel planned for February 29, 2016, and other CLE events. Our Legislative Action Committee is also actively preparing White Papers for submission to Congress focusing on the pending Trans-Pacific Partnership, the Defend Trade Secrets Act (DTSA) of 2015, and various aspects of the pending patent legislation relating to IPRs, venue, and the proposed life sciences IPR carve-out. In addition, the Amicus Brief Committee is continuously reviewing decisions to determine which cases would benefit from NYIPLA amicus briefing.

The 94th Annual Judges Dinner will be held on April 1, 2016. At this event, the NYIPLA will award the Outstanding Public Service Award to the Honorable Leonard Davis, who recently retired as the Chief Judge of the United States District Court for the Eastern District of Texas. Our guest speakers will be NPR personalities Peter Sagal and Nina Totenberg, who promise to be entertaining. As most members already know, the Judges Dinner is the highlight of the year for intellectual property practitioners in the tri-state area.

The NYIPLA is a dynamic organization that derives its vitality from its members. This year I encourage each NYIPLA member to ask a colleague to join our organization, to join a Committee, or to attend a CLE event. In this manner, we can continue to grow and thrive.

Dorothy R. Auth



ITC Needs “Material Things” in a Digital World — *ClearCorrect Operating, LLC v. Int’l Trade Comm’n*, Case No. 14-1527 (Nov. 10, 2015)

By *Kenneth R. Adamo, Eugene Goryunov,
Jon Carter, and Aaron Resetarits**

On November 10, 2015, the United States Court of Appeals for the Federal Circuit reversed the International Trade Commission (“the Commission”), holding that the Commission’s jurisdiction did not extend to the importation of electronic transmission of digital data. The majority found that the application of the 1930 Tariff Act—which confers upon the Commission the authority to remedy unfair trade practices, including patent infringement—is limited to the importation of “material things.”

I. Procedural Background

Align Technology, Inc. (“Align”) owns several patents generally related to the production of orthodontic appliances called “aligners.” Much like conventional braces, aligners attach to, and gradually reposition, a patient’s teeth. Align petitioned the Commission to institute an investigation for alleged patent infringement and violation of Section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337) (“Section 337”), by ClearCorrect Operating, LLC (“ClearCorrect US”), and Clear Correct Pakistan, Ltd. (“ClearCorrect Pakistan”) (collectively “ClearCorrect”).

ClearCorrect manufactures aligners, and its manufacturing process involves the transmission of digital information between ClearCorrect US, an entity in the United States, and ClearCorrect Pakistan. The manufacturing process begins when ClearCorrect US takes a physical scan of a patient’s teeth and creates a digital model. The digital data corresponding to that model is then electronically transmitted to ClearCorrect Pakistan for further processing. ClearCorrect Pakistan then sends a revised digital model back to ClearCorrect US for use in the creation of a physical, thermoplastic model. Align alleged that ClearCorrect’s transmission of digital information corresponding to three-dimensional models for patients’ teeth from Pakistan to the United States constituted importation of infringing “articles” within the scope of Section 337.¹

The Commission instituted an investigation in response to Align’s complaint. An Administrative Law Judge (“ALJ”) held an evidentiary hearing and found that ClearCorrect infringed two groups of Align’s patents. The ALJ further concluded that the Commission had the authority to order ClearCorrect to stop transmitting its digital models into the United States. The Commission

reviewed and agreed with the ALJ’s determination that Section 337 vested the Commission with jurisdiction because the importation of “articles,” as that term is used in Section 337, encompasses electronic transmission of digital data into the United States. The Commission, however, found that ClearCorrect US had not violated Section 337 because infringement occurred within the borders of the United States. ClearCorrect Pakistan was a contributory infringer, according to the Commission, because its transmission of digital information led to an act of direct infringement by ClearCorrect US.

ClearCorrect appealed the Commission’s decision to the Federal Circuit.²

II. Section 337 “Articles” Are “Material Things,” Not Electronic Transmissions

Key to the Commission’s decision was its interpretation of the term “articles” in Section 337. The Federal Circuit reviewed the Commission’s decision under the two-step framework of *Chevron v. Natural Res. Def. Council*,³ and concluded that the Commission’s jurisdictional finding was both contrary to Congress’ intent and an unreasonable interpretation of Section 337.

In *Chevron*, the United States Supreme Court established a two-prong test for judicial review of an agency’s statutory interpretation. First, a court must determine “whether Congress has directly spoken to the precise question at issue. If the answer is yes, then the inquiry ends,” and the reviewing Court must “give effect to Congress’ unambiguous intent.” However, if the answer is “no,” then “the second question is whether the agency’s answer to the precise question at issue is a permissible construction of the statute.” In answering this second question, “[t]he agency’s interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.”⁴

A. *Chevron* Step One

Applying step one of *Chevron*, the majority of the Federal Circuit panel concluded that Congress unambiguously expressed its intent to define the term “articles” to mean “material things” and not to include the electronic transmission of digital information.⁵

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Because neither the 1930 Tariff Act nor its 1922 predecessor expressly defined the word “articles,” the Federal Circuit majority relied upon contemporaneous dictionary definitions for support. The majority concluded from the dictionaries that the term “articles” is limited to “material things” and that it does not include digital information.⁶

The majority next reviewed Congress’ use of the term “articles” throughout Section 337, observing that if the term “articles” were to include intangible things—such as electronic data—then many provisions of Section 337 would be superfluous. For example, the majority noted that the forfeiture subsection authorizing the Commission to order that “articles” in violation of the 1930 Tariff Act be “seized” and “forfeited,” would become inoperable because the Commission could not physically stop or seize electronic transmissions.⁷

To ensure that its interpretation of “articles” did not run afoul of other provisions of the 1930 Tariff Act, the Federal Circuit majority also analyzed the Act as a whole. The majority noted that the sole remedy provided under the original version of Section 337 was exclusion, and such a remedy, the majority reasoned, could only affect material things. “[E]lectronic transmissions of digital data could not be excluded in the fashion contemplated by the Act.”⁸ The majority then reasoned that the impracticability of such a scenario supported its “articles” construction. Likewise, the majority reasoned that an interpretation of “articles” that includes digital transmission is inconsistent with the Commission’s authority to issue cease-and-desist orders. Congress intended a cease-and-desist order to be a “softer remedy” than an exclusion order, but if “articles” include digital transmissions, then cease-and-desist orders would expand the Commission’s exclusionary power, which the majority determined was contrary to Congressional intent.⁹ The majority reinforced its conclusion by noting that Congress had approved Tariff Schedules identifying tangible goods while specifically carving out items such as electricity and electrical energy.¹⁰

Finally, the Federal Circuit majority examined the legislative history of the 1930 Tariff Act and identified further support for its conclusion. First, Congress used the words “goods” and “articles” synonymously, and because it was well understood at the time that “goods” were “limited to movables” such as “material things,” the majority reasoned that the same understanding should apply to the term “articles.”¹¹ Second, the majority observed that while the 1988 amendment to the Tariff Act expanded the Commission’s authority to address IP infringement, that amendment did not expand the definition of “articles.”¹² Indeed, definitions of the words “merchandise” and “goods,” which appear

throughout the 1988 amendment, were again limited to tangible objects. The majority also relied upon the Federal Circuit’s finding in *Bayer AG v. Housey Pharm., Inc.* that Congress had adopted the definition of “articles” from Section 337 and introduced it into 35 U.S.C. § 271(g).¹³ The *Bayer* court concluded that “there is no indication of any intent to reach products other than tangible products produced by manufacturing processes.”¹⁴

Ultimately, the majority concluded that “the literal text, the context in which the text is found within Section 337, and the text’s role in the totality of the statutory scheme all indicate that the unambiguously expressed intent of Congress is that ‘articles’ means ‘material things’ and does not extend to electronically transmitted digital data.”¹⁵

B. Chevron Step Two

Despite finding unambiguous Congressional intent as to the meaning of “articles,” the majority in *ClearCorrect* nevertheless also addressed step two of *Chevron*, finding that the Commission’s interpretation of the term “articles” was unreasonable. In particular, the majority concluded that “the Commission failed to properly analyze the plain meaning of ‘articles,’ failed to properly analyze the statute’s legislative history, and improperly relied on Congressional debates” in reaching an erroneous interpretation.¹⁶

As to the plain meaning of “articles,” the majority faulted the Commission for failing to adopt a definition that was consistent with various dictionary definitions on which the Commission purported to rely.¹⁷ The majority also faulted the Commission for supporting its interpretation by omitting a key portion of the legislative history. The legislative history, when read in its entirety, limits the Commission’s authority and excludes nontangible items. Because the Commission “use[d] this misquote as its main evidence that the purpose of the act was to cover all trade, independent of what form it takes, the Commission’s conclusion regarding the purpose of the Act is unreasonable.”¹⁸

Finally, the majority dismissed the Commission’s reliance on current debates in Congress that had addressed the meaning of “articles,” stating simply that none of those bills had passed into law, nor were they informative of the Commission’s jurisdiction based on the law as it currently stands.¹⁹

C. Judge O’Malley’s Concurrence

Judge O’Malley filed a concurring opinion in which she agreed that the Commission lacked jurisdiction, but disagreed with the majority’s analysis under the *Chevron* framework. This case, in Judge O’Malley’s

opinion, was one of those extraordinary circumstances where it was clear that Congress did not intend to grant the Commission authority to regulate the digital exchange of information. Judge O'Malley was skeptical of the Commission's conclusion because: (a) there was no reference to electronic data transmission in the 1930 Tariff Act; (b) the Commission had never previously purported to have authority to regulate data transmission over the Internet; and (c) the Commission lacked expertise in developing rules concerning such matters.²⁰

Judge O'Malley's concurrence also reasoned that, "[i]f Congress intended for the Commission to regulate one of the most important aspects of modern-day life, Congress surely would have said so expressly."²¹ Judge O'Malley observed that Congress' most recent amendment to Section 337 was in 1988, before the proliferation of the Internet, and it is unlikely that Congress would have delegated authority to the Commission to regulate something over which, at the time, the Commission lacked expertise. And, since the 1988 amendments, Congress has not spoken about the Commission's authority to regulate the Internet.²² Applying *Chevron* was thus unnecessary in Judge O'Malley's opinion, because it was clear that Congress never intended to delegate regulation of the Internet to the Commission.

D. Judge Newman's Dissent

Judge Newman dissented. In her view, the purpose of Section 337 was to provide a remedy for unfair competition; it does not differentiate between "tangible" and "intangible" articles, a focus of the majority's opinion.²³ By holding that only "tangible" imports are subject to exclusion, the dissent argued, the majority's opinion removed the protections Section 337 provides from unfair importation of electronic information, which, in Judge Newman's view, was a departure from the 1930 Tariff Act and the case law.²⁴

III. Conclusion

The term "articles" in the 1930 Tariff Act means "material things;" it does not extend to electronically-transmitted digital data. Practitioners will be well served by monitoring further developments at the Federal Circuit and possibly at the U.S. Supreme Court.

(Endnotes)

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New York office of Kirkland & Ellis LLP. His practice focuses on patent litigation in a variety of technical fields, ranging from semiconductor and computer technologies to satellite communications to pharmaceuticals. Aaron Resataris is an intellectual property litigation associate in the New York Office of Kirkland & Ellis LLP. He is focused on patent infringement litigation and represents clients from various industries, including medical devices, biotechnology, consumer products, and telecommunications. This article reflects only the present considerations and views of the authors, which should not be attributed to Kirkland & Ellis LLP, or to any of its or their former or present clients.

¹ *ClearCorrect Operating LLC v. Int'l Trade Comm'n*, No. 2014-1527, 2015 WL 6875205, at *1 (Fed. Cir. Nov. 10, 2015).

² *Id.* at *1-3.

³ 467 U.S. 837, 842-43 (1984).

⁴ *ClearCorrect*, 2015 WL 6875205, at *4 (citations omitted).

⁵ *Id.*

⁶ *Id.* at *5-8.

⁷ *Id.* at *8-9.

⁸ *Id.* at *10.

⁹ *Id.* at *10-11.

¹⁰ *Id.* at *12.

¹¹ *Id.*

¹² *Id.* at *13.

¹³ *Id.* (citing *Bayer AG v. Housey Pharm., Inc.*, 340 F.3d 1367, 1374 (Fed. Cir. 2003)).

¹⁴ *Bayer*, 340 F.3d at 1375.

¹⁵ *ClearCorrect*, 2015 WL 6875205, at *13.

¹⁶ *Id.* at *14.

¹⁷ *Id.*

¹⁸ *Id.* at *15 (citing S. Rep. 67-595).

¹⁹ *Id.*

²⁰ *Id.* at *16 (O'Malley, J. concurring).

²¹ *Id.*

²² *Id.* at *17 (O'Malley, J. concurring).

²³ *Id.* at *20 (Newman, J. dissenting).

²⁴ *Id.* at *18-21 (Newman, J. dissenting).

As Time Goes By — Paved With Good Intentions?

Back in 1999, after Intel was sued for patent infringement, the company referred to its opponent as a “patent extortionist” and was immediately threatened with a libel suit. In response, Peter Detkin, Intel’s Assistant General Counsel, had the allegedly libelous phrase changed to “patent troll” in order to, in his words, depict the foe as “somebody who tries to make a lot of money off a patent that they are not practicing and have no intention of practicing and in most cases never practiced.”¹ In short, Intel chose to label their patent adversary with a moniker that would doubtless discredit the adversary as a “bad guy” while protecting itself from libel.

Later, Mr. Detkin left Intel to become a founder of Intellectual Ventures, LLC, which some observers might characterize as a patent troll. Seemingly, Mr. Detkin had come full circle. More recently, Intellectual Ventures tried to shed light on its new-found proclivity to enforce its patents by means of litigation, noting that the patent grant embodies the negative right to exclude others.²

Back when Intel was honing “patent troll” as a brand to negatively implicate its patent foe, Google also seemed to be on the slippery slope toward the dark side, adopting the slogan “Don’t Be Evil” in an apparent effort to cast competitors in a negative light vis-à-vis the angelic image it projected of itself.³ More recently, its slogan has morphed into “Do the Right Thing,” perhaps in view of an evolution of public perception regarding Google’s true motivations.⁴

Google next tried to capitalize upon a dichotomy existing in the popular press between “good” patentees on the one hand, as it considered itself, and “bad” patentees on the other, conjured up as patent trolls. More specifically, in April



toddmoore.com

2015, Google announced a so-called “Patent Purchase Program” (PPP) under which it would buy, at its sole discretion, patents that owners were willing to sell—purportedly to keep the patents out of the hands of patent trolls.⁵

In support of its public posture regarding the PPP, Google further vilified the patent trolls, saying that under patent trolls’ control “bad things happen, like lawsuits, lots of wasted effort, and generally bad karma. Rarely does this provide any meaningful benefit to the original patent owner.”⁶

The PPP ran from May 8 through May 22, 2015. Patent submissions came from individual inventors, brokers, and those whom Google characterizes as patent trolls.⁷ Google purchased 28%, or just over one-quarter, of the patents submitted.⁸ An obvious question for practitioners is: what will Google do with the patents that it purchased? In that regard, Google refused to be put in a box, saying simply that it might do what any patent owner might do with its patents. We might speculate that Google also will follow the sellers’ future IP developments in hopes of harvesting those too.

Perhaps a less obvious inquiry relates to what Google will do with the information that it has already accumulated with respect to the three-quarters of the patents that it chose not to purchase under the PPP. If sued for infringement by the owner of any of those patents, presumably Google might (a) use PPP information to leverage the PPP asking price in order to minimize any damages award in the litigation or (b) use the PPP offer-to-sell as a basis for defeating an award of injunctive relief to the patent proprietor, or both.



Dale Carlson, a retired partner at Wiggin and Dana, LLP is “distinguished practitioner-in-residence” at Quinnipiac University School of Law, NYIPLA historian, and a Past President. His email is dlcarslon007@gmail.com. The views expressed herein are those of the author and do not reflect the views of Quinnipiac University School of Law or the NYIPLA.

On a somewhat opaque level, inventors utilizing Google's Internet browsers, such as Google Chrome, or operating systems, such as Android, might become uncomfortably concerned that Big Brother is looking over their shoulder—with Big Brother watching the clicks on their devices for hints as to what the inventors may be wishing to invent, or actually inventing, next.

If you are thinking what I am thinking, namely, that we are living in a realm that smacks of the netherworld depicted in the movie *The Matrix*, don't think again. Certainly don't click on that thought. Seems like bad karma.

With kind regards,
Dale Carlson

(Endnotes)

¹ Brenda Sandburg, *Trolling for Dollars*, THE RECORDER, July 30, 2001, at 1, <http://www.therecorder.com/id=900005370205/Trolling-for-Dollars>.

² See generally Susan P. Pan, *Profiles in Intellectual Property Law: Cory Van Arsdale, Senior VP, Global Licensing, Intellectual Ventures Management, LLC (IV®)*, 8(1) LANDSLIDE (Sept.-Oct. 2015), available at http://www.americanbar.org/content/dam/aba/publications/landslide/2015-september-october/ABA_LAND_v008n01_cory_van_arsdale_senior_vice_president_global_licensing_intellectual_ventures_management_llc_iv.authcheckdam.pdf.

³ See generally *Don't be Evil*, WIKIPEDIA, https://en.wikipedia.org/wiki/Don%27t_be_evil.

⁴ *Id.*

⁵ See Allen Lo, *Announcing the Patent Purchase Promotion*, GOOGLE PUBLIC POLICY BLOG (Apr. 27, 2015), <http://googlepublicpolicy.blogspot.com/2015/04/announcing-patent-purchase-promotion.html>.

⁶ *Id.*

⁷ Tam Harbert, *Google Tries to Keep Patents Out of the Hands of Trolls*, IEEE SPECTRUM (Oct. 28, 2015), <http://spectrum.ieee.org/computing/software/google-tries-to-keep-patents-out-of-the-hands-of-trolls>.

⁸ *Id.*

Moving UP ▲ & Moving ON ►►►

- Christopher Colvin and Charles E. Miller have joined Eaton & Van Winkle LLP as partners in the firm's Intellectual Property practice. Mr. Colvin was previously a partner at Colvin IP PC, and Dr. Miller was a senior counsel at Sills Cummis & Gross P.C.
- Mark Hannemann, Thomas Makin, and Matthew Berkowitz, formerly of Kenyon & Kenyon LLP, have joined Shearman and Sterling as partners in its Intellectual Property Litigation practice.
- Benjamin Hsing, formerly of Kaye Scholer LLP, has joined BakerHostetler as a partner in its Intellectual Property Group.
- David Silverstein, formerly in-house counsel for Par Pharmaceutical, has joined Axinn Veltrop & Harkrider LLP as a partner in its Intellectual Property group.
- Steven I. Wallach, formerly of Scully, Scott, Murphy & Presser PC, has joined Gerard Fox Law, P.C., as a partner in its litigation practice in its newly opened New York office.

The Report's Moving Up and Moving On feature is for the Association's members. If you have changed your firm or company, made partner, received professional recognition, or have some other significant event to share with the Association, please send it to The Report editors: William Dippert (wddippert@patentusa.com) or Mary Richardson (mary.e.w.richardson@gmail.com).



The
94th
Annual Dinner
 IN HONOR OF THE
Federal
Judiciary

APRIL 1, 2016
 WALDORF ASTORIA NEW YORK HOTEL

SCHEDULE

“Day of the Dinner” Luncheon CLE Program

11:00 AM – 11:30 AM	Registration	Palm Room 18 th floor
11:30 AM – 12:20 PM	Luncheon	Starlight Roof 18 th floor
12:20 PM – 2:15 PM	Panel Discussion: Changing the Rules of the Road: Recent Amendments to the Fed. R. Civ. P., the Continued Push for Patent Law Reform, and the Impact on Intellectual Property Litigation	Starlight Roof 18 th floor

Dinner in Honor of the Federal Judiciary (BLACK TIE PREFERRED)

5:00 PM – 8:00 PM	Reception Table	Basildon Room 3 rd floor
6:30 PM – 7:30 PM	Reception for Honored Guests and NYIPLA Members	Jade Room 3 rd floor
8:00 PM – 10:00 PM Dinner	<i>Dinner Speakers:</i> Nina Totenberg , legal affairs correspondent for National Public Radio (NPR), and Peter Sagal , host of NPR’s weekly news quiz show <i>Wait, Wait...Don’t Tell Me!</i> <i>14th Annual Outstanding Public Service Award:</i> Honorable Leonard Davis , former Chief Judge of the U.S. District Court for the Eastern District of Texas	Grand Ballroom 3 rd floor West Foyer, East Foyer & Astor Salon 3 rd floor Empire Room 1 st floor Starlight Roof 18 th floor
10:00 PM	The After-Dinner Party with DJ	Palm Room 18 th floor

Note: CLE Program and Dinner require separate registrations and payment



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December 2015/January 2016 IP Media Links

By Jayson L. Cohen*

The Death of Form 18

Among the December 1, 2015 changes to the Federal Rules of Civil Procedure, an important change for patent owners was the elimination of the liberal pleading requirements for patent infringement under the old Form 18 of now abrogated Rule 84. Instead, patent infringement complaints must now satisfy the Supreme Court's more demanding *Iqbal-Twombly* pleading standard. Patent attorneys have known that November 30, 2015—the last day to file a complaint that satisfied only Form 18—was coming since the Supreme Court approved the changes to the Federal Rules in April 2015 and Congress did not act subsequently to block the elimination of Form 18. In view of this change, patent owners and particularly non-practicing entities (“NPEs”) filed a record number of patent infringement complaints on November 30, as Jeff John Roberts reported in an online article for *Fortune* on December 2 entitled, “Patent Lawsuits Set One-Day Record with 257 New Cases, Most Filed in Texas.” Roberts’ message is largely a cautionary one about stalled patent reform, with the first page of his article displaying a picture of actor Patrick Stewart, head in hand, covering his eyes, as Captain Jean-Luc Picard of *Star Trek: The Next Generation*. However, Roberts also appears to understand that the 257 new cases symbolize the end of an era, not a trend in patent cases filed by NPEs. Not surprisingly, of the 257 new patent cases filed on November 30, 196 (or 76%) of them were filed in the Eastern District of Texas. (<http://fortune.com/2015/12/02/patent-lawsuit-record>.)

The new pleading standard for patent infringement cases is expected to raise the bar for NPEs to assert their patents. It will be interesting to see if and how the mainstream press in the coming months reports any changes or trends caused by the new pleading standard.

USPTO’s Intellectual Property Attachés

In a December 8, 2015 article for *The Detroit News*, entitled “Patent officers help U.S. companies manage global risks,” Finance Editor Brian O’Connor reported on a “little known arm of the Patent Trademark Office—the 14 Intellectual Property Attaches.” While the intellectual property issues facing companies seeking to do business in, manufacture products in, or export

goods to countries such as China, Russia, Indonesia, etc., have been reported extensively, it is not as well known that the USPTO employs attachés who may be able to help. Mr. O’Connor reports that, according to Dominic Keating, the Director of the attaché program, “the office works with foreign governments to educate and advocate for intellectual property protections, and intervenes [on behalf of U.S. companies] when problems arise.” The article offers IP tips from the attachés for U.S. companies that aim to do business in a foreign market. (<http://www.detroitnews.com/story/business/2015/12/08/patent-attaches-protect-us-intellectual-property-abroad/76999900>; see also <http://www.uspto.gov/learning-and-resources/ip-policy/ip-attach-program>.)

CRB Sets Rates for Streaming Music Services like Pandora

On December 16, 2015, the Copyright Royalty Board (“CRB”) issued a written determination that set the compulsory copyright “royalty rates and terms to apply from January 1, 2016, through December 31, 2020, to digital performance of sound recordings over the Internet by nonexempt, noninteractive transmission services (webcasters) and to the making of ephemeral recordings to facilitate those performances.” (The CRB proceeding is Docket No. 14-CRB-0001-WR (2016-2020) (Web IV), relating to compulsory statutory licenses under 17 U.S.C. §§ 114(d)(2) and 112(e).) This written determination is not yet fully available to the public; however, key aspects of the decision may be found at the CRB’s website, including the following ruling (<http://www.loc.gov/crb>):

The rate for commercial subscription services in 2016 is \$0.0022 per-performance. The rate for commercial nonsubscription services in 2016 is \$0.0017 per-performance. The rates for the period 2017 through 2020 for both subscription and nonsubscription services shall be adjusted to reflect the increases or decreases, if any, in the general price level, as measured by the Consumer Price Index applicable to that rate year, as set forth in the regulations adopted by the Judges’ determination.

cont. on page 12

cont. from page 11

The CRB decision was widely reported in the mainstream media and was much anticipated because of its potential effects on music streaming service provider Pandora (a payor), as well as on sound recording rights holders and artists (payees). Media articles relating to the CRB decision include a December 16 piece by Hannah Karp for *The Wall Street Journal*, "Copyright Royalty Board Raises Rates on Internet Broadcasters," and a December 16 piece by Ryan Faughnder for the *Los Angeles Times*, "Copyright Royalty Board hikes rates Pandora must pay." Faughnder reported that Pandora, while it had sought lower rates from the CRB, welcomed the certainty that the rate-setting decision provided, quoting Brian McAndrews, chief executive of Pandora, as saying, "This is a balanced rate that we can work with and grow from. This decision provides much-needed certainty for both Pandora and the music industry." By contrast, according to a statement from SoundExchange, a music rights organization that is the primary representative of record labels, artists, and artist unions, the sound recording rights holders were apparently disappointed not to get the range of rates that they had sought for the 2016 to 2020 period, \$0.25-\$0.29 per 100 plays. The statement said, "We believe the rates set by the CRB do not reflect a market price for music and will erode the value of music in our economy." SoundExchange has the right to appeal the decision, and it remains to be seen whether it will do so. (<http://www.wsj.com/articles/copyright-royalty-board-raises-rates-on-internet-broadcasters-1450309962>; <http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-pandora-royalty-rates-20151216-story.html>.)

(Endnote)

* Jayson L. Cohen is an associate at Morrison & Foerster LLP, where his practice focuses on patent litigation and counseling. He is a member of the Publications Committee of the NYIPLA.



2016 NYIPLA HONORABLE WILLIAM C. CONNER INTELLECTUAL PROPERTY LAW WRITING COMPETITION

Deadline: Friday, March 6, 2016



The Winner will receive a cash award of \$1,500.00 .

The Runner-up will receive a cash award of \$1,000.00.

Awards to be presented on
May 17, 2016

NYIPLA Annual Meeting and Awards Dinner
at The Princeton Club of New York

The competition is open to students enrolled in a J.D. or LL.M. program (day or evening). The subject matter must be directed to one of the traditional subject areas of intellectual property, i.e., patents, trademarks, copyrights, trade secrets, unfair trade practices and antitrust. Entries must be submitted electronically by March 6, 2016 to the address provided below.

See the rules for details on
www.nyipla.org

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The Report to Publish Biologics/Biosimilars Issue



<http://cliparts.co/dna-clip-art>

The February/March 2016 issue of *The Report* will be devoted to Biologics and Biosimilars. Articles may encompass any of the intellectual property aspects of Biologics and Biosimilars, including patent (utility and design), trademark, and copyright, and also including topics such as damages, licensing, and issues arising under the Biologics Price Competition and Innovation Act of 2009 (BPCIA).

Articles can be any length, but a length of 1700 to 2500 words is expected to be about average. Please submit the articles in Microsoft Word, 1997-2003 format (i.e., “.doc,” not “.docx”). and with endnotes rather than footnotes. Also, please submit electronic versions of all sources cited in either the text of the article or the endnotes.

- Final articles are due by **February 6, 2016**.

For more information, contact *The Report* editors
Mary Richardson (mary.e.w.richardson@gmail.com) or
William Dippert (wdippert@patentusa.com).

Notable Trademark Trial and Appeal Board Decisions

(Unless noted, all decisions are precedential)

By Pina Campagna and Michael Cannata*

Board Dismisses an ID’s “Associated With” Language Argument

The Board affirmed the Examining Attorney’s refusal to register I AM for “[c]osmetics” under Section 2(d) of the Trademark Act based upon the registration I AM for “perfume.” The applicant claimed that there was no likelihood of confusion because: its mark identifies the applicant’s founder “will.i.am” (stage name for American musician William Adams of the group Black Eyed Peas); the applicant’s goods are exclusively associated with the applicant’s founder “will.i.am”; the goods associated under the respective marks are marketed differently; and the cited mark is not famous. “Applicant contend[ed] that its I AM mark” was “a natural extension of its registered [marks,] WILL.I.AM [for music] and I AM [for clothing], and ‘conveys the synthesis of [Mr. Adams’] own artistry, expression, and activism’ (Response, March 14, 2011).”

The applicant’s main argument against the refusal was that the language “associated with William Adams, professionally as ‘will.i.am’” contained in the identification of goods in the registration ensured that consumers are unlikely to be confused because they will perceive the mark as identifying Mr. Adams, and that perception will affect the marketing of the goods and the customers to whom they are directed.

The Board concluded, however, that the language does not impose a meaningful limitation on the applicant’s goods in channels of trade or to a specific class of purchasers. The Board further indicated that the association language is not limiting in any way to the nature of the goods and is merely precatory language and not binding on consumers when they encounter the applicant’s mark.

The Board noted that the statute still protects the registrant and senior user from the newcomer’s similar mark (i.e., from reverse confusion), and one cannot assume that purchasers will be able to distinguish the source of the goods. Perhaps if the applicant was seeking to register i.am with a period as a natural extension of will.i.am, the Board’s analysis would have been different, however, the applicant was not seeking to register the mark with periods.

In re i.am.symbolic, llc, Serial No. 85/044,494 (TTAB October 7, 2015) (appealed December 7, 2015).

Coupon Specimen Acceptable to Show Use on Goods

The Board reversed the Examining Attorney’s refusal to register the mark EARNING TRUST WITH EVERY BOTTLE for “facial and skin cleansers, soap, lotions, and shampoos,” finding the specimen was acceptable to show use of the mark in commerce.

Section 45 of the Trademark Act states that the mark is “in use in commerce (1) on goods when— (A) it is placed in any manner on the goods or their containers or the displays associated therewith or on tags or labels affixed thereto, or if the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale, and (B) the goods are sold or transported in commerce.” Section 45 does not, however, define what the term “displays” includes, and thus, the Board must determine on a case-by-case basis whether a specimen is a “display” according to the statute or is merely advertising.

The applicant stated that the coupon functions as a point-of-sale display that is provided to the customer at the cash register of the store where the product is made available. The coupon included a photo of two bottles of the goods, the mark, the store’s name, and the wording “save 75¢ on any Johnson’s Baby Wash or Lotion product.” The Examining Attorney argued that the coupon was mere advertising.

In support of its decision, the Board looked to whether the coupon had a “point of sale nature,” i.e., to induce a consumer to buy the product. The Board likened the coupon to a catalogue (which is an acceptable specimen if certain conditions are met). Specifically, a catalogue displays a product that is offered for sale, with descriptions and pictures to induce a sale to a consumer, and a means by which to order the product. The Board found that the coupon was “the instrument through which a purchase is induced” and the refusal to register was reversed.

In re Johnson & Johnson, Serial No. 85/286,071 (TTAB September 22, 2015) (non-precedential).

B&B Hardware Cited to find Preclusive Effect of a TTAB Decision

A district court granted a motion to dismiss on the grounds that the claim was barred under the doctrine of collateral estoppel based on a TTAB decision.

On October 25, 2011, Ashe filed an application for the mark SPENDOLOGY for web-based finance tools. PNC filed an application for the same mark a day after Ashe's application was published, and PNC then filed an opposition against Ashe in the TTAB, moving for summary judgment. During the opposition at the TTAB, PNC established use of the mark dating to August 2010 while Ashe could not prove use prior to his trademark application filing date, October 25, 2011. The Board found that there was no genuine issue of material fact in dispute concerning PNC's prior use and refused Ashe's application. Ashe did not appeal the Board's decision.

In a later district court case filed by plaintiff Ashe, he claimed that defendant PNC infringed his SPENDOLOGY trademark through its online financial services business. PNC filed a motion to dismiss for failure to state a claim, arguing that the TTAB had already found that PNC had priority of use of the SPENDOLOGY trademark. Although Ashe tried to relitigate priority, the court confirmed that the issue had been determined in the earlier Board proceeding. Citing *B&B Hardware, Inc. v. Hargis Industries, Inc.*, 135 S. Ct. 1293 (2015), a case relating to the issue preclusive effect of a TTAB decision on the issue of likelihood of confusion, the court found that collateral estoppel based on a prior Board decision also applies to the issue of priority of use for purposes of trademark applications and for purposes of an infringement claim, barring Ashe's infringement case against PNC. Therefore, the court granted PNC's motion to dismiss.

Keith A. Ashe v. The PNC Fin. Servs. Grp., Inc., No. 8:2015-cv-144 (D. Md. Nov. 17, 2015) (Motion to dismiss complaint granted) (non-precedential).

Board Dismisses Section 2(a) Challenge to MARATHON MONDAY Application

The Board dismissed an opposition filed by the Boston Athletic Association ("BAA") to an application filed by Velocity, LLC ("Velocity"), seeking registration of MARATHON MONDAY in connection with "clothing, namely, tops, bottoms, headwear, sweatshirts, sweat pants, jackets, pullovers, caps, hats, socks."

The BAA alleged that the mark should not be

registered under Section 2(a) of the Trademark Act because it creates a false suggestion of a connection with the BAA. At the outset, the Board determined that the BAA had standing to oppose the application because the BAA used both BOSTON MARATHON and MARATHON MONDAY in association with marathon races and, thus, had a reasonable belief that it would be damaged by registration of MARATHON MONDAY.

To establish a claim of false suggestion, the Board stated that the BAA must prove: "(1) MARATHON MONDAY is, or is a close approximation of, Opposer's name or identity, as previously used by it or identified with it; (2) that Applicant's mark, MARATHON MONDAY, would be recognized as such by purchasers of Applicant's goods, in that it points uniquely and unmistakably to Opposer; (3) that Opposer is not connected with the goods that are sold or will be sold by Applicant under its MARATHON MONDAY mark; and (4) that Opposer's name or identity is of sufficient fame or reputation that when used by Applicant as a mark for its goods, a connection with Opposer would be presumed."

The Board first concluded that MARATHON MONDAY is not a close approximation of the BAA's previously used name or identity as there was "little evidence that MARATHON MONDAY has become known as Opposer's persona, or as a synonym for Boston Marathon." The Board also concluded that MARATHON MONDAY does not point uniquely and unmistakably to the BAA. In that connection, the Board cited to other evidence, which demonstrates that entities other than the BAA use MARATHON MONDAY to refer to marathons, including the ING New York City Marathon.

Accordingly, the Board dismissed the BAA's opposition, stating that registration to Velocity will issue in due course.

Boston Athletic Ass'n v. Velocity, LLC, Opposition No. 91202562 (TTAB October 26, 2015).

Board Affirms Refusal to Register THE KITCHEN under Section 2(d)

After careful consideration of certain *du Pont* factors, the Board affirmed the refusal to register the application filed by the applicant, The Kitchen Cafe, LLC, which sought registration of THE KITCHEN despite an existing registration for DA KITCHEN.

The applicant sought registration of THE KITCHEN in International Class 43 for "restaurant services." The Examining Attorney, however, refused registration of

THE KITCHEN based on a likelihood of confusion with an existing registration for DA KITCHEN in International Class 43 for “restaurant services; carry out restaurant services; catering services.”

On appeal, the Board affirmed the refusal, determining that because the services at issue were identical in part, there was a presumption that the services traveled in the same trade channels to the same classes of purchasers. The Board also noted that neither the application, nor the cited registration, contained a limitation on the trade channels.

With respect to the comparison of the marks, the Board concluded that “the similarities in meaning and commercial impression outweigh differences in sight and sound.” In reaching this conclusion, the Board determined that there was no need to consider other meanings of the word DA as the obvious meaning of DA in the context of the services is clear— it gives “the clear commercial impression of ‘the kitchen.’”

The Board also rejected the applicant’s argument that the cited registration DA KITCHEN is weak, and thus, is only entitled to a limited scope of protection. Specifically, the Board concluded that “there is no evidence of commercial weakness of the mark.”

In re The Kitchen Cafe, LLC, Serial No. 85/969,508 (TTAB November 17, 2015) (non-precedential).

Board Rejects Attempt to Register SUGARLANDS DISTILLING COMPANY

The applicant Sugarlands Distilling Company, LLC attempted to secure a trademark registration for SUGARLANDS DISTILLING COMPANY in connection with “craft moonshine beverages.” The Examining Attorney, however, refused registration on the basis that the mark was primarily geographically descriptive, and separately, because of a likelihood of confusion with the registered mark SUGARLAND CELLARS.

On appeal, the Board reversed the refusal to register SUGARLANDS DISTILLING COMPANY on the basis that it was primarily geographically descriptive, but affirmed the refusal based on a likelihood of confusion with the registered mark.

With respect to the geographic descriptiveness refusal, the Board concluded that “the record did not support a finding that [Sugarlands] is a generally known geographic region.” The record consisted of one Wikipedia entry which identified “The Sugarlands” as a valley in the north-central Great Smokey Mountains. The Board concluded that this evidence was insufficient to demonstrate that “consumers have been exposed to this term and are aware of its geographic significance.”

At the same time, the Board affirmed the refusal based on a likelihood of confusion with SUGARLAND CELLARS. The Board concluded that “Applicant’s goods ‘craft moonshine beverages’ are sufficiently related to Registrant’s ‘wine,’ that when used under a very similar mark, confusion is likely.” To support this conclusion, the Board cited examples of wineries that also distill and sell spirits.

Next, the Board concluded that: (i) the trade channels are similar and would include liquor stores, bars and restaurants, and the alcoholic beverages sections of retail outlets; and (ii) the relevant class of consumers is similar and includes connoisseurs as well as ordinary consumers of alcoholic beverages.

Finally, in analyzing the similarity between the marks, the Board held that the similarities between SUGARLANDS DISTILLING COMPANY and SUGARLAND CELLARS outweigh any differences. Specifically, the Board observed that “[t]he marks begin with the common element which adds to the prominence of that term in both marks . . . [and that] . . . the additional wording is merely descriptive and lacks source-identifying significance.”

In re Sugarlands Distilling Co., LLC, Serial No. 85/818,277 (TTAB November 20, 2015) (non-precedential).

(Endnote)



*Pina Campagna is a partner at Carter, DeLuca, Farrell & Schmidt, LLP. Ms. Campagna’s practice includes representing regional, national and international businesses, with a particular concentration in trademark and design patent matters. She is Co-Chair of the Trademark Law & Practice Committee. Michael Cannata is an associate in the intellectual property group at Rivkin Radler LLP, and has experience litigating complex intellectual property, commercial, and other business disputes in state and federal courts across the country. He is a member of the Trademark Law & Practice Committee.

#Trademarkinghashtags & Emojis:

How and When to Trademark Hashtags and Emojis

On November 4, 2015, the Trademark Law & Practice Committee of the New York Intellectual Property Law Association hosted a Committee Meeting and a Continuing Legal Education presentation at Cowan, Liebowitz & Latman, P.C., entitled, “#Trademarkinghashtags & Emojis: How and When to Trademark Hashtags and Emojis.” Joel Karni Schmidt, a partner at Cowan, Liebowitz & Latman, P.C., was the speaker.

Mr. Schmidt reviewed the manner in which hashtags and emojis are being used in modern communications, noting the expanding use of hashtags and emojis by businesses attempting to relate to younger consumers. Mr. Schmidt pointed to examples such as REI’s use of the hashtag “#optoutside” to advertise the fact that REI is closing all of its stores on Black Friday and encouraging employees to spend the day outdoors, as well as Domino’s’ advertisements offering customers the ability to text a pizza emoji to Domino’s to order a pizza.

The presentation outlined potential legal issues that businesses may encounter if they seek to use and protect hashtags and emojis as trademarks. Mr. Schmidt reviewed recent amendments to the USPTO’s Trademark Manual of Examining Procedure addressing the registration of hashtag marks, as well as existing trademark law applicable to the registration of both hashtags and emojis. Mr. Schmidt showed that, as with other potential marks, whether or not a hashtag or emoji can function as a trademark and be

registrable with the USPTO will depend on a number of factors, including the nature of the hashtag or emoji and the manner and context in which a business is using it. For example, the USPTO has approved various hashtags and emojis such as Coca-Cola’s #SMILEWITHACoke for soft drinks and an indifferent face emoji for, inter alia, computer application software for mobile phones. On the other hand, Mr. Schmidt noted that the USPTO would reject an application to register a descriptive or generic hashtag such as #WINE for “wine.” The USPTO may refuse to register an application on another ground, such as a likelihood of confusion between an applied-for emoji mark and a registered word mark.

According to Mr. Schmidt, Federal Trade Commission regulations and other laws and regulations may apply in the event that a company’s use of a hashtag or emoji results in false endorsement, misleading advertising, or disparagement. In addition, he indicated that other forms of protection, such as copyright or patent, may be available and should be considered by businesses seeking to use hashtags or emojis as trademarks.

There were a total of 40 registrants, including five new members to the Association. The CLE program was well received. The program was followed by a cocktail hour, and many of the attendees remained well after the event to socialize and network with one another. ■



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The Nuts and Bolts of Marketing Your IP Practice

By Richard Goldstein

The Law Firm Management Committee's second annual "Nuts and Bolts" Breakfast was held on November 10th, hosted by Committee Co-Chair Scott Stimpson at his firm, Sills, Cummis & Gross P.C. This year's topic was "Marketing Your IP Practice." With a topic as important to practitioners as this one, the event expectedly sold out on the same day that it was announced. Unexpectedly, however, we had the honor of two guest speakers who travelled significant distances to speak at the Breakfast. One of these speakers was Neil Milton, a patent attorney from Ottawa, Canada. Last year, Law Firm Management Committee Co-Chair Rich Goldstein saw Neil's presentation on Marketing for IP Practitioners during INTA's Annual Meeting in San Diego. Rich invited Neil to come to New York to the Nuts and Bolts Breakfast to share his marketing knowledge with our group. At the Breakfast, Neil shared a great deal about his experiences with marketing, including the difficult

transition that attorneys must make to begin thinking like a marketer. A central message that he urged us to consider was: when prospective clients are considering hiring us, they are always asking "Why You?" Our marketing needs to successfully answer that question before prospective clients will choose us.

Also joining the panel was Doris Fournier, litigation practice manager from Proskauer Rose LLP in Boston. Doris shared her experiences in working with new associates, and getting them to begin thinking like marketers. She also shared how the training and mentoring of Proskauer Rose's attorneys continues throughout their careers. Doris encouraged the audience to build relationships and center their marketing and networking activities around the things they already enjoy doing.

The Law Firm Management Committee will hold its next event this Spring. Details will be announced.

The New World Order – Current Developments in Challenging and Defending Patents in the PTAB

By Jeffrey Butler, Annemarie Hassett and Mark Abate

On Wednesday, December 2, 2015, the NYIPLA and the NJIPLA jointly hosted a one-day CLE seminar at the Hotel Woodbridge at Metropark, in Iselin, N.J. The seminar focused on PTAB (Patent Trial and Appeal Board) post-grant proceedings. With the enactment of the AIA, a host of new and updated post-grant proceedings were introduced, namely, inter partes proceedings in which granted U.S. patents can be challenged. These include inter partes review (IPR) and covered business method (CBM) proceedings, as well as post-grant review (PGR) and derivation proceedings. Many practitioners feel that these new post-grant proceedings have created opportunities for certain patent challengers, and uncertainty and risk for certain patent owners.

The seminar addressed post-grant proceedings with an emphasis on IPRs involving high-tech and bio/pharma patents. It explored this new world—new challenges, new risks, new opportunities, new proceedings—via four panels of knowledgeable jurists, practitioners, professors, business leaders and other experts, including judges (from both the Federal District Court and the PTAB), educators, senior in-house counsel from some of the nation's most patent savvy companies, legislation advisors/consultants, and leaders of patent-asserting and patent-monetization companies.

In addition, the current state of affairs (in the U.S. courts, the PTAB, and Congress) was explored, and best practices and practical tips, based on the

panelists' own first-hand experiences and insights, were shared to help assist the participants in managing this new world. The program also included a luncheon keynote speaker and a networking function at the conclusion of the event. The keynote speaker was the Hon. Pauline Newman, Circuit Judge, U.S. Court of Appeals for the Federal Circuit.

Panel I: Overview of USPTO PTAB Proceedings from District Court and PTAB Judges—Statistics, Trends/Directions, and Proposed PTAB Rule Changes

Panel I comprised the Hon. Jerome Simandle, Chief Judge, United States District Court for the District of New Jersey; the Hon. Susan Mitchell, Lead Judge, Patent Trial and Appeal Board; and the Hon. Scott Boalick, Deputy Chief Patent Judge, Patent Trial and Appeal Board. The panel was moderated by NYIPLA President (and Cadwalader Wickersham & Taft LLP partner) Dorothy Auth.

The panel provided insights and information on the PTAB and its work and mandate, as well as an overview of various PTAB proceedings, including both *ex parte* and *inter partes* proceedings. Various PTAB statistics—such as PTAB “receipts” (e.g., appeals, AIA petitions) and “dispositions” were discussed. The relative number of IPRs, CBM proceedings, and PGRs was pictorially presented, showing that the vast majority of proceedings to date have been IPRs, with a relatively small number of CBMs and (quite unsurprisingly, given the effective date prescribed by the AIA) an even smaller number of PGRs.

With an emphasis on IPRs (which, at this point in time, can provide the basis for the most meaningful statistical analysis and the most comprehensive study, due mostly to the relatively large number of, and relatively longer experience with, such proceedings), there was a detailed and lively exploration of the current statistics and trends—such as AIA petitions by technology center (TC), and the timing of PTAB dispositions. There was also a discussion of IPR “terminations”—with a thorough exploration of the closely watched number of (and percentage of) claims that have been canceled or disclaimed versus those that were found to be patentable (or those with respect to which there was no challenge or no challenge was instituted, etc.).

Recent developments and proposed pilot programs (such as the proposed Single-Judge Pilot Program) also were explored. Changes regarding motions to amend claims were also discussed. This is a topic receiving attention not only in the Patent Office but also on Capitol Hill, where Congress has been considering various bills that would, among other things, impact the availability of amendments during AIA proceedings. (The NYIPLA, via the Legislative Action Committee, is actively engaged in reaching out to Congress, and informing the public and the bar regarding proposed legislative changes. *See*, e.g., http://www.nyipla.org/nyipla/Legislative_Action.asp.)

There was a lively discussion and exchange of views regarding the interaction and interplay between PTAB AIA proceedings, on the one hand, and federal district court infringement litigations, on the other. For example, the extent to which stays may or should be imposed, and the extent to which a holding of validity in an Article III proceeding may be impacted by a later PTAB determination were discussed. Both the panelists and various audience participants discussed the current balance between Article III courts and the PTAB, and explored various “lessons learned” from past and ongoing AIA proceedings, including strategic determinations around whether to challenge a given claim, when and how to mount the strongest possible challenge, and the use of experts.

Panel II: PTAB Hot Topics in the Hi-Tech Space

The second panel focused on PTAB proceedings in connection with electrical and computer-related patents. It included an analysis of recent trends, current statistics, and lessons learned from precedent-setting cases; consideration of the PTAB's new rules; best practices for identifying and challenging the identification of real parties-in-interest; and a lively discussion about whether IPRs are really an effective defensive measure against patent enforcement by non-practicing entities (NPEs).

The panelists were Ken Corsello, Counsel, IBM; Alexander Poltorak, Chairman and CEO, General Patent Corporation; and Edward Tempesta, Senior Counsel, MasterCard. The panel was moderated by Mark Abate, a partner at Goodwin Procter LLP.

Based on the panel's comments, it appears that attorneys representing large tech companies generally seem content with the way IPRs currently are being handled (and the relative ratio of claims being held unpatentable/canceled versus claims that survive the IPR process). It was noted that tech companies are frequently sued by NPEs, and their ability to challenge asserted patents in an IPR proceeding is seen by some as an effective tool in combating such patent infringement assertions.

Not all members of the panel and audience were satisfied with the way IPRs currently are being handled. At least one attorney representing a patent-owning/patent-enforcing company overall seemed dissatisfied with the current IPR process (perhaps unsurprisingly given that the company reportedly more often asserts its own patents than challenges those of others) and the statistical chances of having the PTAB cancel one or more claims with respect to which an IPR has been instituted. Along those lines, it was even humorously noted that, in at least one person's view, the Patent Office seems to be charging a substantial sum to grant a patent, and then a substantial additional sum for a patent owner to defend an issued patent in a post-grant PTAB proceeding.

Keynote Speaker—the Honorable Pauline Newman

Judge Newman delivered an insightful and entertaining keynote presentation focusing on the history of the Federal Circuit (and its predecessor courts). She spoke about how the Federal Circuit has seen its mandate and mission evolve over time, including in connection with its newly added role in deciding appeals from AIA post-grant proceedings. Judge Newman, who has honored the NYIPLA and other bar organizations by being a keynote speaker or honored guest/participant on numerous previous occasions, offered observations and remarks that were simultaneously timely, germane, and highly thought-provoking. Judge Newman additionally honored the Association by attending the following panel presentation, during which her historical and learned comments served as a springboard for further lively, in-depth discussion.

Panel III: Legislative Changes Regarding IPRs and Other Post-Grant Proceedings (Among Other Patent-/AIA-related Proposed Legislation)

The panelists for this segment of the program were Henry Hadad, Senior Vice President and Deputy General Counsel, Bristol Myers Squibb Company; Colman Ragan, Intellectual Property Counsel, Actavis (and NYIPLA Board Member); Peter Waibel, Patent Litigation Head, Novartis; and Chris Israel, Partner, American Continental Group. The panel was moderated by Jeffrey Butler, Global IP Consultant/Acting General Counsel and Advisor, Sentient Lifesciences (who, along with panelist Colman Ragan, is a member of the NYIPLA's Legislative Action Committee).

This panel primarily focused on IPR-related issues in connection with patents in the bio/pharma space. Each of the panelists shared his own first-hand experience and insights regarding, among other things, how IPRs are being used by generic and follow-on biologic competitors/patent challengers, including as a potential tool to impact Hatch-Waxman ANDA litigation, or to impact exclusivities accorded by the Hatch-Waxman Act. For example, panelist Henry Hadad discussed his testimony before Congress, including his comments on IPRs and related proceedings and the impact they may have on the pharmaceutical industry, and beyond. Panelist Colman Ragan reported on several ANDA and other litigations in which he has been actively engaged and has offered advice, and discussed the interplay between IPRs, on the one hand, and infringement litigation, on the other. Panelist Peter Waibel spoke, among other things, about his experience with ANDA and other bio/pharma litigation that had reached a certain outcome, only to be later impacted by the outcome of post-grant proceedings in the PTAB. Panelist Chris Israel, who, among other things, works closely with the NYIPLA to provide Capitol Hill guidance and advice as part of the Association's Legislative Action outreach and activities, spoke insightfully about his testimony and meetings with Congressional leaders regarding various proposed pending bills, the expressed concerns of patent owners in the bio/pharma space (and other technology areas) regarding the current IPR practice, and current IPR impact on patent owners.

The panel discussed the perception among some in Congress and among some interest groups that there are some provisions of the patent law (including certain pleading, fee-shifting, and venue provisions, along with some specific IPR-related provisions) that may require a Congressional fix. Thus far in the 114th Congress (2015–2016), there have been no fewer than four substantial patent law reform bills introduced, including H.R. 9 (the Innovation Act), S. 632 (STRONG Patents Act of 2015), S. 1137 (the PATENT Act) and S. 2019 (Preserve Access to Affordable Generics Act). The panel discussed the players/stakeholders and their views regarding the proposals to address purported patent litigation abuse and to address some purported deficiencies in the current IPR-related legislation (such as the claim construction standard, presumptions, perceived limitations on amendment practice during IPRs, etc.). The panel provided information on the various legislative items (pending/proposed bills and amendments) that are aimed at fixing/refining/reforming the patent law (including IPR-related provisions), including the proposed “carve out” (from IPRs) for bio/pharma patents and a proposed “off-ramp” (from IPR proceedings) to allow for claim amendments. Specific attention was paid to the impact that IPRs may be having on bio/pharma patents.

Various participants, including a highly experienced and equally highly regarded litigator in the hi-tech space, noted that the impact that IPRs are having may not be unique to bio/pharma, but indeed may be seen with regard to other patented technologies as well, such as in the hi-tech space. The panelists discussed their views on the likelihood of any of the pending legislation being enacted in the near term, and concluded by teeing up the issue of IPRs (against pharma/biotech patents) sought by petitioners who are not facing any infringement suit or risk (specifically, “coalitions” and “hedge funds,” etc.). At least some of the pending legislation, it was noted, was motivated by concerns in the biotech/pharma industry about IPRs being sought by “hedge funds.” Some commentators, it was noted, have described such IPR petitions as an abuse of the process, the topic of the fourth panel of the day.

Panel IV: Hedge-Fund Sponsored IPR Challenges to Pharmaceutical Patents: Should They Be Treated Like Every Other Filing?

Many have criticized hedge-fund sponsored IPR challenges to patents covering approved pharmaceutical products as a means for the hedge funds, which are not competitors in the biologics/pharmaceutical markets, to reap profits unfairly in the short term while chilling biotech and pharma innovation in the long term. This panel considered that question from the perspectives of the worlds of business and academia.

Moderator Annemarie Hassett first presented data on the number of IPRs filed against pharmaceutical and biologics patent claims to date, the percentages in which the petitioners were competitors versus non-competitors in the biologics/pharmaceutical markets, and the IPR institution rates. The data also showed the rates of institution, settlement, and claim invalidation for various bio/pharma non-competitor filers like financial funds, activist organizations, and patent defense firms.

Ms. Hassett then introduced the panelists, Professor David Opperbeck (Professor of Law and Director of the Gibbons Institute of Law, Science & Technology) and Timothy Salmon (principal and co-founder, Empire IP LLC). Both Professor Opperbeck and Mr. Salmon agreed with the PTAB’s assessment that the AIA does not limit who can file an IPR or preclude filing by a financial fund acting with a profit motive. The panelists then engaged in lively discussion with members of the audience regarding the criteria for determining when a practice is an abuse of the IPR system, the role of IPRs vis-à-vis district court patent litigation, and whether patents are property rights akin to deeds or government-granted privileges which can be revoked.

Networking Reception

The CLE event concluded with a networking reception, allowing participants and attendees to interact with each other in a more social setting. The CLE program was seen as a tremendous success not only by the NYIPLA and the NJIPLA, but also by the attendees and participants.

MINUTES OF NOVEMBER 11, 2015

MEETING OF THE BOARD OF DIRECTORS OF THE NEW YORK INTELLECTUAL PROPERTY LAW ASSOCIATION

The Board meeting was held at the Midtown offices of Cadwalader, Wickersham & Taft LLP. President Dorothy Auth called the meeting to order at 4:20 p.m. In attendance were:

Garrett Brown	Denise Loring
Frank DeLucia	Kathleen McCarthy
Walter Hanley	Matthew McFarlane
Annemarie Hassett	Colman Ragan
Robert Isackson	Robert Rando
Anthony Lo Cicero	Peter Thurlow

Jessica Copeland, Raymond Farrell, and Jeanna Wacker were absent and excused from the meeting. Feikje van Rein and Lisa Lu were in attendance from the Association’s executive office.

The Board approved the Minutes of the October 14, 2015 Board meeting.

Treasurer Rob Rando reported that the Association’s finances continue to be sound. He noted that income from CLE programs was strong. The Board discussed the benefits of CLE programs, as compared to their cost.

Rob Rando reported that the Association added 11 new members, including six students and two corporate members. The Board approved admission of the new members.

Rob Isackson reported on the activities of the Amicus Brief Committee. On November 9, 2015, the Committee filed a brief in connection with a petition for certiorari filed with the U.S. Supreme Court in *Cuozzo Speed Technologies, LLC v. Lee*. The brief urged the Court to provide guidance on the standards to be applied in IPR proceedings for appellate court review and claim construction.

The Amicus Brief Committee recommended that the Association file a brief in support of a petition for certiorari in *Shammas v. Focarino*, relating to allowance of attorney fees for salaried government staff attorneys in connection with TTAB awards under Section 21 of the Lanham Act. The brief would be due December 2, 2015. The Board approved preparation of the brief.

Rob Isackson also reported that the Amicus Brief Committee continues to monitor and

discuss a number of cases: *Halo Electronics, Inc. v. Pulse Electronics, Inc.*; *Daiichi Sankyo Co. v. Lee*; and *Amgen Inc. v. Sandoz Inc.*

Tony Lo Cicero and Katie McCarthy recused themselves from Board discussion and consideration of the *Daiichi Sankyo Co. v. Lee* case.

Matt McFarlane reported on the Strategic Planning Committee’s consideration of a proposal to collaborate with law schools on intellectual property programs for law students. The Committee is at the information gathering stage, and it proposed to set up meetings with law schools in the NYC area. The Board approved an initial meeting with Benjamin N. Cardozo School of Law, after which the Committee will consider contacting Fordham University School of Law and St. John’s University School of Law.

The Board discussed potential candidates for the Association’s Outstanding Public Service Award.

Anne Hassett and Denise Loring reported on activities of the Legislative Action Committee. LAC working groups are in the process of preparing white papers, to be followed by meetings in Washington, D.C., relating to (1) IPR provisions of pending patent litigation reform bills, (2) changes to U.S. IP law that may be required if the Trans-Pacific Partnership treaty is implemented, and (3) pending trade secret legislation, in conjunction with an ad hoc committee of the Association.

The Board discussed establishing a new Trade Secrets Committee of the Association.

Peter Thurlow reported on comments being prepared by the Patent Law & Practice Committee to USPTO proposed Rules relating to post-grant proceedings.

Board members reported on upcoming and previous programs of the Association.

Committee liaisons reported on the activities of various Association Committees.

The meeting adjourned at 6:15 p.m.

The next Board meeting will take place on December 9, 2015.

MINUTES OF DECEMBER 9, 2015

MEETING OF THE BOARD OF DIRECTORS OF THE NEW YORK INTELLECTUAL PROPERTY LAW ASSOCIATION

The Board meeting was held at the Midtown offices of Cadwalader, Wickersham & Taft LLP. President Dorothy Auth called the meeting to order at 12:20 p.m. In attendance were:

Frank DeLucia	Robert Isackson
Walter Hanley	Kathleen McCarthy
Annemarie Hassett	Colman Ragan

Garrett Brown, Jessica Copeland and Robert Rando participated by phone. Raymond Farrell, Anthony Lo Cicero, Denise Loring, Matthew McFarlane, Peter Thurlow, and Jeanna Wacker were absent and excused from the meeting. Feikje van Rein was in attendance from the Association's executive office.

The Board approved the Minutes of the November 11, 2015 Board meeting.

Treasurer Rob Rando reported that the Association's finances continue to be sound. He noted that membership dues are down, but program revenues are up.

Rob Rando reported that the Association added nine new members, including five law students, two law firm associates, and two corporate members. The Board approved admission of the new members.

Rob Isackson reported on the activities of the Amicus Brief Committee. The Board approved the filing of an amicus brief in support of a petition for certiorari filed with the Supreme Court in *Daiichi Sankyo Co., Ltd. v. Lee* involving correction of patent terms for previously issued patents. The brief would be due to be filed by December 17, 2015. Katie McCarthy recused herself from the Board discussion and consideration of the *Daiichi Sankyo* case.

Rob also provided notice that the Amicus Brief Committee is considering recommending to the Board that it approve the filing of amicus briefs in two more cases: *Fox Television Stations, Inc. v. Aereokiller LLC*; and *Amgen Inc. v. Sandoz Inc.*

Rob further reported that the Committee had recently filed amicus briefs in *Shammas v. Hirschfeld* on December 1, 2015, in *Lexmark International, Inc. v. Impression Products, Inc.* on October 2, 2015, and in *Cuozzo Speed Technologies, LLC v. Lee* on November 9, 2015.

Rob additionally reported that the Committee decided not to file an amicus brief in *Halo Electronics, Inc. v. Pulse Electronics, Inc.* and *Stryker Corp. v. Zimmer, Inc.*

Colman Ragan reported on the Strategic Planning Committee's consideration of a proposal to collaborate with law schools on intellectual property programs for law students. The Committee is at the information gathering stage, and proposed to set up meetings with law schools in the NYC area. The Committee will be reaching out to set up an initial meeting with Cardozo Law School after the holidays.

Anne Hassett reported on activities of the Legislative Action Committee. LAC working groups are in the process of preparing white papers, to be followed by meetings in Washington, D.C., relating to (1) IPR provisions of pending patent litigation reform bills, (2) changes to U.S. IP law that may be required if the Trans-Pacific Partnership treaty is implemented, and (3) in conjunction with an ad hoc committee of the Association, pending trade secret legislation.

Board members reported on upcoming and recent programs of the Association.

Committee liaisons reported on the activities of various Association Committees.

The meeting adjourned at 2:00 p.m.

The next Board meeting will take place on January 13, 2016.

Last Name	First Name	Company/ Firm /School	Membership Type	State
Acosta	Maritza	Thomas Jefferson School of Law	Student	California
Adams	Katherine	Fitzpatrick, Cella, Harper & Scinto	Active 3-	New York
Barajas	Lakendra	Harvard Law School	Student	New York
Bochinski	Julianne B.	Conair Corporation	Corporate	Connecticut
Chichetti	Stephanie M.	Fitzpatrick, Cella, Harper & Scinto	Active 3-	New York
DeClerck	Russell	Hogan Lovells US LLP	Active 3+	New York
DelPonte	Stephanie S.	Fitzpatrick, Cella, Harper & Scinto	Active 3-	New York
Dooley	Rachel S.	Willkie Farr & Gallagher LLP	Active 3+	New York
Fan	Una	Fitzpatrick, Cella, Harper & Scinto	Active 3-	New York
Gan	Rosanna	Fitzpatrick, Cella, Harper & Scinto	Active 3-	New York
Guhaniyogi	Jayita	Fitzpatrick, Cella, Harper & Scinto	Active 3-	New York
Hamilton	Amanda J.	Frommer Lawrence & Haug LLP	Active 3+	District of Columbia
Hyberg	Sean	Fitzpatrick, Cella, Harper & Scinto	Active 3-	New York
Jay	Jeffrey S.	Fitzpatrick, Cella, Harper & Scinto	Active 3-	New York
Kalish	Paul W.	Fitzpatrick, Cella, Harper & Scinto	Active 3-	New York
Lee	Ronald A.	Fitzpatrick, Cella, Harper & Scinto	Active 3-	New York
Madhani	Nehal	Alt Legal Software Company - Plainlegal	Corporate	New York
Manas	Gregory	Fitzpatrick, Cella, Harper & Scinto	Active 3-	New York
McCarthy	Sean M.	Fitzpatrick, Cella, Harper & Scinto	Active 3-	New York
Million-Perez	Helena R.	Fitzpatrick, Cella, Harper & Scinto	Active 3-	New York
Pickens	Robert	Fitzpatrick, Cella, Harper & Scinto	Active 3-	New York
Rhoda	Quinn	Suffolk University Law School	Student	Massachusetts
Roth	Cali	Fitzpatrick, Cella, Harper & Scinto	Active 3-	New Jersey
Scaccia	Giancarlo	Fitzpatrick, Cella, Harper & Scinto	Active 3-	New York
Scerbo	Michael S.	Fitzpatrick, Cella, Harper & Scinto	Active 3-	New York
Singh	Gurneet	Rutgers School of Law–Newark	Student	New Jersey
Surry	David	Fitzpatrick, Cella, Harper & Scinto	Active 3-	New York
Varghese	David	Fitzpatrick, Cella, Harper & Scinto	Active 3-	New York
Whitt	Jacob T.	Fitzpatrick, Cella, Harper & Scinto	Active 3-	New York
Williams	Adi	Georgetown University Law Center	Student	Massachusetts

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