



# OCPLA NEWSLETTER

Orange County Patent Law Association

[www.ocpla.org](http://www.ocpla.org)

March 2009

## THURSDAY, MARCH 19, 2009 LUNCHEON

John King and Ron Schoenbaum of Knobbe, Martens, Olson & Bear, LLP will speak on "*In re Bilski: Prosecution and Litigation Perspectives.*" The luncheon will be held at the Sports Club/LA Orange County. Please register online by close-of-business Monday, March 16, 2009. We look forward to seeing you there!

As a reminder, the OCPLA monthly luncheons will now take place at the Sports Club/LA Orange County, 1980 Main St., Irvine, California 92614.

Registration and payment for OCPLA luncheons must be made online ONLY at [www.ocpla.org](http://www.ocpla.org). Payment must be made at the time of registration using a credit card or a PayPal account.

## PLEASE RSVP ON TIME FOR MONTHLY LUNCHEONS

To ensure adequate seating at our monthly luncheons and to reduce the likelihood of rate increases, please register no later than close-of-business on the Monday preceding the luncheon. Your efforts to register within this timeline are greatly appreciated by the host facility and the OCPLA board.

## MARCH BOARD MEETING

The March 2009 OCPLA board meeting will be held Thursday, March 19, 2009, 11:00 AM at the Sports Club/LA Orange County prior to the March luncheon. Members who wish to present items for the Board's consideration should contact our president, TJ Singh, at [tjsingh@koslaw.com](mailto:tjsingh@koslaw.com) to have

their items placed on the agenda, and to verify the time and location of the meeting.

## 2009 OCPLA MEMBERSHIP RENEWAL

Membership for 2009 is now available online only. Payment must be made at the time of registration using a credit card or a PayPal account. Go to [www.ocpla.org](http://www.ocpla.org) and use the "Membership App" link on the left column. If you have any questions regarding 2009 membership applications or renewals, please contact Tom Dao at [tdao@koslaw.com](mailto:tdao@koslaw.com).

## NEW MEMBERS

We have received a number of new members – we will post them in next month's newsletter, and thanks for your patience!

Please encourage your colleagues to renew their OCPLA membership or to join as new members!

## 2009 ANNUAL IP PROGRAM AT UCI

Please see details at the end of this newsletter for the **2009 Annual IP Program: Multi-Front Patent Litigation: Navigating Concurrent District Court, ITC and Reexamination Proceedings**. The event will be held Wednesday, March 18, 2009 at the University of California, Irvine Student Center.

## INTERNET SIGHTINGS

BY JIM HAWES

This column highlights some of the more notable recent internet notices, newsletters and blogs dealing with IP prosecution issues. It may be a distillation by the editor of the submitted IS column. The full IS column, with compilations of some of the sources such as Hal Wegner's newsletter, is now up and available at [www.internetsightings.com](http://www.internetsightings.com). Check it out!

**Hal Wegner's** newsletter – a lot of great stuff – Contact: [hwegner@foley.com](mailto:hwegner@foley.com)

- The 2/1/09 newsletter reports that M.A. Smith (a GW law prof.) has published a new book on *Inter Partes Reexamination*.
- Another 2/1/09 offering reports Hal's current top ten list. See also Hal's e-mail for 2/11, 2/19, 2/23, and 2/24.
- The 2/5/09 e-mail discusses BlackBerryGate - quite a history.
- The 2/9/09 message reports the *Ball* CAFC decision invalidating a patent by using *KSR* to supply the motivation for a § 103 rejection.
- The 2/11/09 e-mail reports that China is now no. 1 in total patent filings.
- The 2/13/09 newsletter discusses various strategies for appellate success at the PTO.
- The 2/24/09 e-mail reports a Deferred Examination Roundtable recently held by the PTO.

**Patently-O** – a blog written by Dennis Crouch – [www.patentlyo.com](http://www.patentlyo.com).

- The 2/2/09 blog focuses on the *Kinetic* CAFC split decision and the unpredictability of claim construction it evidences.
- The 2/6/09 message observes that while an *inter partes* reexamination creates an estoppel, an ITC § 337 investigation may not.
- The 2/6/09 e-mail seeks “no-no” words for patent applications and proposes some.

- The 2/10/09 blog reports that the use of “means for” claims in patents dropped from 40% in 1979 to 12% in 2009.
- The 2/11/09 e-mail reports that the PTO will begin an optional eOffice Action program in March 2009. For more info see the PTO's website.
- The 2/16/09 blog cites Dennis' study showing that almost 5% of all new U.S. patents refer to Microsoft.
- The 2/19/09 message takes another look at patent term extensions. The most recent data shows an average extension of 1 year.
- The 2/23/09 blog reports that about 30% of recent patents reference a provisional application. It also expresses concern about waiting until the last week or day to file the full, § 112 application.
- Another 2/23/09 blog cites a study finding that 85% of U.S. patents pay the 4-year maintenance fee, 65% the 8-year fee and 45% the 12-year fee. See the 2/27 blog for a discussion of reinstatement after failing to pay the fee. Currently about 2000 patents per year are being reinstated.
- A third 2/23/09 blog lists the top patent blogs.
- The 2/26/09 e-mail reports that the current omnibus spending bill provides \$2B for the PTO, and holds back \$5M pending certain patent examiner expectancy goals being met - interesting reading.
- The 2/28/09 blog discusses the quickest patent to issue – 2 ½ months from filing to issuance in an art unit averaging 2.2 years to allowance - interesting to read how it was done, and about the dangers.

**Carl Oppedahl** – e-mail of IP practice matters: [carl@oppedahl.com](mailto:carl@oppedahl.com).

- The 2/5/09 e-mail discusses the use of Korea as the ISA. See also his 2/7/09 and 2/8/09 messages.
- The 2/6/09 message discusses examiners' “official notices,” and strategies for responding to and overcoming them.

**IP law 360** – a newsletter covering all IP, but focusing mainly on litigation – web address: [www.iplaw360.com](http://www.iplaw360.com)

- The 2/9/09 guest column discusses how to preempt a § 101 rejection.
- The 2/13/09 e-mail reports that the EPO has announced a new fee schedule effective 4/1/09.
- The 2/23/09 message states that the House, in its new appropriations bill, tells the PTO to up its efficiency, not its spending.

**Daily Dose of IP** – a grab-bag of various IP matters by Mark Reichel – [www.dailydoseofip.com](http://www.dailydoseofip.com).

- The 2/5/09 dose reports that the PTO now has its Learning Management System for delivering continuing education materials to patent attorneys tested and ready to go.
- The 2/12/09 e-mail notes that the Patent Public Advisory Committee meetings are now available via webcast.

**AIPLA Direct** – a newsletter issued from time to time -

[http://www.aipla.org/Content/ContentGroups/About\\_AIPLA1/AIPLA\\_Reports/AIPLA\\_Reports\\_TOC.htm](http://www.aipla.org/Content/ContentGroups/About_AIPLA1/AIPLA_Reports/AIPLA_Reports_TOC.htm)

- The interference committee reports that it is studying *inter partes* reexamination as critiqued by some posted papers.
- On 2/4/09 the AIPLA reported that it was now on Facebook.

**PTO notices** –

[www.uspto.gov/main/newsandnotices](http://www.uspto.gov/main/newsandnotices)

- The PTO is holding a “Design Day 2009” on 4/6/09.
- The eAlert update service has changed various things and urges all to update their e-mail address. See [www.uspto.gov/ebc/optin](http://www.uspto.gov/ebc/optin).
- The PTO has extended the period for public comment concerning deferred examination to 5/29/09.

**WIPO** – [madrid@wipo.int](mailto:madrid@wipo.int)

- The use of IP assets in fundraising will be discussed in a WIPO conference on 3/10/09.

- WIPO now offers info. notice 4/2009 under Madrid, tips for avoiding provisional refusals of trademark registration in the U.S.

**Other Stuff** –

- LSI will hold a patent claims construction seminar in SF on 3/13/09.

For more information about any of the patent topics mentioned, consult *Patent Application Practice* published by West and updated twice a year.

## RECENT IP CASES

BY IRFAN LATEEF  
KNOBBE, MARTENS, OLSON & BEAR

◆ In *Kinetic Concepts, Inc. v. Blue Sky Medical Group, Inc.*, Nos. 2007-1340, -1341, and -1342, the Federal Circuit affirmed the district court's denial of the parties' cross-motions for JMOL and new trial after a jury found that the defendants did not directly infringe or induce infringement of the plaintiffs' patents, which it held were not invalid for obviousness.

The Federal Circuit upheld the jury verdict of no direct infringement of the apparatus claims as supported by substantial evidence. Although only the plaintiffs offered expert testimony on the issue of infringement, the appellate court held that the jury was not required to accept the testimony of plaintiffs' lone infringement witness. The appellate court found that the testimony of the defendant's co-founder and the jury's observations of the accused device were sufficient to support the jury's non-infringement conclusion.

The Federal Circuit also upheld the jury verdict of no induced infringement of the method claims because substantial evidence supported a finding that the defendant lacked the necessary specific intent to encourage another's infringement. Both founders testified that they did not believe the defendant's method infringed because they performed methods found in the prior art. The court held that although

"practicing the prior art" is not a defense to infringement, a defendant's belief that it can freely practice inventions found in the public domain can support a jury finding that the intent required for inducement was lacking.

The Federal Circuit held that the asserted patents would not have been obvious as a matter of law. A dispute centered around the claim limitation "treating wounds with negative pressure" and whether the prior art disclosed devices designed to do so. Though the parties disputed the meaning of that claim limitation, the trial court had refused to instruct the jury on its meaning. The majority held that such refusal was error but that it was harmless because the jury verdict was supported under the proper construction. The majority agreed with the plaintiffs that the claim term "wound" should be limited to the skin wounds identified as examples in the patent. The majority found that the plaintiffs presented substantial evidence at trial that the prior art was directed to other kinds of wounds or non-wounds. Accordingly, the jury could have found that the prior art did not teach or suggest treating a wound with negative pressure as required by the claims.

Judge Dyk dissented from the majority's holding that affirmed the claims' nonobvious. He would not have limited the claim term "wound" to the embodiments disclosed in the specification. He noted that the specification repeatedly uses the term "wound" in a broad and inclusive way and even includes examples other than skin wounds. Accordingly, he would have broadly defined wound consistent with an accepted medical dictionary to mean "trauma to any of the tissues of the body" and "surgical incision." Under this claim construction, he would have found the claims obvious.

♦ In *Ball Aerosol & Specialty Container, Inc. v. Limited Brands, Inc.*, No. 08-1333, the Federal Circuit reversed the district court's summary judgment of no invalidity and infringement.

The asserted patent involved a candle holder with a removable cover. The cover functions as a base for the candle holder

when the candle holder is placed on top of the removable cover. The claims were directed to candle holders possessing protrusions or feet that reduce heat transfer between the candle holder and the removable cover when the cover is used as a base. The protrusions or feet minimize scorching of the surface supporting the candle holder and cover.

Regarding validity, the district court denied the defendant's motion for summary judgment of obviousness. The district court agreed with the defendant that all the elements of the asserted claims could be found in the prior art. However, the district court rejected as "conclusory" the defendant's argument that because the prior art sought to solve the same problem as the patentee—that is, the scorching problem—the motivation to combine the elements was "self-evident." Shortly thereafter, the district court issued an order, *sua sponte*, holding that the asserted patent was valid as a matter of law. The district court reaffirmed the ruling after issuance of the Supreme Court's *KSR* decision. The district court interpreted *KSR* to require that a defendant's analysis of the motivation to combine prior art references should be made explicit and concluded that "conclusory statements" fail to meet this requirement.

The Federal Circuit reversed. The appellate court characterized one reference as disclosing a candle holder resting on its removable cover, another reference as disclosing bumps or protuberances on the bottom of the candle holder, and both references as addressing the problem of scorching. On this basis, the Federal Circuit held the patented candle holder to be a predictable variation on the prior art, obvious to try, grounded in common sense, and obvious under *KSR*. The Federal Circuit also noted that, contrary to the district court's ruling, it is a court's analysis of the motivation to combine that must be made explicit under *KSR* rather than the defendant's analysis or the analysis set forth in the prior art.

Regarding infringement, the district court held that the accused candle holder product infringed the asserted claims because the

accused product is reasonably capable of being placed on top of its removable cover when the removable cover is set open end down on a surface. The Federal Circuit reversed on the basis that (1) there was no proof that the accused product had ever been placed in the infringing configuration, and (2) that the accused product did not necessarily have to be placed in the infringing configuration.

◆ In *Baden Sports v. Molten USA*, Nos. 2008-1216 and -1246, the Federal Circuit reversed the district court's denial of judgment as a matter of law and vacated an \$8 million damages award for intentional false advertising under the Lanham Act.

Baden sued Molten for false advertising under Section 43 of the Lanham Act based on the defendant's advertisements using the word "innovative" to describe its own product. After a jury awarded \$8 million in damages to the plaintiff, the district court denied the defendant's motion for judgment as a matter of law that the Supreme Court's holding in *Dastar* precluded Lanham Act claims based on authorship of an idea.

On appeal, the Federal Circuit held that the Section 43(a) Lanham Act claims based on advertisements using the word "innovative" were barred by *Dastar*, which held that the term "origin of goods" in Section 43(a)(1)(a) refers to "the producer of the tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods." Because the defendant was the producer of the product it sold, the plaintiff's claims that the defendant falsely advertised its product as innovative were not actionable under Section 43(a)(1)(A). The Federal Circuit panel also held that authorship is not a "nature, characteristic, or quality" of a good, as those terms are used in Section 43(a)(1)(B).

◆ In *Revolution Eyewear v. Aspex Eyewear*, No. 2008-1050, the plaintiff had asserted its patent relating to magnetically-attached auxiliary eyeglasses against Aspex. On the eve of trial, the plaintiff offered Aspex a covenant not to sue for patent infringement "based upon any activities and/or products made, used, or sold on or before the

dismissal of this action." As a result, the district court found that the covenant "forever remove[d] the possibility that Aspex may be sued under the . . . patent" and eliminated any case or controversy with respect to Aspex's declaratory judgment claims.

The Federal Circuit reversed. The court first acknowledged that a covenant not to sue in the future for products made, used, or sold in the past removes actual controversy in the present. The covenant, however, did not extend to future sales of the same product. Aspex had a quantity of the product in storage that it sold before and wished to sell again. Moreover, the plaintiff stated that it intended to return to court if Aspex reentered the market with these products. Accordingly, the covenant not to sue on past infringements was insufficient to remove the controversy.

◆ In *Line Rothman v. Target Corp.*, No. 2008-1375, the Federal Circuit concluded that the district court properly upheld a jury's finding of invalidity but erred in upholding the jury's inequitable conduct finding. Accordingly, the Federal Circuit affirmed the district court in-part and reversed-in-part.

After trial, the jury found the asserted claims were anticipated by and obvious over the prior art. The jury further found that the plaintiff's patent was unenforceable due to inequitable conduct. The district court sustained the jury's verdict on all counts, denying the patentee's motions for JMOL that its patents were valid and enforceable.

On appeal, the Federal Circuit affirmed the denial of the plaintiff's motion for JMOL as to validity. The Federal Circuit concluded that a reasonable jury could have found that the patent was obvious as a combination of well-known prior art elements that functioned in an ordinary and expected way. Strong market demand could have provided the motivation to combine.

The Federal Circuit held that the district court erred, however, in sustaining the jury's finding of inequitable conduct and denying the plaintiff's JMOL as to enforceability. The Federal Circuit concluded that the plaintiff's failure to submit prior art to the examiner

was not inequitable conduct because the prior art references were cumulative and there was no evidence of deceptive intent. In addition, the appellate court found that the purported misrepresentations of material fact made by the attorney to the examiner were legitimate attorney arguments made without deceptive intent.

◆ In *Eli Lilly & Co. v. Teva Pharmaceuticals, USA, Inc.*, No. 2009-1071, the Federal Circuit affirmed the trial court.

In early 2006, Teva filed an ANDA with the FDA for generic raloxifene and notified Lilly, the drug's innovator, of its paragraph IV certification. Accordingly, Lilly sued Teva on June 29, 2006 for infringement of seven patents covering raloxifene. The FDA stayed approval of Teva's ANDA for 30 months, consistent with the Hatch-Waxman Act. Eight months before the scheduled trial date of March 9, 2009, and more than eighteen months after Teva provided Lilly with the original samples, Teva amended its ANDA to include a new particle-size measuring methodology and provided three additional batch samples to Lilly both before and after the discovery deadline set by the court. The district court, therefore, extended the 30-month stay under the Hatch-Waxman provision in which the court has the discretion to shorten or lengthen the stay if either party fails to reasonably cooperate in expediting the action.

The Federal Circuit affirmed the district court's decision under an abuse of discretion standard. The appellate court reasoned that there was sufficient evidence on record providing a rational basis for the district court's decision.

Prost, in the dissent, argued that because the 30-month stay is based on a statutory provision, the Federal Circuit's standard of review should be without deference, rather than abuse of discretion. Judge Prost further argued that even under the abuse of discretion standard, the district court erred in not providing any evidence that Teva had failed to reasonably cooperate in expediting the action, but rather justified the extension of the stay to provide Lilly with enough time

to test the samples and assess the information in preparation for trial.

### NEWSLETTER VIA EMAIL ONLY



**The Newsletter is now transmitted solely by e-mail.** If you know of anyone who should be added to the OCPLA Newsletter distribution, please have them contact Valerie Sarigumba at [vls@viplawgroup.com](mailto:vls@viplawgroup.com).

### OCPLA NEWSLETTER POLICY

While we are open to comments and suggestions, our present policy concerning publication of advertisements in this newsletter is as follows:

(1) "Positions Wanted," "Positions Available," and other similar ads will be printed free of charge and, unless otherwise requested, will run for two months; and

(2) Other ads such as word processing, legal support services, and firm announcements will be published for \$15 per issue or \$150 per year (for all 12 issues), payable in advance. We reserve the right to edit each advertisement.

Please contact the Newsletter editor, Valerie Sarigumba at [vls@viplawgroup.com](mailto:vls@viplawgroup.com), to place your ad or with your comments and suggestions.

### OCPLA BOARD OF DIRECTORS

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**OCPLA NEWSLETTER**

Orange County Patent Law Association

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The OCPLA reserves the right to determine which, if any, submitted articles will appear in this Newsletter.

We hope that the Newsletter is helpful, informative, entertaining and interesting. Comments, ideas, announcements, proposed articles, suggestions and any other communications concerning the content, form or other aspect of this newsletter may be directed to:

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**SERVICES, ANNOUNCEMENTS, WANT ADS****Business Development Patent Attorney**

Intellectual property law firm in Irvine, California seeks attorney for Business Development and Patent Prosecution position. **Position can be business development only or a combination of business development and case work.** This position will be responsible for developing new business in litigation and patent prosecution areas by establishing, maintaining and growing relationships with key decision-makers at medium to large size corporations.

Qualified candidate must have experience in patent prosecution with a technology background (minimum 10 years preferred). Experience as corporate counsel a plus. Ideal candidate must possess excellent communication skills and be professional, charismatic, and self-motivated. Prior business development experience preferred.

Position requires the ability to prospect via phone, email or other medium, face-to-face sales calls, interaction with clients and potential clients at networking events, and the ability to work independently and as a team player. Please send resume to [sbownen@shimokaji.com](mailto:sbownen@shimokaji.com).  
03/09

Orange County company looking for solo practitioner or small firm to do occasional patent prosecution work in medical/polymer arts. Please send resume or firm description to [darzint@yahoo.com](mailto:darzint@yahoo.com)"

### **Patent Attorney Position**

The Intellectual Property Division of Canon U.S.A., Inc. has an opening for an in-house Patent Attorney. This position acts as legal counsel to the IP Division and maintains company patent applications, trade secrets, trademarks, copyrights, licensing and research agreements. Primarily, the Patent Attorney will be responsible for preparing legal opinions, analysis of patents, and reviewing and drafting significant corporate documentation. Other responsibilities include evaluation of validity of competitor patents and potential infringements that require recommendation and study.

### **Minimum Requirements**

This position requires a JD degree plus 3 years of prior patent/IP experience in the area of electrical engineering, chemistry or physics, and you must be registered with the U.S. Patent and Trademark Office. The ideal candidate will demonstrate strong written and verbal communication skills with technical depth and patent expertise.

### **About the Company**

Canon U.S.A., Inc. is an industry leader in consumer, business-to-business, and industrial imaging solutions. The company offers a comprehensive line of imaging solutions and products for our customers from individual consumers to large corporate enterprises. Canon is listed as one of Fortune's Most Admired Companies in America and is rated #35 on the BusinessWeek list of 'Top 100 Brands.' Its parent company, Canon Inc. (NYSE: CA) is a top patent holder of technology, ranking second overall in the U.S. in 2005, with global revenues of \$31.8 billion. For more information, visit [www.usa.canon.com](http://www.usa.canon.com)

If interested, please send resume to Paul Amante, Jr. at [pamante@cusa.canon.com](mailto:pamante@cusa.canon.com)

### **Patent Attorney/Patent Agent**

**Klein, O'Neill & Singh, LLP** is a cutting edge Intellectual Property law firm with offices in Irvine and San Jose, CA. Our mission is to provide top-quality service for our clients, and our employees share that vision. Klein, O'Neill & Singh offers a collegial and creative work environment, with excellent compensation and benefits.

Our Irvine Office has an opening for a Patent Attorney or Patent Agent with an electronics background to join our growing practice. The ideal candidate will have a Bachelor's degree in Electrical Engineering, Computer Science, or Physics; 1-5 years of patent prosecution experience (including experience in electronics); and excellent written and oral communication skills. As a boutique firm, we can customize a package for the right candidate. Please submit resume, transcripts, writing sample, and references for consideration to: [info@koslaw.com](mailto:info@koslaw.com). For more information about our firm, please visit our website: [www.koslaw.com](http://www.koslaw.com).

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**FBA\OC**

***2009 Annual IP Program:***  
***Multi-Front Patent Litigation:***  
***Navigating Concurrent District Court, ITC and***  
***Reexamination Proceedings***

Panelists:

- Hon. James V. Selna (C.D. Cal.)
- Hon. Sidney Harris (Ret., Intern'l Trade Commission)
- Kevin Rivette (PTO Patent Public Advisory Committee)
- Robert G. Sterne (Sterne, Kessler, Goldstein & Fox P.L.L.C. founder)

**Wednesday, March 18, 2009**  
**University of California, Irvine**  
**Student Center, Crystal Cove Auditorium (2<sup>nd</sup> Floor)**  
**Irvine, CA 92697**

(Directions at [www.studentcenter.uci.edu/information/index.php](http://www.studentcenter.uci.edu/information/index.php))

**6:00 PM - Registration and Cocktail / Hors D'oeuvres Reception**  
**6:45 PM to 8:15 PM – Program**

The above activity has been approved for Minimum Continuing Legal Education by the State Bar of California in the amount of 1.0 hour. The FBA/OC certifies that this activity conforms to the standards for the approved education activities prescribed by the rules and regulations of the State Bar of California governing MCLE.

To make reservations, please complete the reservation slip and return it with your check to FBA/OC 6789 Quail Hill Parkway #204, Irvine, CA 92603  
Any questions call or fax (949) 608-9905 or by email at [info@fbaoc.com](mailto:info@fbaoc.com)

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**RESERVATION SLIP**

FBA OC Annual IP Program – March 18, 2009

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Firm or Business: \_\_\_\_\_

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- \_\_\_\_\_ As a Federal Bar Association member, enclosed is \$35.00 for one (1) admission to the seminar
- \_\_\_\_\_ As a law firm seeking group admissions, enclosed is \$300.00 for up to ten (10) admissions to the seminar
- \_\_\_\_\_ As a non-member of the Federal Bar Association, enclosed is \$45.00 for one (1) admission
- \_\_\_\_\_ As a UCI Student, Government Employee and/or a Law Student, enclosed is \$15.00 for one (1) admission
- \_\_\_\_\_ As a Judicial Clerk my attendance is at no charge

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