



# OCPLA NEWSLETTER

Orange County Patent Law Association

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

May 2009

## THURSDAY, MAY 21, 2009 LUNCHEON

Our May luncheon will feature ***Intellectual Property and the Gaming Industry: Perspectives and Tips***, presented by Eric Abott, Patent Counsel, Shuffle Master Inc. Las Vegas, and Rob Ziems, Ziems, P.C. (a Professional Corporation), Las Vegas. The luncheon will be held at the Sports Club/LA Orange County. Please register online by close-of-business Monday, May 18, 2009. We look forward to seeing you there!

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.

## MAY BOARD MEETING

The May OCPLA board meeting will be conducted May 21, 2009 at 11:00 AM at the Sports Club/LA, prior to the May 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 LAIPLA SPRING SEMINAR

Please see details at the end of this newsletter for the **2009 LAIPLA Spring Seminar**. The Seminar will be held June 12-14, 2009 at Lake Arrowhead Resort & Spa.

## 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 is a distillation by this publication's editor of the submitted IS column. If you

would like to receive the full column directly by email, write [onejehawes@aol.com](mailto:onejehawes@aol.com).

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

- The 4/1/08 message states that at least 8 of the 11 CAFC judges are now or will be eligible for senior status within the next two years.
- Another 4/1/08 mailing reports that the E.D. Va. Court in *Tafas* has held the PTO's continuation rules to be void as beyond the PTO's authority. But don't throw away all your new continuation rule plans just yet. The PTO may appeal - see Hal's 4/2/08 newsletter.
- The 4/7/08 newsletter discusses 10 years of experience with the Japanese doctrine of equivalents.
- Two 4/8/08 offerings continue Hal's running criticism of the accelerated examination fiasco at the PTO. In the second, Hal suggests that the PTO is cooking the books. See – IP practice can be fun.
- The 4/9/08 message points out that the PTO has not yet issued a final, appealable decision in *any inter partes* reexamination. So much for "special dispatch."
- The 4/11/08 issue states that, contra to Hal's prayers, the Leahy patent reform bill may make it to the floor for a vote, possibly even in a week or two. Oh, oh. (That now looks to be very unlikely – Ed.)
- Another 4/11/08 posting gives Hal's current top ten list of cases on appeal. It was updated by Hal on 4/17/08 and 4/21/08.
- Still another 4/11/08 message discusses the *PowerOasis* CAFC decision affirming denial of priority to a CIP and pointing out that a priority filing date does not apply to subject matter obvious over what is expressly disclosed. See also Patently-O, 4/14/08.
- And yet another 4/11/09 offering discusses the *Symantec* CAFC decision and when a claim's preamble is a limitation. Patently-O

discusses the decision in its 4/15/08 posting.

- The 4/16/08 posting discusses the *Zenith* CAFC decision, the latest bucket of mud dumped by the Court into patent law waters. It concerns the now-questionable axiom: If it infringes if later, it anticipates if earlier.
- The 4/17/08 message discusses the unconstitutionality of PTO Boards, some recent challenges to Board decisions on this basis, and some PTO efforts to fix the problem.
- The 4/28/08 issue discusses the *Reuning* CAFC decision and its criticism of the PTO for increasing examination delays, especially of applications thought to be important. Patently-O also discusses it.

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

- The 4/1/08 blog discusses the *Agrizap* CAFC decision showing why NOT to file a terminal disclaimer in response to a § 103 rejection.
- The 4/2/08 issue gives a thorough discussion of the *Tafas* decision with relevant attachments.
- The 4/8/08 blog discusses the *Akira* decision of the CAFC which answers the question – while patent assignments must be in writing, do intestate transfers need be in writing? The Court's answer – NO.
- The 4/10/08 issue considers some of the briefs in the en banc *Biliski* case before the CAFC. Oral argument is scheduled for May 8.
- The 4/11/08 blog cites a new patent searching site – priorsmart.com. Check it out.
- The 4/12/08 message reports that the PTO has issued a new set of written description training materials for examiners with 17 mostly biotech examples covering 60 plus pages.
- The 4/17/08 posting discusses the *Translogic* BPAI decision now on its way to the Supreme Court for the inclusion on the BPAI panel of an asserted unconstitutional judge.

- The 4/23/08 blog discusses the *Finistar* CAFC decision and its requirement that means plus function clauses in claims require some (even minimal) support in the specification.
- The 4/25/08 message includes a reminder that the CAFC has an active mediation program. Recent statistics are given.

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

- The 4/2/08 issue reports that WIPO has cut its patent application fees.
- The 4/7/08 newsletter includes a discussion of how the *KSR* decision has forced prosecutors to “step up their own game.”
- The 4/8/08 message reports that two Chinese companies face record damages for enabling the downloading of copyrighted music. Query: when an ISP located in country A posts on the web a file that is unprotected in A but which is requested by a site in country B, where downloading violates rights, which law applies – A or B?
- The 4/17/08 issue includes an observation that IPOs for IP law firms are on the way.
- The 4/28/08 newsletter includes a guest column which asks if the enablement bar has been set too high by recent decisions.

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

- The 4/9/08 issue focused on the new EPO search fees – they are now \$2496.
- The 4/14/08 bag includes a discussion of the PTO’s online chat hosting program for independent inventors.
- The 4/17/08 posting cites a new PTO financial profile system, a secure, fast and convenient way to check on your PTO payments over the internet.

**PTO** – info from you know who, about you know what – [www.uspto.gov](http://www.uspto.gov)

- The next Biochem – Pharmaceutical Customer Partnership group will meet at the Knox bldg. conf. center on June 4 from 9 to 4:30.
- A 4/15/08 e-Alert announced a pilot e-Office Action program to permit dealings with e-xaminers by e-mail. e-Wow!
- TESS has been updated with two new features – image viewing and a multiple search capability.
- The PTO has proposed adopting restrictions on Markush claims.
- The PTO announced that the EPO has joined the Patent Prosecution Highway – a way for Offices to expedite prosecution of patent applications pending in multiple countries.

**AIPLA Direct** – a sporadic electronic newsletter - <http://www.aipla.org/>

- The Spring Meeting is being conducted in Houston May 14-16.
- On June 11 it will hold a 90 minute interactive video conference to discuss “The Initial Inventor Interview.”

**Cal Bar IP Section** – Section news – [Mitch.Wood@calbar.ca.gov](mailto:Mitch.Wood@calbar.ca.gov)

- The Section will be holding an “IP Issues for In-House Counsel” conference on May 28 at the Beverly Hills Hotel.

**Copyright Office News** – [copynews@loc.gov](mailto:copynews@loc.gov)

- The 4/14/08 newsletter reports that the Office is shifting from paper to internet-based processing, resulting currently in up to an 8 month delay for registration certificates.

**WIPO** – The international IP group in Geneva – [www.wipo.int](http://www.wipo.int)  
For those with a yearning to see Geneva in the spring, or to learn more about the Madrid system, WIPO is offering a two day seminar on May 15 and 16.

**Other Stuff –**

- The CSUSA has announced that its annual meeting will be held June 8-10 at the Newport R.I. Marriott (signup by 5/7). Always a fun event.
- The interference committees of the ABA, AIPLA and IPO have announced a joint video conference Q&A with the BPAI judges for May 12 – the local site is at the KMOB offices.
- Oral argument in the Egyptian Goddess design patent case will be heard en banc by the CAFC on June 2.

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 *The Euclid Chemical Co. v. Vector Corrosion Technologies, Inc.*, Case No. 2008-1170, the Federal Circuit vacated the district court's grant of partial summary judgment that the disputed patent was assigned to Vector and vacated, as an abuse of discretion, the dismissal of Euclid's claim to be a bona fide purchaser of the patent. The Federal Circuit remanded the case for consideration of extrinsic evidence as to intent.

On appeal were Euclid's claims that the disputed patent was not assigned to Vector and that Euclid was a bona fide purchaser of the patent. The assignment assigned "any and all" "continuations in part" to a number of listed applications and an issued U.S. patent. The disputed patent was a CIP of the listed issued patent, but the disputed patent issued before the date of the assignment. The Federal Circuit determined that because the assignment was otherwise consistent in its use of singular and plural and because it referred to only one issued U.S. patent, it was reasonable to read the assignment as assigning only the listed patent and not the already issued disputed

patent. The Federal Circuit remanded the case for consideration of extrinsic evidence as to the intent of the parties, according to Ohio law.

The district court had previously ruled that Euclid abandoned its "bona fide purchaser" claim because it had not argued or supported it in response to Vector's motion for summary judgment on the assignment claim. The Federal Circuit held that this was an abuse of the district court's discretion because Euclid had no obligation to show a genuine issue for trial on a claim that was not the subject of a summary judgment motion and had no affirmative obligation to move for summary judgment.

♦ In *Ariad Pharmaceuticals, Inc. v. Eli Lilly & Co.*, Case No. 2008-1248, the Federal Circuit reversed in part and affirmed in part a district court's ruling against the defenses of unpatentable subject matter and inequitable conduct.

Ariad sued Eli Lilly in district court for infringement of a drug patent it owned relating to gene regulation. The jury found the patent infringed and not invalid for anticipation, lack of enablement, or lack of written description. Following a separate bench trial, the district court ruled that the patent's asserted claims were directed to patentable subject matter and that the patent was not unenforceable for inequitable conduct or prosecution laches. Lilly appealed the district court's ruling against its defenses of unpatentable subject matter and inequitable conduct.

The Federal Circuit concluded on appeal that the asserted claims were invalid because the jury lacked substantial evidence for its verdict that the asserted claims were supported by adequate written description. Specifically, although the specification described decoy molecular structures relevant to the asserted claims, it did not provide adequate description that the structures could be used to reduce NF-kB activity as claimed. The Federal Circuit further concluded that the patent was not unenforceable due to inequitable conduct. The court reasoned that Ariad's removal of a known incorrect figure from several related applications suggested that its failure to

remove the same figure during prosecution of the patent at issue did not rise to the level of "purposeful concealment." Further, Ariad's failure to submit four references to the U.S. Patent and Trademark Office during the patent's prosecution did not rise to the level of inequitable conduct because Lilly failed to show that deceptive intent was the reason for the failure to disclose.

◆ In *In re Kubin*, Case No. 2008-1184, the Federal Circuit affirmed a Board of Patent Appeals and Interferences decision rejecting a patent applicants' claims on the basis of obviousness.

The rejected claims of the application were directed towards certain DNA sequences coding for a cell surface receptor protein known as Natural Killer Cell Activation Inducing Ligand (NAIL). When certain signaling proteins bind to NAILS on the surface of a Natural Killer (NK) Cell, the NK cell is stimulated to activate various cytotoxic mechanisms. Specifically, the claims were directed towards any DNA sequence encoding a polypeptide at least 80% identical to a particular amino acid sequence (Sequence #2) of NAIL. The Board rejected the claims as obvious and lacking written description.

The Federal Circuit affirmed the Board's conclusion that the claims were obvious, without addressing whether there was lack of written description. In doing so, the Federal Circuit reconsidered the holdings of *In re Deuel* and *In re O'Farrell* in light of *KSR*. In particular, the Federal Circuit recognized that the Board's obviousness determination was in direct conflict with the holding of *In re Deuel*—that a DNA sequence encoding a known protein sequence was not necessarily obvious in view of a known method of determining DNA sequence from protein sequence. The Federal Circuit reasoned, however, that *KSR* had overruled this aspect of *In re Deuel* which was based on a misapprehension of the "obvious to try" doctrine. Instead, the Federal Circuit noted, *KSR* had "resurrect[ed] . . . [the] wisdom in *In re O'Farrell*" regarding the proper interpretation of the "obvious to try" doctrine. Specifically, the court explained that "obvious to try" cannot be equated with obviousness when

(1) what was obvious to try was a vast array of choices with no guidance from the prior art as to which choices would be successful, or (2) what was obvious to try was to explore a new technology or new field of experimentation with little guidance from the prior art. Applying *O'Farrell*, the Federal Circuit held that the NAIL DNA sequence was obvious because the prior art taught the protein of interest, the motivation to recover the DNA sequence coding for the protein, and a method of obtaining the DNA sequence. Simply put, in this case, the claimed technology was "obvious to try" and Applicants had more than a reasonable expectation of success.

◆ In *TransCore, LP v. Electronic Transaction Consultants Corp.*, Case No. 2008-1430, the Federal Circuit affirmed the district court's grant of summary judgment that TransCore's patent infringement claims against Electronic Transaction Consultants ("ETC") were barred by patent exhaustion, implied license, and legal estoppel in view of a settlement agreement between TransCore and the supplier of the products ETC installed, Mark IV.

In 2000, TransCore sued Mark IV for patent infringement. The parties settled, with TransCore granting Mark IV an unconditional covenant not to sue. Subsequently, ETC entered an agreement to install systems purchased from Mark IV. TransCore sued ETC for infringing four patents: three patents from the Mark IV suit and a fourth patent that was pending at the time of the Mark IV litigation.

With regard to the three patents from the Mark IV suit, the Federal Circuit agreed with the district court that the 2000 Mark IV settlement agreement exhausted TransCore's rights in these patents. The Federal Circuit stated that the doctrine of patent exhaustion provides that an initial "authorized sale" of a patented item terminates all patent rights to that item. The Federal Circuit found that a covenant not to sue is equivalent to a non-exclusive license authorizing sales. The Federal Circuit then held that TransCore's unrestricted covenant not to sue Mark IV both "authorized" sales by Mark IV and triggered patent exhaustion.

The Federal Circuit also found that TransCore's rights to the fourth patent, although not yet issued in 2000 and thus not identified in the Mark IV settlement agreement, were also exhausted. The Federal Circuit asserted that legal estoppel precludes a party from granting rights in a patent and then seeking to derogate the granted rights. The parties agreed that the fourth patent was "broader than . . . [the patents] that were included in the TransCore-Mark IV settlement agreement." Reasoning that Mark IV must be permitted to practice the fourth patent in order for Mark IV to obtain benefit under the Mark IV settlement agreement, the Federal Circuit held that TransCore was legally estopped from asserting the fourth patent against Mark IV in derogation of the authorizations granted to Mark IV under the settlement agreement. The Federal Circuit added that Mark IV thus is an implied licensee of the fourth patent and that Mark IV's sales were authorized and exhausted TransCore's rights in the fourth patent.

◆ In *Felix v. American Honda Motor Co., Inc.*, Case No. 2008-1367, the Federal Circuit affirmed the district court's grant of summary judgment that American Honda's "In-Bed Trunk" did not literally infringe Claim 6 of Felix's patent. The Federal Circuit also held that Felix was barred from asserting the doctrine of equivalents because of prosecution history estoppel.

Patentee Felix sued American Honda for infringing a patent that describes an arrangement for a weather-tight trunk in the bed of a pickup truck. The relevant limitation, which was added in response to an examiner rejection, recited a "weathertight gasket mounted on said flange and engaging said lid in its closed position." The district court construed "mounted" to mean "securely affixed or fastened to" and construed "engaging" to mean "coming together and interlocking." Under this construction, the court granted American Honda's motions for summary judgment of no literal infringement and no infringement under the doctrine of equivalents.

The Federal Circuit affirmed, agreeing, for the most part, with the district court's construction of the terms. The Federal

Circuit rejected Felix's argument that a broader, dictionary meaning should apply to "mounted" and to "engaging" because "it is improper to read a claim term to encompass a broader definition simply because it may be found in a dictionary . . ." and because the suggested meaning was inconsistent with the law of gravity in the context of the invention. In a strongly worded rebuke, the Federal Circuit admonished Felix for citing "highly misleading" quotations from the dictionary that "border on a misrepresentation to the court."

The Federal Circuit also rejected Felix's argument for infringement under the doctrine of equivalents. Even though the narrowing amendment in question did not place the claim in condition for allowance, the Federal Circuit nevertheless held that prosecution history estoppel applied. The Federal Circuit rejected Felix's argument that "the rationale underlying the narrowing amendment bore no more than a tangential relation to the equivalent in question." Felix, the Federal Circuit concluded, did not identify an explanation in the prosecution history for the addition of the narrowing limitation. Thus, Felix failed to carry the burden of proving an objectively apparent reason for the amendment that was discernable from the prosecution history record.

◆ In *Takeda Pharmaceutical Co., Ltd. v. Doll*, Case No. 2008-1131, the Federal Circuit addressed whether it was proper for courts and the U.S. Patent and Trademark Office (PTO) to consider after-developed technology when deciding whether process claims are unpatentable under the judicially-created doctrine of obviousness-type double patenting. The Federal Circuit vacated and remanded because there were still genuine issues of material fact unresolved by the U.S. District Court for the District of Columbia.

After Takeda's patent was rejected during reexamination, Takeda appealed to the Board of Patent Appeals and Interferences and then to the District Court for the District of Columbia. The district court denied the PTO's motion for summary judgment, and the PTO appealed to the Federal Circuit.

Takeda filed a first patent on a chemical compound and later filed a second patent on a process for making the chemical compound. During reexamination, the process patent claims were rejected for obviousness-type double patenting. According to the Manual of Patent Examining Procedure, a product and its process are patentably distinct, and therefore not double patented, if "the product as claimed can be made by another materially different process."

The district court found that later developments in the art are relevant in determining whether a product and its process are patentably distinct. The Federal Circuit clarified that later developments in the art are relevant only if they were developed prior to the filing date of the secondary application that triggered the double patenting rejection. The Federal Circuit vacated and remanded to determine whether the materially different processes were developed prior to the filing date of the process patent.

◆ In *Synthes (U.S.A.) v. G.M. dos Reis Jr. Industria e Comercio de Equipmentos Medicos*, Case No. 2008-1279, the Federal Circuit held that a foreign company (GMReis) that exhibited allegedly infringing products at a U.S. trade show that were not available for sale in the United States could nevertheless be sued for infringement here, even though its other contacts with the United States were minimal.

In 1997, representative from GMReis, a Brazilian company, attended a conference in the United States and displayed five allegedly infringing products, but prominently indicated that they were not for sale in the United States. When Synthes sued GMReis for patent infringement in the Southern District of California, GMReis moved to dismiss the complaint for lack of personal jurisdiction. The district court dismissed the case.

The Federal Circuit reversed the dismissal and remanded, because it found specific jurisdiction. The Federal Circuit held that GMReis "purposefully directed its travel with the . . . [products] to the United States and then displayed those products at a trade

show . . . attended by U.S. residents." The Federal Circuit then held that exercising personal jurisdiction over GMReis was both reasonable and fair.

◆ In *Princo Corp. v. International Trade Commission*, Case No. 2007-1386, the Federal Circuit affirmed the ITC's finding of no patent misuse arising out of tying licenses, but vacated and remanding its finding of no patent misuse arising out of requiring licensees to comply with a standard.

Philips Corp., along with other companies, held patents to CD-R and CD-RW technologies. Philips also authored the Orange Book, the CD-R/RW standard. Philips licensed the patents in pools but not individually and required Orange Book compliance by licensees.

Princo, a CD-R/RW manufacturer, argued that Philips misused its patents by including in the pools the Lagadec patent, because Lagadec was not essential to Orange Book compliance. The Federal Circuit rejected this argument. Where a manufacturer reasonably could have believed a patent was essential to a technology, the court reasoned that pooling was permissible, as it had the pro-competitive effect of reducing litigation costs and delays. Here, Philips reasonably could have believed that Lagadec was essential to Orange Book compliance, even if it was not actually essential, so including Lagadec in the pool was not misuse.

Princo next argued that Philips misused its patents by requiring Orange Book compliance in its licenses, foreclosing development of alternate technologies such as one disclosed in Lagadec. The Federal Circuit accepted this argument and held that where there is sufficient likelihood of commercial viability of an alternative technology, then preventing development of that alternative technology will constitute misuse. The court remanded to determine what likelihood of viability was sufficient and whether Lagadec met that standard.

◆ In *Ritchie v. Vast Resources, Inc.*, Nos. 2008-1528 & -1529, the Federal Circuit reversed the District Court's finding of

infringement with respect to U.S. Patent No. RE 38,924, the 2005 reissue of No. 6,132,366, and found the patent invalid as obvious.

Plaintiffs held a patent directed to a "sexual aid comprising a cylindrical rod" fabricated of "a generally lubricous glass-based material containing an appreciable amount of an oxide of boron." Plaintiffs sued Topco Sales (Vast Resources, Inc.), another manufacturer of "sex aids," for infringing the patent.

The Federal Circuit focused its obviousness analysis on commercial success. The Federal Circuit noted that Pyrex glassware was made of borosilicate glass having the same qualities as the glass described in the patent. Pyrex glassware has been sold by Corning Glass Works since 1893, typically in the form of kitchen glassware. During that time, the glass was not manufactured for sex aids. As inventions having commercial value will likely come to market shortly after conception, the fact that the invention *did not come to market* for so long a period, suggested nonobviousness.

However, the court observed that, as set forth *KSR International Co. v. Teleflex Inc.*, design incentives and other market forces can prompt predictable variations of the art. As the properties of the glass were previously known, and its utility as a sex aid was readily apparent, the court classified the present situation among other cases of routine experimentation. To experiment with "substituting borosilicate glass for ordinary glass in a sexual device was not a venture into the unknown." Accordingly the patent was found invalid.

♦ In *Revolution Eyewear, Inc. v. Aspex Eyewear, Inc.*, Nos. 2008-1267 & -1376, the Federal Circuit affirmed the district court's denial of summary judgment of invalidity, grant of summary judgment of infringement, and denial of motion for JMOL, a new trial, or remittitur.

In a declaratory judgment action, patent owner Contour counterclaimed that Revolution infringed its reissue patent directed to a primary spectacle frame (eyeglasses) to which an auxiliary spectacle

frame (sunglasses) may be attached. The underlying action had previously been dismissed, so the only remaining issue was the infringement action. The district court held that Revolution infringed one claim of the patent.

The background section of the patent's specification discussed two deficiencies in the prior art, namely stable support and decreased strength. The claims, however, included limitations directed only to one of these deficiencies: decreased strength. The claims had no limitations directed to stable support. Consequently, on appeal, Revolution argued that the claim was invalid for three reasons: (1) failure of written description under § 112, first paragraph, because the apparatus as claimed did not address both deficiencies in the prior art; (2) failure to claim the "original" invention in the reissued patent under § 251; and (3) improper expansion of claim scope in the reissue application under the recapture rule.

The Federal Circuit concluded that when the specification sets out two different problems present in the prior art, the written description requirement is met, even where particular claims are addressed to only one of those problems. The Federal Circuit also noted that the inquiry for whether a reissue patent is reissued "for the invention disclosed in the original patent" is analogous to the written description inquiry. Because the claims satisfied § 112, first paragraph, Revolution's § 251 argument dissolved. With respect to the recapture argument, the Federal Circuit observed that there were no amendments or arguments made during the original prosecution. Therefore, there was no admission or disclaimer to be recaptured. The recapture argument consequently failed, and the district court was affirmed.

Regarding infringement, Revolution argued, "a device does not infringe simply because it is possible to alter it in a way that would satisfy all the limitations of a patent claim." The court explained that the claim at issue required a capacity to perform a function; thus a product "capable" of performing a function infringes, even if it is not specifically designed or marketed to do so. Furthermore, the court noted that

Revolution's product did not require any alteration to be "capable" of performing the claim elements.

This case went to trial only on the issue of damages. Regarding JMOL, a new trial, or remittitur, the Federal Circuit affirmed the district court, finding that substantial evidence supported the damages award and that the district court did not abuse its discretion in denying a new trial or reducing the jury verdict. The Federal Circuit also affirmed the district court's denial of Contour's motion for attorney fees based on willful infringement. The court noted that a limited finding of willfulness for product sold after summary judgment was insufficient to qualify this case as "exceptional."

♦ In *Amgen, Inc. v. ITC*, No. 2007-1014, the Federal Circuit affirmed the ITC's ruling that 35 U.S.C. § 271(e)(1) applies in proceedings under the Tariff Act to both process and product patents. The court reversed and remanded, however, the grant of summary determination to Roche, citing a genuine dispute of material fact as to whether their activities fell within the safe harbor.

Plaintiff Amgen owned U.S. patents claiming processes to make recombinant human erythropoietin (EPO). Defendant Roche openly imported EPO into the United States, and Amgen sued Roche for infringing many claims of these patents by this importation.

The safe harbor provided by § 271(e)(1) states that it is not infringement to import a patented invention into the United States "solely for uses reasonably related to development and submission of information under a Federal law which regulates the manufacture, use, or sale of drugs." In this case, Amgen argued that "a patented invention" only refers to product patents and cannot refer to process patents. The Federal Circuit affirmed that both product and process patents are protected by the safe harbor after citing legislative history that confirmed congressional intent for the Tariff Act to do

so. In addition, the Federal Circuit cited *Eli Lilly* and *Merck*, in which the court stressed the congressional purpose of removing patent-based barriers to proceeding with federal regulatory approval.

Amgen also argued that Roche imported some non-exempt products because their actual use was not "reasonably related to the development and submission" of information under Federal Law and was likely not relevant to FDA approval processes. Amgen claimed that Roche was conducting infringement analysis experiments, market-seeding trials, and litigation-related activity. The Federal Circuit stated that the Commission incorrectly assumed that all infringing activity is exempt under § 271(e)(1) until regulatory approval is granted. Given the genuine dispute of fact as to the studies being conducted by Roche at the time, the Federal Circuit reversed and remanded the case to further investigate the level of infringement exemption Roche should receive.

♦ In *Every Penny Counts, Inc. v. American Express, Co.*, Case No. 2008-1434, the Federal Circuit affirmed the district court's claim construction and stipulated final judgment of non-infringement.

Plaintiff Every Penny Counts (EPC) is a patent holding company that owns a patented method for automatically donating "excess cash," the loose change from retail sales transactions, to predetermined charitable or savings accounts. EPC brought two suits against a number of defendants that make and sell gift cards that can be used instead of cash to complete retail transactions. At a joint claim construction hearing, the defendants proposed a construction of "excess cash" to mean an "amount selected by the payor beyond the total amount due at the point of sale." The plaintiff offered no evidence to support an alternate construction. The court therefore adopted the defendants' proposed

construction. Based upon the court's claim construction, EPC stipulated that it could not prove infringement.

On appeal, the Federal Circuit found that the specification strongly supported the district court's construction. EPC argued that the district court erred by using the accused products to tailor a construction of the claims that would make it impossible to prove infringement. The Federal Circuit found that this argument had no merit.

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### OCPLA NEWSLETTER

Orange County Patent Law Association

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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:

OCPLA Newsletter Editor  
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Tel: (949) 724-1849  
Fax: (949) 625-8955  
E-mail: [vls@viplawgroup.com](mailto:vls@viplawgroup.com)

**SERVICES, ANNOUNCEMENTS, WANT ADS**

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"

**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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**Patent Agent / Scientific Luminary  
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Dalina Law Group, PC is a cutting edge law firm with offices in Pasadena, Ca and La Jolla, Ca that represents innovative high-technology companies.

We are looking for a Patent Agent with a strong technical background in computer science or electrical engineering. This is an excellent opportunity to join an entrepreneurial environment and work closely with experienced practitioners. We offer excellent salaries and the ability to practice in an informal and collegial atmosphere. The ideal candidate will possess excellent attention to detail and have superior writing and oral communication skills.

Prior patent experience and a USPTO registration are preferred, but not essential. Candidates willing to become registered before the USPTO will also be considered.

If interested please send your resume to [jwallace@dalinalaw.com](mailto:jwallace@dalinalaw.com).

AN INVITATION TO ATTEND

# STATEWIDE INTELLECTUAL PROPERTY SPRING SEMINAR EVENT

LAKE ARROWHEAD RESORT & SPA  
JUNE 12-14, 2009

MULTIPLE  
EDUCATIONAL  
INSTITUTIONS  
AND  
ORGANIZATIONS  
PARTICIPATING  
INCLUDING:

## LAIPLA

Los Angeles Intellectual Property Law Association



LOS ANGELES INTELLECTUAL PROPERTY LAW ASSOCIATION • THE INTELLECTUAL PROPERTY LAW SECTION OF THE STATE BAR OF CALIFORNIA • ORANGE COUNTY PATENT LAW ASSOCIATION • VENTURA COUNTY BAR ASSOCIATION, IP SECTION • SILICON VALLEY INTELLECTUAL PROPERTY LAW ASSOCIATION • SAN DIEGO INTELLECTUAL PROPERTY LAW ASSOCIATION • CALIFORNIA WESTERN SCHOOL OF LAW • CHAPMAN LAW SCHOOL • LOYOLA LAW SCHOOL • PEPPERDINE SCHOOL OF LAW • SOUTHWESTERN LAW SCHOOL • UNIVERSITY OF CALIFORNIA IRVINE SCHOOL OF LAW • UNIVERSITY OF CALIFORNIA LOS ANGELES SCHOOL OF LAW • UCLA JOURNAL OF LAW AND TECHNOLOGY • UNIVERSITY OF SOUTHERN CALIFORNIA GOULD SCHOOL OF LAW • UNIVERSITY OF SAN DIEGO SCHOOL OF LAW • WHITTIER LAW SCHOOL



LAKE ARROWHEAD RESORT & SPA

JUNE 12-14, 2009

# SPRING SEMINAR 2009



PROGRAM TO INCLUDE:

PATENT TRACK  
TRADEMARK TRACK

PROPOSED TOPICS TO INCLUDE:

- Mock Opening and Closing with prominent practitioners and jury consultant
- Patent Prosecution Appeal Process and Trends of the Board of Patent Appeals/Federal Circuit
- Anatomy of an International Trade Commission Proceeding
- Emerging Trends in Patent Litigation
- In-House Counsel Perspectives on Patent Portfolio Development, Strategy, and Selection of Outside Counsel
- IP Licensing

ADDITIONAL BENEFITS:

- Multiple networking opportunities throughout the weekend
- Friday Evening Reception
- Saturday Evening Reception and Dinner Event
- Exhibit Area with multiple service providers, sponsors and firms
- Sponsorship opportunities available



## WATCH FOR UPCOMING ANNOUNCEMENTS!

FOR FURTHER INFORMATION OR A SPONSORSHIP PACKAGE CONTACT THE LAIPLA OFFICE AT 1-626-974-5429  
OR VIA EMAIL TO LAIPLAOFFICE@AOL.COM OR VISIT OUR WEBSITE [WWW.LAIPLA.ORG](http://WWW.LAIPLA.ORG)

*MARK YOUR CALENDAR TODAY TO JOIN US JUNE 12-14, 2009. FOR ROOM RESERVATIONS CALL  
LAKE ARROWHEAD RESORT DIRECTLY AT (909) 336-1511 AND MENTION LAIPLA SPRING SEMINAR.*



# SPRING SEMINAR 2009

## SCHEDULE OF EVENTS

### FRIDAY – June 12, 2009

#### Complimentary In-House Counsel Day

1:00 – 2:00 p.m.

#### REGISTRATION

1:50 – 2:00 p.m.

#### WELCOMING REMARKS

- **Franklin D. Kang**,  
Spring Seminar Chair, LAIPLA  
Latham & Watkins LLP

2:00 – 3:00 p.m.

#### Anatomy of ITC Case from Commencement to Trial

- **Tom Schaumberg**,  
Adduci Mastriani & Schaumberg LLP
- **Judge Paul Luckern**,  
Chief Administrative Law Judge  
International Trade Commission

3:00 – 4:10 p.m.

#### Cost Effective Management of Outside Counsel and Work Projects in Today's Economy. . .Who's Bailing US out?

- **Stefan J. Kirchanski**,  
Venable LLP
- **Rachel Nico**,  
Vice President, Business and Legal Affairs,  
Hulu, LLC
- **John J. Love**,  
Burleson Cooke LLP  
Ex-Deputy Commissioner for  
Patent Examination Policy - United  
States Patent and Trademark Office
- **Keith A. Newbury**,  
Vice President, Chief Intellectual Property  
Counsel, Edwards Lifesciences LLC
- **Hannah Dvorak-Carbone**  
Licensing Associate, Office of Technology  
Transfer, California Institute of Technology
- **Georgann Grunebach, Moderator**,  
Vice President, Intellectual Property,  
Fox Group Legal

4:10 – 5:10 p.m.

#### Hot Topics in Intellectual Property Licensing, A Panel Discussion

- **Art Rose**,  
Knobbe Martens Olson & Bear LLP
- **Seong-Don Hwang**,  
Chief IP Counsel, Samsung SDI Co., Ltd.
- **Blake English**,  
Managing Director, FTI Consulting
- **Matthew D. Hanna**,  
Senior Counsel, Legal Affairs, Corporate and  
Distribution, Sony Pictures Entertainment Inc.

5:10 – 6:30 p.m.

#### BREAK

6:30 – 7:30 p.m.

#### RECEPTION, All Attendees (1 Guest/Attendee)

7:30 – 10:00 p.m.

#### SPEAKERS' DINNER (by invitation only)

### SATURDAY – June 13, 2009

8:00 – 8:50 a.m.

#### BREAKFAST (Attendee ONLY)

8:50 – 9:00 a.m.

#### WELCOMING REMARKS

- **Jason S. Feldmar**,  
President, LAIPLA

9:00 – 10:15 a.m.

#### PATENT TRACK

##### Mock Opening and Closing

- **Edward G. Poplawski**,  
Sidley Austin LLP
- **Dean G. Dunlavey**,  
Latham & Watkins LLP
- **Dr. Phillip K. Anthony**,  
CEO, DecisionQuest
- **Honorable Andrew J. Guilford**  
United States District Judge

#### TRADEMARK TRACK

##### ICANN, Domain Names, and Internet Hot Topics – Proposed additions to Domain Name Suffixes

- **Phil Lodico**,  
FairWinds Partners
- **Paul McGrady**,  
Greenberg Traurig LLP (Chicago)

10:15 – 11:15 a.m.

#### PATENT TRACK

##### Patent Prosecution Appeals – Predictions, Changes, and Potential for Success

- **John D. McConaghy**,  
Connolly Bove Lodge & Hutz LLP
- **Ronald J. Schoenbaum**,  
Knobbe Martens Olson & Bear LLP
- **Glenn E. Von Tersch**,  
TIPS Group

#### TRADEMARK TRACK

##### Fraud on the Trademark Office – Views from the TTAB on Declarations, Applicant Knowledge, & Opposition/Cancellations

- **Christopher C. Larkin**,  
Seyfarth Shaw LLP

11:30 – 12:30 p.m.

#### PATENT TRACK

##### Emerging Trends in Patent Litigation A Panel Discussion

- **Luke L. Dauchot**,  
Kirkland & Ellis LLP
- **Charles S. Barquist**,  
Morrison & Foerster LLP
- **Jonathan S. Kagan**,  
Irell & Manella LLP

#### TRADEMARK TRACK

##### Counterfeiting and Enforcement – Issues, Problems and Best Practices for Enforcing Your Mark Nationally and Internationally

- **Robert Hart**,  
Harman Industries, Inc.
- **Elva Muneton**,  
LA/Long Beach Supervisory Import Specialist,  
U.S. Custom and Border Protection

12:30 – 6:30 p.m.

#### FREE TIME, WATER SKIING, HIKING, AND RESORT ACTIVITIES

12:30 – 2:30 p.m.

#### BBQ LUNCH, (All Attendees and Guest(s))

6:30 – 7:30 p.m.

#### RECEPTION, All Attendees (1 Guest/Attendee)

7:30 – 9:45 p.m.

#### DINNER, All Attendees (1 Guest/Attendee)

#### KEYNOTE SPEAKER

- **John J. Love**,  
Burleson Cooke LLP  
Ex-Deputy Commissioner for  
Patent Examination Policy - United  
States Patent and Trademark Office

9:45 – 11:00 p.m.

#### BEACH BONFIRE, SMORE ROASTING, GUIDED STAR GAZING

#### All Attendees (Guests and Children Welcome)

### SUNDAY – June 14, 2009

8:00 – 9:00 a.m.

#### BREAKFAST, (All Attendees and Guest(s))

9:00 – 10:00 a.m.

#### Patent Year in Review

- **Harold C. (Hal) Wegner**,  
Foley & Lardner LLP

10:10 – 11:10 a.m.

#### Copyright Year in Review

- **Professor Robert Lind**,  
Southwestern Law School

11:20 – 12:20 p.m.

#### Trademark Year In Review

- **Professor David S. Welkowitz**,  
Whittier Law School

12:20 – 12:30 p.m.

#### FAREWELL REMARKS

- **Keith A. Newbury**,  
Edwards Lifesciences LLC



## REGISTRATION FORM

### SPRING SEMINAR 2009, LAKE ARROWHEAD RESORT & SPA FRIDAY, JUNE 12 – SUNDAY, JUNE 14, 2009

You are invited to join LAIPLA and their Sponsors at this year's Spring Seminar being held at the elegant mountain retreat of **Lake Arrowhead Resort & Spa, Lake Arrowhead, CA**

Hotel reservations need to be made directly with the resort by calling 800-800-6792 or 909-336-1511. Please mention that you are attending the LAIPLA Spring Seminar to ensure that you receive the special room rates of \$255.00 per night. **ALL HOTEL ROOMS ARE ON FIRST-COME, FIRST-SERVED BASIS FOR GROUP RATE.** Please reserve early as we expect a sold out event. After May 11, 2009 at 5:00 p.m. we cannot guarantee group rate. Please visit [www.laresort.com](http://www.laresort.com) or further information about the resort and activities.

### PROGRAM REGISTRATION FORM

Please complete the following and return it with your payment to:

LAIPLA - 1430 South Grand Avenue, # 256, Glendora, CA 91740  
OR Fax the form to: (626) 974-5439

Name: \_\_\_\_\_ Title: \_\_\_\_\_

Company/Firm: \_\_\_\_\_

Address: \_\_\_\_\_

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Name(s) (for Badges): \_\_\_\_\_

Registrant: \_\_\_\_\_ Guest: \_\_\_\_\_

Accompanying Children:

Name(s)/Age(s): \_\_\_\_\_

Name(s)/Age(s): \_\_\_\_\_

**Membership Signup and Renewal:** It is time to renew your individual LAIPLA membership for the membership period July 1<sup>st</sup>, 2009 – June 30<sup>th</sup>, 2010. Renew today and save \$5.00 (No individual renewal necessary for those who benefit from a firm or company membership. New LAIPLA members benefit from the discounted Spring Seminar registration fee.)

**Renew Today for \$100.00** \$ \_\_\_\_\_

I am interested in participating in one or more of the following committees:

Law School Outreach  Membership  Newsletter  Judge's Night

Washington in the West  Spring Seminar  Monthly Meetings  Website

\* **Cancellation Policy:** Full refund if cancellation is received by May 21; 50% refund if received by May 27; No refund on or after May 27, 2009.

**MEMBER RATE**

**NON-MEMBER RATE**

**Basic Registration Fees:** Includes admission for registrant and one guest to breakfasts, receptions, & dinner. (All members of LAIPLA, IP Law Section of the CA State Bar, SDIPLA, SVIPLA, OCPLA and VCBA qualify for the member registration rates)

\$845 - **Student** registering on or before May 21, 2009 \$ \_\_\_\_\_

\$1,000 - **Student** registering after May 21, 2009 \$ \_\_\_\_\_

\$945 - **Members** registering on or before May 21, 2009 \$ \_\_\_\_\_

\$1,000 - **Members** registering after May 21, 2009 \$ \_\_\_\_\_

\*includes all Sponsorship Organizations

\$1,145 - **Non-Members** registering on or before May 21, 2009 \$ \_\_\_\_\_

\$1,200 - **Non-Members** registering after May 21, 2009 \$ \_\_\_\_\_

**In-House Counsel Friday CLE Seminar & Reception**

**Complimentary** registering on or before May 27, 2009

\$25 registering after May 27, 2009 \$ \_\_\_\_\_

**SATURDAY PROGRAM** – Register for Track (Pick One) \_\_\_\_\_ **Patent Track** \_\_\_\_\_ **Trademark Track**

**EVENT REGISTRATION** – Please indicate which events below you and your guest(s) plan to attend.

**Friday** \_\_\_\_\_ **Number** \_\_\_\_\_

6:00 p.m. – 7:00 p.m. Welcome Reception/Hors d'oeuvres (Max 2) \_\_\_\_\_

**Saturday** \_\_\_\_\_

8:00 a.m. – 8:45 a.m. Continental Breakfast (Attendee ONLY) \_\_\_\_\_

12:30 p.m. – 2:30 p.m. BBQ Lunch (Attendees and Guest(s)) \_\_\_\_\_

6:30 p.m. – 7:30 p.m. Cocktail Reception (Max 2) \_\_\_\_\_

7:30 p.m. – 11:00 p.m. Dinner (Max 2) \_\_\_\_\_

**Sunday** \_\_\_\_\_

8:00 a.m. – 8:45 a.m. Continental Breakfast (Attendee and Guest(s)) \_\_\_\_\_

Extra Surcharge for Printed Materials in Binder \_\_\_\_\_ \$75

(Standard registration fee includes all distributed materials on a USB Drive ONLY)

### OPTIONAL EVENTS (NOT INCLUDED WITH BASIC REGISTRATION FEE)

Please indicate whether you and/or your guest(s) will participate in any of the following optional events:

**Children's Evening Program** \$ \_\_\_\_\_

"Reservations Required - \$50 Per Child/Per Evening"

Number of Children for: \_\_\_ Friday \_\_\_ Saturday

(Age appropriate games, crafts, movies & dinner will be provided) TOTAL: \$\$ \_\_\_\_\_

### ADDITIONAL ACTIVITIES:

Beach Picnic, Hiking, Biking, Shopping, Tennis, Spa Treatments.

Please contact Lake Arrowhead Resort & Spa directly to sign up for additional activities.

### PAYMENT OPTIONS:

Company Check  Visa  MasterCard  AmExp

Credit Card Number: \_\_\_\_\_ Exp. Date: \_\_\_\_\_

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