

IPLS PROCEEDINGS

STATE BAR OF MICHIGAN

The 2007 Intellectual Property Law Spring Seminar on Monday, March 19, 2007

By Denise Glassmeyer

The Intellectual Property Law Section is sponsoring the 2007 Intellectual Property Law Spring Seminar on Monday, March 19, 2007, at the Kellogg Hotel and Conference Center at MSU, 55 S. Harrison Road, East Lansing MI. IPLS is collaborating with the Institute of Continuing Legal Education in Ann Arbor to present this event.

The Spring Seminar has been designed by members of the IPLS Council under the direction of co-moderators Greg Bonderenko and David Wisz to address current issues in intellectual property law. This year's Seminar will run from 9:00 a.m. to 4:15 p.m. and will include a luncheon featuring a keynote address by the Honorable Avern Cohn of the U.S. District Court, Eastern District of Michigan, focusing on Electronic Discovery in Intellectual Property Litigation.

Continued on page 4

Volume 18 • Issue 2 • 2007

Table of Contents

From the Chair	2
Help Wanted: To Improve the Economic Survey for Michigan IP Practitioners.....	2
Utah Federal Court Rejects Copyright Lawsuit Challenging Advertisers' Right to Freely Use "Digitized"	
Vehicle Images	3
Calendar of Events.....	3
Where Do We Get Our Information?	4

The 33rd Annual Intellectual Property Law Summer Institute on Mackinac Island

By Denise Glassmeyer

The upcoming 33rd Annual Intellectual Property Law Summer Institute cosponsored by IPLS in conjunction with ICLE presents some new innovations and offerings together with many of the features favored by Section members. This year's Institute will be held at the Grand Hotel on Mackinac Island, from Thursday, July 12 to Saturday, July 14.

The Institute will continue its popular practice of providing the popular Updates in patent, trademark and copyright Law as the Friday sessions. Kate Spellman of Cobalt LLP will return to provide the Copyright Update. Tom Irving of Finnegan Henderson will update attendees in current developments in Patent Law. Leslie Lott of Lott and Friedland, Coral Gables, FL will provide the Trademark Update.

New this year to the Institute are two-hour advanced-level sessions available at no cost to attendees on Thursday afternoon. This year's advanced sessions feature Tom Irving speaking on the subject of "Drafting and Prosecuting Patents for Subsequent Litigation and Licensing" and Michael Lisi of Honigman Miller speaking on the topic "How to Help Clients Survive a Tax Audit on IP Valuations." This year's moderator, Council Chairman-Elect Laura Slenzak, explains, "For the past few years we have offered advanced sessions opposite the Update sessions. Our attendees enjoy the advanced sessions but dislike having to choose between a valuable update and an advanced session. Offering advanced sessions on the opening afternoon of the Institute permits us to accommodate all interested attendees at no extra charge."

Continued on page 4

Chair:

Beverly M. Bunting

Gifford, Krass, Groh, Sprinkle, Anderson & Citkowski
P.O. Box 7021
2701 Troy Center Drive, Suite 330
Troy, MI 48007-7021
E-mail: bbunting@patlaw.com
Phone: (248) 647-6000
Fax: (248) 647-5210

Chairperson-Elect:

Laura M. Stenzak, Auburn Hills
Phone: (248) 209-5698

Secretary-Treasurer:

Denise M. Glassmeyer, Troy
Phone: (248) 649-3333

Term Expires 2007:

Frank A. Angileri, Southfield
Phone: (248) 226-2829

Gregory P. Bondarenko, Grand Rapids
Phone: (616) 752-2420

John M. Naber, Ann Arbor
Phone: (734) 623-1931

Term Expires 2008:

Mark A. Davis, Grand Rapids
Phone: (616) 742-3500

Andrew M. Grove, Troy
Phone: (248) 689-3500

Jennifer S. Warren, Midland
Phone: (989) 636-5355

Term Expires 2009:

Jennifer Sheehan Anderson, Bloomfield Hills
Phone: (248) 566-8532

David L. Wisz, Birmingham
Phone: (248) 988-8360

Austin W. Zhang, Ann Arbor
Phone: (734) 622-5035

Ex-Officio:

Craig A. Baldwin, Auburn Hills

Commissioner Liaison:

Rodger D. Young, Southfield

Editors:

Jennifer Sheehan Anderson

Honigman Miller Schwartz and Cohn LLP
38500 Woodward Ave., Suite 100
Bloomfield Hills, MI 48304-5048
Phone: (248) 566-8532 Fax: (248) 566-8533
E-mail: janderson@honigman.com

Denise Glassmeyer

Young & Basile, PC
3001 W. Big Beaver Rd., Ste 624
Troy, MI 48084
Phone: (248) 649-3333 Fax: (248) 649-3338
E-mail: glassmeyer@ybpcc.com

Jennifer S. Warren

Dow Chemical Company
Washington St., 1790 Bldg
Midland, MI 48674
Phone: (989) 636-9785 Fax: (989) 636-9785
E-mail: jswarren@dow.com

Letter From the Chair—Beverly Bunting

Happy New Year! The council is busy finalizing plans for the Monday, March 19, 2007, Intellectual Property Law Seminar. The seminar will again be held at the Kellogg Center in East Lansing. You can register online at www.icle.org/springIP. One advantage of being a Section member, is a discounted price off the regular registration fee. Based on feedback from previous seminars, we will continue to offer two tracks. One track will have a patent-oriented theme, and the other a copyright/trademark-oriented theme.

How do rates charged by Michigan firms for IP services compare to surrounding regions? Many of us utilize the AIPLA publication, "Report of the Economic Survey" to try to answer this question. However, Michigan is lumped in with the "other central" category, which makes it difficult to obtain a definitive answer. The council is taking the lead in helping Michigan practitioners gain a better understanding of how Michigan service fees compare to those charged in other parts of the country for similar services. Be sure to respond to the AIPLA survey, and indicate that you want to separate Michigan.

Hold the dates in your calendar for the Summer IP Institute on July 12 - 14, 2007. We are changing the format this year. The advanced sessions will be held on Thursday afternoon from 3:30 p.m. – 5:30 p.m., and the cost is included in your registration fee. This way, you can attend both the advanced sessions and updates on patent, trademark, and copyright law. So arrive early on Mackinac and take advantage of this opportunity to receive practical strategies for prosecuting patents for subsequent litigation by Tom Irving and advice on how to counsel clients on surviving a tax audit on IP valuations by Michael Lisi. We are trying a new format for the corporate counsel lunch. It will be open only to corporate counsel, and will feature a speaker on a unique strategy for training in-house counsel.

As always, we welcome your comments and suggestions regarding section activities. ?

Help Wanted: To Improve the Economic Survey for Michigan IP Practitioners

By Andrew (Jake) Grove

The Council is working with the AIPLA to improve the Economic Survey for Michigan IP practitioners and we need your help.

You may have noticed in the past that the AIPLA Economic Survey does not have a separate section for Michigan. Michigan is lumped into an "other central" category with a number of other areas extending all the way down to Alabama. As a result, the information on Michigan practice is not precise. This impacts corporations who need to know economic information about law firms in Michigan; and it impacts law firms too. Law firms need precise information to set their billing rates and to justify those billing rates to corporations and other clients.

The Council has addressed the matter to the AIPLA, and the AIPLA seems inclined to give Michigan its own section in the upcoming 2007 survey. However, you can do two things to help make this happen. First, contact the AIPLA and tell them that you want this, too. Contact Heather Haney at hhaney@aipla.org. Second, when the survey information comes, make sure that you or your organization respond. The AIPLA has already started sending the survey and some of you may have received it already.

We will have a better chance of getting a separate section for Michigan if Michigan practitioners show interest and support. ?

Utah Federal Court Rejects Copyright Lawsuit Challenging Advertisers' Right to Freely Use "Digitized" Vehicle Images

By Brian D. Wassom

Take a look at the next automotive print advertisement you see. Chances are that the car "pictured" there is a digital creation instead of a photograph. Photo-quality digital images allow advertisers to adjust color, lighting, model-year variations, and animation without entirely new photo shoots. Recently, however, a digital imaging company tried to throw a wrench in this system by claiming to own copyrights in some of those pictures. But a federal judge in Utah rejected the company's lawsuit, upholding advertisers' right to make free use of the rough digital data underlying these images.

Saatchi & Saatchi North America creates ads for Toyota Motor Sales U.S.A. Saatchi commissioned Farmington Hills-based Grace & Wild to provide digital images of several Toyota vehicles. Grace & Wild subcontracted Utah-based Meshwerks to make the initial digital scans of the vehicles. This involves laying intersecting rows of tape on actual vehicles, mechanically measuring the intersections of the tape, then fine-tuning that data in a computer to create a "wire-frame" image.

After Grace & Wild modified some of the images to reflect updates in the 2004 model designs, however, Meshwerks sued all three companies for copyright infringement.

Judge Tena Campbell rejected Meshwerks's claims, because the digital scans were not "original," as copyright law uses that term, and hence cannot be copyrighted. Copyrights protect creativity, not hard work. An unoriginal creation cannot be copyrighted, no matter how much skill or toil went into making it. A work is not "original" for copyright purposes if the work is intended merely to copy as near

as possible an existing object. Cases following this principle have rejected copyright claims in (a) topographical site plans, (b) hand-drawn recreations of catalog photos, (c) a plastic version of a metal toy, (d) costumes based on Disney characters, and (e) AutoCAD drawings of existing buildings, to name a few.

Everyone agreed that Meshwerks exercised significant skill, time, and effort to digitize the Toyota vehicles. Judge Campbell even acknowledged that in colloquial, everyday language, one might call this a "creative" process. Nevertheless, Meshwerks's only role in the overall creation of the final digital images was to recreate the shapes of the vehicles as near to photo-realistically as possible. Meshwerks did not intentionally add anything to the wire-frame measurements. Indeed, nothing other than a photo-realistic depiction would have been usable for Saatchi's advertising campaign. All of the "creative" elements, such as lighting, texture, color, and animation, were added later by Grace & Wild.

Copyright law does not require a great deal of originality for a work to be copyrightable. As Judge Campbell noted, this means that drawing the line between "sublime expression" and "simple reproduction" is sometimes difficult. But the distinction is important. If someone could claim a copyright in the image of an object, such as an automobile, without having added anything to that image, then for all intents and purposes, that person becomes the owner of *every* image of that automobile. Even a conventional, two-dimensional photograph, for example, cannot be copyrighted if it merely reproduces an object without adding any creative element (such as distinct lighting

or pose) to the picture—that is, if it is more of a *photocopy* than a *photograph*.

Judge Campbell's decision has practical ramifications throughout the automotive and advertising industries. As digital imagery becomes an increasingly convenient means to depict real-world objects, advertisers must have certainty as to who owns the rights to those images. A contrary result in the *Meshwerks* case could have cast a shadow over the entire digital imaging enterprise. Judge Campbell's decision applied longstanding copyright principles to the digital arena, drawing a line between mechanical reproduction and genuine creativity. ?

Brian D. Wassom is a partner with the law firm Honigman Miller Schwartz and Cohn LLP in Detroit, Michigan. He was the lead litigator on the legal team representing Toyota Motor Sales U.S.A., Inc., Saatchi & Saatchi North America, Inc., and Grace & Wild, Inc. in this case.

Submissions to IPLS Proceedings

Articles of interest to the membership are actively solicited for publication on the IPLS website. If you have recently researched a topic of interest to our membership, or have been involved in a case, please consider a submission.

Submission Deadlines:

- April 13, 2007 for the May 2007 issue
- September 14, 2007 for the October 2007 issue

Submissions should be sent to:

Jennifer Sheehan Anderson
Honigman Miller Schwartz and Cohn LLP
38500 Woodward Ave., Suite 100, Bloomfield Hills, MI 48304-5048
Phone: (248) 566-8532 Fax: (248) 566-8533
E-mail: janderson@honigman.com

Calendar of Events

February 8, 2007

Council Meeting at 9:30 a.m.*

March 8, 2007

Council Meeting at 9:30 a.m.*

March 19, 2007

IPLS Meeting and Spring Seminar
Kellogg Center, East Lansing

April 12, 2007

Council Meeting at 9:30 a.m.*

May 10, 2007

Council Meeting at 9:30 a.m.*

June 14, 2007

Council Meeting at 9:30 a.m.*

July 12-14, 2007

Intellectual Property Law Institute
Grand Hotel on Mackinac Island

* Contact a council member for the meeting location.

Throughout the day, participants will be able to choose from a two-track format of a variety of timely and specialized topics. The seminar will include speakers from the USPTO addressing subjects, including new and upcoming rule changes as well as tactics and strategies for practice before the Board of Patent Appeals and before the Trademark Trial and Appeal Board. Brian Diner of Finnegan Henderson will address claim drafting practice in view of recent changes in PTO rules and federal case law.

IPLS Council has also organized topics and speakers to address topics of interest to all in the IP community. Jennifer Sheehan Anderson of the Honigman firm will speak on the use of customs regulations to address counterfeiting in the U.S. and abroad. Kevin Ripa of Advanced Surveillance Group and Peter Psarouthakis of EWI & Associated will present on the topic of performing effective internet investigations relating to IP issues.

The seminar also includes discussions on Hot Topics in Licensing and Trademarks by Dick Rademaker, Licensing Resource Group Inc., and Patent and Technology Licensing by Sasha Mayergoyz of Latham & Watkins. Latest Tactic and Developments in E-Commerce, Internet and Trademark Litigation is being presented by Daniel Frohling of Loeb & Loeb.

The seminar will also include a roundtable discussion to provide current law students with the opportunity to meet with current practitioners working in various aspects of intellectual property law. ?

Where Do We Get Our Information?

The Internet has opened up a world of opportunity to locate just about any type of information you can imagine. A couple of links you may find interesting and helpful to your practice are:

<http://www.ipmenu.com> – IP Menu is a worldwide Internet directory system aimed at users and researchers working in the intellectual property field. The system is designed in a hierarchical fashion with indexes by country or property type (e.g. patent, trademark etc). Each section has access to online websites containing patent, trade mark, design, domain name, legislation, company, and business information. IP Menu also links to government and library websites, and lists unique features, such as, information and intellectual property conferences.

<http://www.zoominfo.com> – ZoomInfo is a summarization search engine that delivers fresh, comprehensive information on over 33 million business professionals and 2 million companies across virtually every industry. This is not a public record database. All the matches are from websites in which the person searched is mentioned.

http://www.google.com/advanced_patent_search – Google Patent Search covers the entire collection of patents made available by the USPTO—from patents issued in the 1790s through those issued in the middle of 2006. It does not currently include patent applications, international patents, or U.S. patents issued over the last few months, but Google is going to be expanding coverage in the future.

Summer Institute

continued from page 1

Other topics being offered include a panel discussion on *KSR v. Teleflex* by James Dabney, counsel of record for KSR, Int'l and Thomas Goldstien, counsel of record for Teleflex. For those more interested in trademark law, there will be a panel discussion, "Trademark Dilution Law – 2006 and Beyond" by Theodore Davis of Kilpatrick Stockton and Trademark Update speaker Leslie Lott. John Steele of Fish & Richardson will discuss "Conflicts of Interest when Obtaining Intellectual Property Interests."

Plenary sessions on Saturday include a discussion of proactive protection of intellectual property interests in China by Douglas Clark of the Lovells firm of Shanghai. The Saturday offerings will conclude with a presentation on E-discovery in Federal Court presented by the Honorable Gerald Rosen US District Court, Eastern District of Michigan.

Other offerings of interest include the 5th Annual Corporate Counsel Luncheon. This year, Mary Gail Gears of Bingham McCutcheon will discuss the novel attorney internship program offered by her firm in conjunction with Citigroup. Ms. Gears will also be the featured speaker at the Women in IP Networking Breakfast.

The annual business meeting of the IPLS will be held on Saturday, July 14, 2007, at 8 a.m. at the Grand Hotel, immediately prior to the beginning of the Saturday speaker offerings. Receptions for attendees and guests will be held on Thursday and Friday evenings at the Grand. This year's firm sponsors include Dickinson Wright PLLC, Clifford Chance, Carlson Gaskey & Olds PC, and Reising Ethington Barnes Kisselle PC. ?



MICHAEL FRANCK BUILDING
306 TOWNSEND STREET
LANSING, MI 48933-2012

www.michbar.org

PRESORTED
FIRST CLASS MAIL
U.S. POSTAGE PAID
Lansing, MI
PERMIT NO. 191