

IPLS P STATE BAR OF MICHIGAN PROCEEDINGS

View From the Chair State Bar of Michigan Intellectual Property Law Section: 2007-2008 year in review

By Laura Slenzak

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The term “busy body” has a negative connotation. It typically means someone who spends too much time scrutinizing and gossiping about the activities of others. So I’d like to use this opportunity to give it a better meaning – the IP Law Section has been a “busy” “body” this year. The talented volunteers of this body give their time and enthusiasm week after week, month after month, to help bring the kinds of programs and seminars that keep you coming back for more.

We started our 2007-2008 membership year like we do each year, with the elections on the morning of day three of the Summer Institute. Since it’s our biggest event, what better place to hold our annual meeting and to elect our new slate of officers and council members? We said our goodbyes to ex officio Craig Baldwin, and to council members Greg Bondarenko, John Naber, and Austin Zhang. Craig had served on the council since 2000, while Greg and John completed their three-year council seats and Austin had to unfortunately depart early from his three-year seat due to a job relocation. Taking their places, Kevin McKenzie was tapped to serve the remaining two years of Austin’s council seat, while Anna M. Budde, Julie Voutyras, and Donald J. Wallace joined the council for three-year terms. And, despite being a no-show for my own inauguration because of a rather untimely run-in with poison sumac, I was elected as chairperson for the 2007-2008 year. Luckily, outgoing chairperson Beverly Bunting, incoming chair-elect Denise Glassmeyer, and incoming secretary/treasurer Frank Angileri were there to keep things on track.

The 33rd Annual Summer IP Law Institute (which was held July 12-14, 2007, on beautiful Mackinac Island) featured a stellar slate of topics. The two advanced sessions were moved to Thursday afternoon, as opposed to during the main program on Friday, due to both their popularity and the requests of our members. Tom Irving lead a session on “Drafting and Prosecuting Patents for Subsequent Litigation and Licensing,” while Mike Lisi tackled “Taxation of Intellectual Property Interests.” Kate Spelman, Tom Irving, and Leslie Lott lead the ever-popular Friday morning “updates on...” sessions, with their specialties being copyrights, patents, and trademarks, respectively. Later on Friday, John Steele tackled an ethics session geared

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View from the Chair

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specifically toward the issues faced in IP practice. Continuing another trend borne again of our members' requests, Saturday's morning activities were broken into two tracks. On one track, participants were witness to a lively panel discussion by Ernie Brooks, Jim Dabney, Catherine Nyarady, and John VanOphem regarding the *KSR v Teleflex* case, while the other track featured Ted Davis and Leslie Lott giving their insights regarding the recently enacted Trademark Dilution law and the new TTAB standards. Later that morning, Douglas Clark shared his experiences with protecting and enforcing IP rights in China, while Judge Rosen counseled the crowd regarding the recently-enacted e-discovery rules and how the courts were putting them into action. No Institute would be complete without our Thursday and Friday evening receptions on the porch. Thank you to our sponsors, Dickinson Wright and Carlson, Gaskey & Olds, for the wonderful food and drinks. Clifford Chance graciously sponsored our morning continental breakfasts. And just in case you were wondering if there were opportunities for a bit more intimate networking, our women's networking breakfast and corporate counsel lunch were just the right touch. Of particular note, Mary Gail Gearns informed the corporate crowd about the impetus behind and success of a ground-breaking partnership between Citigroup and Bingham McCutchen for corporate law department internships. It all sounds so easy – putting on a program like this – doesn't it? That's because the events like this Institute continue to be made easy for the council by our excellent partnership with the Institute for Continuing Legal Education.

Without giving ourselves much time to breath, we jumped right into back-to-back PCT practice road shows. David Wisz hosted the Troy site on October 22nd, while Mark Davis hosted the Grand Rapids site on October 23. Again, in response



Don't forget to register for the 34th Annual Intellectual Property Law Summer Seminar July 17-19, 2008, at the Grand Hotel on Mackinac Island.

Attend this Institute to get the latest developments in patent, trademark and copyright, and international brands law from some of the top experts in the field. Hear what's new at the U.S. Copyright Office from the U.S. Register of Copyrights. Gain practical insights on the use of design patents to protect IP interests, the ins and outs of European patent practice, how to handle an ITC proceeding, and handling IP issues in bankruptcy. Plus, you'll hear cutting-edge topics, including the latest on patent reform legislation and the IP issues connected with online gaming and "second life."

You may also choose to attend one of two pre-conference advanced sessions: "How the Latest Changes in Patent Law Affect Strategy for Patent Prosecutors and Litigators" or "Digital Media: Copyright Issues Raised by Google - What Is "Legal" for Internet Media?"

to member demand, these seminars were geared more towards interns, new lawyers, paralegals, and office administrators. Besides being full of substantive tips and tricks, these types of events give the non-attorneys in your office a much-needed opportunity to network with others. And, frankly, it is just one way to let them know that you appreciate their time, effort, and expertise.

It bears noting that the cost of every event is underwritten by your section dues. Through judicious negotiations and the pooling of resources, we are able to permit our section members and their office staff to attend all of these many events for a fraction of their true cost. You will never see mention of credit card junkets by IP Law Section council members. One hundred percent of your dues money goes to support the work of the section!

The fall seminars were unfortunately the last event where council member Mark Davis was able to serve. He was nearly to the end of his three-year council seat when it became necessary for him to bow to the needs of the others who were competing for his time and talent. Luckily, Scott Keller was available to step in to fill the remainder of Mark's unexpired term.

This winter, council member Jake Grove led the effort to bring "Kayton" to Detroit. The Patent Resource Group, the organization behind the eponymous Kayton patent courses, conducted an advanced seminar on "Latent Dangers of Common Patent Prosecution Practices" on February 20. State Bar members received a \$200 discount off the normal course registration fee. By all accounts, this first was a successful endeavor, so much so that the PRG folks plan to add Detroit to their regular slate of localities.

Less than one month later, the council hosted the annual Spring Seminar at the Kellogg Center in East Lansing. Not wanting to sound like a broken record, but the council has taken the cue from you, our mem-

bers, and we continued our practice of offering two tracks of seminars so that the participants could hone in on the topics of particular interest to them. Packed into seven hours, the topics included New KSR Compliance Standards at the USPTO and Update on Patent Rules (Bruce M. Kisiulik of the USPTO), Update on TTAB Rules and Discovery under the New Trademark Rules (Cindy B. Greenbaum of the TTAB), How to Avoid the 10 Most Common Patent Application Mistakes (Lynne H. Browne of the BPAI), The 10 Most Common Mistakes in TTAB Practice (Cindy B. Greenbaum of the TTAB), Opinions of Counsel After the Seagate Decision (Michael P. Brennan of Harness Dickey & Pierce), Handling Patent and Trademark Counterfeiting in the Pacific Rim (Thomas T. Moga of Butzel Long), IP Litigation in State Court (Andrew M. Grove of Reising Ethington Barnes Kisselle, Todd R. Mendel of Barris Sott Denn & Driker, Steven Susser of Young & Susser, and Judge (retired) Jessica R. Cooper), What Every Patent Lawyer Needs to Know to Avoid Malpractice in the Trademark Area (Kevin D. Gasiewski of Brooks Kushman), Process of IP Legislation and Policy Developments in the U.S. (Stephen G. Kunin of Obalon Spivak McClelland Maier & Neustadt, and former of the USPTO), Trade Secrets in the Digital Age (R. Mark Halligan of Lovells), Enforcement of Design Patents on Auto Parts in the ITC (Damian Porcari of Ford), and E-Discovery: How to Ask for the Right Stuff (Carol A. Romej of Butzel Long). Plus, in the midst of all that, council members Julia Voutyras and Denise Glassmeyer hosted a roundtable discussion with the law students. Wow, that's a lot to list without taking a breath...

And, speaking of taking a breather, I will close with my warmest and deepest thanks to everyone who has served on the council this past year. Being chairperson only looked easy because I was blessed with such a wonderful

group of dedicated volunteers who worked tirelessly to offer these fabulous events and programs. Thank you, Chair-Elect Denise M. Glassmeyer, Secretary-Treasurer Frank A. Angileri, and council members R. Scott Keller, Andrew M. Grove, Jennifer S. Warren, Jennifer Sheehan Anderson, Kevin S. MacKenzie, David L. Wisz, Anna M. Budde, Julie Voutyras, Donald J. Wallace and ex officio Beverly M. Bunting. Thank you also to Lynn Chard, Stephanie Law, Lora Freeman, Ryan Bailey, and the entire staff at ICLE. They are the "heavy lifting" that flawlessly pulls all of the seminar and event details together for us. ?

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Submissions to IPLS Section

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, please consider a submission.

Submission deadlines:

- August 10, 2008 for the September 2008 issue
- December 10, 2008 for the January issue
- April 10, 2009 for the May 2009 issue

Submissions should be sent to:

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Patent Prosecution Highway Joins Canada and the United States

This pilot program is intended to expedite patent examination in both countries.

By Graham J. K. McKinnon

The Canadian Intellectual Property Office (CIPO) and the United States Patent and Trademark Office (USPTO) have announced the Canada-U.S. Patent Prosecution Highway (PPH). Under the PPH, it is possible to have an application advanced out of turn for examination when there is at least one claim that has been indicated as allowable by one of the two patent offices. This pilot program is scheduled to run from January 28, 2008 to January 28, 2009, and may be extended for an additional year for further evaluation.

In general, if one of the patent offices indicates that at least one claim in an initial application is allowable, the other patent office may grant advanced examination of a corresponding application filed in the other patent office, if certain documents are filed. There are some exceptions to this generalization, and eligibility for the PPH is subject to priority claiming requirements, which differ somewhat in each country. CIPO is not charging any additional fee for advanced examination during the pilot program, although a petition fee is required by the USPTO. Advanced examination generally means advancing the application to the front of the examiner's queue for immediate examination, allowing the applicant to bypass examination backlogs. In Canada, examination backlogs are usually at least one year and often exceed three years, depending on the field of technology.

To qualify for advanced examination, all of the claims must correspond (i.e., be the same or similar in scope) or be amended to correspond to the claims that have been indicat-

ed to be allowable in the initial application. This may have significant implications for both Canadian and U.S. applications that participate in this program.

To decide whether it is desirable for a Canadian application claiming priority from a U.S. application to enter the PPH, the U.S. prosecu-

tion should be carefully considered. In some situations, acceptable prosecution strategies in the United States may be detrimental in Canada. Differences between our countries' respective double-patenting doctrines give rise to one such example. However, strategies are available to mitigate some of these potential problems. For example, in some cases where multiple continuing applications are pending in the U.S., it may be desirable to defer the request for examination in Canada until all of the desired continuing applications have been allowed in the U.S. More generally, the suitability of this program for Canadian applications should be evaluated on a case-by-case basis, having regard to the technology and subject matter of the application and the state of prosecution in the United States.

Conversely, Canada's unity of invention standard, which is more permissive than U.S. restriction practice, could potentially streamline U.S. prosecution by reducing the number of divisional or continuation applications, if the USPTO gives deference to CIPO's decision to permit multiple claim sets to coexist in the same application. Once again, however, the Canadian prosecution should be carefully considered before deciding to request advanced examination of the U.S. application. One of the requirements for entry into the program in the U.S. is to provide copies of all office actions issued during the Canadian prosecution. These documents will officially become part of the USPTO file wrapper, resulting in a distinct possibility that the Canadian prosecution history may give rise to prosecution history estoppel in the U.S. Careful consideration of the prosecution history of the initial application is required before deciding whether the corresponding application in the other patent office should participate in the PPH program. In general, if early issuance of an application is commercially important, then this program may provide a good opportunity to bypass lengthy examination backlogs. [?]

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Section Calendar

July 17-19, 2008

33rd Annual Intellectual Property Law Summer Institute
Grand Hotel, Mackinac Island
Registration and event details at
www.icle.org

July 19, 2008

Annual Meeting,
including election of council
members and officers, 8 a.m.
Grand Hotel, Mackinac Island

You Can Work a Room Like a Pro

By Patty McCarthy and Paula Blanchard Stone

How do some people walk into a roomful of strangers, meet people, and come away with valuable business contacts?

They are experts at working a room. They know how to take maximum advantage of business and social situations to present themselves and their company or organization. These contacts and the resulting relationships help them grow their business, increase their impact as an advocate, or close a deal.

If you are less than comfortable entering a roomful of strangers, here are tips to put you at ease:

- **Write down your “elevator speech”** beforehand and have it ready. This is your 10-second answer to the question, “What do you do?”

It captures the essence of your work and highlights the benefits.

- **Go up to people who are standing alone** or who are looking around for someone to talk to. Give them a firm handshake, smile, and look them in the eye as you say your name.

The easiest way to start a conversation with a stranger is to ask him/her a question about the event you are attending, such as “Have you heard our speaker before?”

Think of a few questions on your way to the event.

- **Excuse yourself with a handshake** when the conversation lags or the other person acts restless.

Each time you attend a function, make a promise to yourself to meet five new people.

Walking into a room is less daunting if you don't feel pressure to meet everyone.

The contacts you make and the relationships you develop with those contacts will give you golden business opportunities. ?



Patty McCarthy and Paula Blanchard Stone are partners in McCarthy ■ Blanchard LLC, an executive training firm specializing in presentation skills and executive presence. McCarthy ■ Blanchard helps executives look and act like leaders.

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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:

Case Law databases:

Decisions of the European Court of Justice

<http://curia.europa.eu/jurispl/cgi-bin/form.pl?lang=en>

Decisions of the WIPO panel in domain name cases

<http://www.wipo.int/amcl/en/domains/index.html>

Decisions of the Boards of Appeal of the European Patent Office

<http://www.epo.org/patents/appeals.html>

Decisions of the Boards of Appeal of the Community Trademark Office

http://oami.europa.eu/search/legaldocs/la/EN_boa_index.cfm

Decisions of the Opposition Divisions of the Community Trademark Office

http://oami.europa.eu/search/legaldocs/la/EN_boa_index.cfm

China's Internet Law Still in State of Flux

By Ronald Chu

The legal framework governing the Internet in China is still in a state of flux. The PRC has no unified or a comprehensive code governing the Internet. Instead, measures, rules, and regulations have been promulgated on an ad hoc basis to meet changing needs. In this article, we will analyse the potential liability of foreign websites and look at the controversial position of search engines in China.

Potential Liability of Foreign Websites under Chinese Laws

According to the relevant rules and regulations, an ISP (arguably either domestic or foreign) is prohibited from producing, copying, publicizing, or disseminating information that includes contents which:

- are against the basic principles prescribed in the Constitution;
- jeopardize national security, disclose state secrets, subvert the State regime, or damage state integrity;
- harm national honour and interests;
- instigate hatred or discrimination between different nationalities, or damage national solidarity;
- violate the state religion policies or propagate cult and feudal superstition;
- spread rumours, disrupt public order, or damage social stability;
- spread pornography, obscenity, gambling, violence, homicide, terror, or abet crimes;
- insult, libel against others, and infringe other people's legal rights and interests; or
- contain other material prohibited by laws, rules, and administrative regulations.

The PRC Regulations on Telecommunications (2000), the Measures for the Administration of Internet Information Service (2000), and Measures for the Recordal Administration of Non-Commercial Internet Information Service (2005) apply to anyone who engages in telecommunication activities or activities relating to telecommunications in the territory of China. However, the regulations and measures do not elaborate on what would be regarded as “carrying on Internet information services in the territory of China.” Technically, any website on the Internet (no matter where its host server is located) is accessible online from anywhere in the world. What factors would the PRC authorities take into account in deciding whether a “foreign” website will be subject to the rules and regulations? The location of a website's hosting server? The location of the operator or owner of a website? Or whether the operator/owner has a local presence in China?

The Chinese government imposes an *approval* system for commercial ISPs and a *recordal* system for non-commercial ISPs. An ISP wishing to conduct business in the areas of:

- news reporting
- publications
- education
- medical and health care
- pharmaceutical and medical devices
- culture or film and television broadcasts

must obtain the prior consent of the relevant competent authority in those areas before applying for approval or recordal.

However, are these requirements applicable to foreign websites? Arguably not, if the rules and regulations are interpreted literally. The Ministry of Information Industry has confirmed that if the owner/operator of a website is not in China and the host servers are located outside China, then the ISP will not be subject to the registration/approval requirements.

This does not mean that a foreign website is not subject to other PRC laws. Most international ISPs intending to exploit the Chinese market are not too concerned about liability arising from complaints by end users. They already seek to mitigate their risk by relying on the contractual relationship between itself and the customers in the end-user licensing agreement or terms of use of the website. In accordance with the PRC Contract Law, PRC Civil Litigation Law, and the PRC Electronic Signature Law, generally speaking, online contracts are recognized and enforceable in China.

One of the biggest concerns for ISPs, globally, is liability to third parties arising from content uploaded/generated by end users, which turns out to be infringing, pornographic, defamatory, etc. Recent legislation, in particular that relating to copyright protection on the Internet (e.g., the Measures for the Administrative Protection of Copyright on the Internet (2005), Regulations on Protection of Information Network Transmission Right (2006) and the Supreme Court Interpretation of Several Issues on the Laws Applicable to the Trial of Cases Involving Internet Copyright Disputes (2006)), would appear to be applicable to foreign websites as well. Some of the provisions set out in the legislation are similar to those of the U.S. Digital Millennium Copyright Act. However, it would be difficult to enforce any judgment against a foreign website with its hosting server located outside China (assuming the owner/operator of such website has no local presence in China) unless there is a bilateral

agreement on reciprocal recognition and enforcement of judgments between the courts of China and the jurisdiction of the foreign website.

Although we are not aware of any cases so far of foreign companies being caught by these rules and regulations, it is still advisable for a foreign website (whether its host server is located inside China or not) to provide an “illegal/infringing content report mechanism” and “take down procedures,” including reasonable measures to remove or disable access to illegal/infringing material upon receiving notice from a copyright owner of such infringing activities and keeping records of such infringing activities. Otherwise, an ISP risks being regarded as a joint tortfeasor with the uploader of the infringing content in any administrative or judicial proceedings.

Search Engines

As with the rest of the world, this is an area of law that is still evolving. Changes in policy may later affect the implementation of the existing rules and regulations, which are often left vague to allow officials flexibility in their interpretation. In particular, search engines operating in China are coming under increased scrutiny, and the courts are showing signs that they are willing to crack down on the activities of search engines.

The much-publicized Yahoo! China and Baidu cases are an indication of the turbulence in this area of law. In January 2007, the Beijing No.2 Intermediate People’s Court accepted complaints filed by 11 international music companies, including WEA International Inc., Universal Music Ltd., EMI (Taiwan) Ltd., Mercury Records Ltd., Sony BMG Music Entertainment, and Go East Entertainment Co. Ltd., against Yahoo! China (owned by Alibaba.com Ltd) for being involved in illegal downloading of their copyright works by providing links to unlicensed download sites in its music search results.

In April 2007, the Court found Yahoo! China liable as a joint tortfeasor and held it to be guilty of infringing the producers’ rights in the sound recordings, their network transmission rights, and rights to receive payments. Yahoo! appealed. In a landmark decision in December 2007, Yahoo!’s appeal was dismissed by the Beijing High Court. Yahoo! was ordered to remove all hyperlinks relating to infringing copyright works; it was not sufficient to only remove links provided to it by the copyright owners. Yahoo! was also ordered to compensate the plaintiffs U.S. \$27,000 in damages (although

this is significantly less than the U.S. \$710,000 sought).

However, on the same day, the Court dismissed an appeal against a decision finding that Baidu.com (China’s biggest search engine company) was not guilty of copyright infringement. Both Baidu.com and Yahoo! China offered MP3 services that allowed users to search for websites offering unlicensed music download. The Beijing No.1 Intermediate People’s Court in Baidu’s first instance case had rejected the plaintiff’s claims, holding that, as a search engine’s web crawler could not anticipate nor control the legality of the search results, the MP3 search service that provided hyperlinks to the plaintiff’s copyright works should not give rise to liability on the part of Baidu. Further, the Court was of the view that the plaintiff had failed to fulfil its duty to notify Baidu of the infringing hyperlinks.

The Yahoo! China case has been listed in The Top Ten IP cases of 2007, published recently by the Beijing Intermediate Court in China, and sets a precedent for cases against similar operations in China. The Baidu case was originally decided under laws that have been superseded and, in an interview with a chief judge of Beijing Intellectual Property High People’s Court (published recently by SIPO), it appears that the judgment that allowed Baidu to escape liability is unlikely to happen again.

In fact, this could be tested very soon, as new proceedings for copyright infringement were filed in February in the Beijing No.1 Intermediate People’s Court against Baidu by Universal Music Ltd, Sony BMG Music Entertainment (Hong Kong) Ltd, and Warner Music Hong Kong Ltd. The music companies have also joined with Gold Label Entertainment Limited in a separate suit against Chinese media company Sohu.com Inc and its search engine, Sogou. Coincidentally, Sohu is an official sponsor of the 2008 Beijing Olympics.?



Ronald Chu is an associate in the China Intellectual Property Group of Deacons Hong Kong. Ronald concentrates in the protection and enforcement of intellectual property in the PRC and corporate due diligence. Before joining the legal profession, he worked as an IT specialist in various sectors, including banking and in the Information

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