# LAIPLA BULLETIN

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## President's Message

by Alexander R. Schlee

Welcome to the February issue of the LAIPLA Bulletin. We are back in the middle of a very busy season. Our well-attended annual Washington in the West program had a very impressive speaker list of USPTO Officials, Judges, and even a WIPO Official visiting from overseas. This shows us that the West Coast IP Community does matter to the USPTO and to WIPO. Rightfully so, as particularly Southern California is one of the most active user groups for Intellectual Property Authorities worldwide.

In connection with this, I would like to point out our "Bring the USPTO to So. Cal." Committee, created just last year. Melinda Michalerya chairs this Committee, which includes Past President Keith Newburry and Michelle Kim as Board Liaison. Michelle has done significant hands-on work to get this Committee off the ground, including being in touch with the USPTO. The USPTO's Nationwide Workforce Program represents an effort to battle the PTO backlog by hiring and retaining patent examiners from geographically and economically diverse areas of the country. To this end, the USPTO has recently announced the anticipated opening of its very first satellite office in Detroit, Michigan. It is expected that the PTO will consider opening additional satellite offices in other cities following an evaluation of this first satellite office.

Among the factors considered by the PTO in selecting Detroit are a high percentage of scientists and engineers in the workforce; access to major research institutions, particularly leading universities; and, a high volume of patenting activity and significant numbers of patent agents and attorneys in the area. These factors are certainly present in Southern California and lobbying for a regional office here will be an undertaking that will require collaboration across various universities, research institutions and interest groups.

LAIPLA can take a lead on that collaboration. A first step in the effort is to develop a list of groups with whom we can work and to whom we can reach, such as the California Commission for Jobs and Economic Growth. Southern California might not exactly be a low-cost area, but it is the home of one of the most active

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## Event Notice: February 25, 2011 Roundtable Lunch

**Judicial Treatment of Non-Practicing Entities and Its Impact on the Secondary Market for Patents**
**February 25, 2011**
**Jones Day, 555 S. Flower Street, #5000, Los Angeles, CA 90071**

LAIPLA is pleased to announce its upcoming Round Table Lunch being held on Friday, February 25, 2011 at the offices of Jones Day, Downtown Los Angeles. Brent D. Sokol of Jones Day will moderate a discussion with featured speaker Robert P. Merges, Professor of Techonology at the U.C. Berkeley School of Law and co-director of the Berkeley Center of Law and Technology. Mr. Sokol and Professor Merges will discuss "Judicial Treatment of Non-Practicing Entities and Its Impact on the Secondary Market for Patents".

Details and registration information are attached to this Bulletin. Register today and don't miss out on this great event. We look forward to seeing you on the 25th!

## President's Message

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IP Communities, so this may tilt the scale in SoCal's favor. Any members who are willing to be involved are more than welcome, be it as a Committee member or simply by providing the Committee with contacts and useful information. Please contact Melinda Michalerya at Melinda_Michalerya@edwards.com.

Coming back to the Washington in the West program: In addition to the many other organizers involved, I would like to highlight Josue Villalta, David Weiss, Kregg Koch and Soyoung Jung from our firm member Knobbe Martens for organizing this marvelous program. Lauren Schneider worked as the Board Liaison for this program. It is far from an easy program to organize, as the timeline is typically very short. It takes significant effort to organize a meeting involving several high ranking speakers, most of whom are coming from several time zones away, including from overseas.

Onward to the next event. On February 25, we will have our annual Litigation Roundtable. This is a lunch program at the offices of Jones Day in downtown Los Angeles and will feature Professor Robert Merges of the U.C. Berkeley School of Law. Our member Brent Sokol chairs this program and is supported by Committee member Sanjesh Sharma. Please see details about this unique program in our attached meeting flyer and registration form. We like to organize a few lunch meetings each year, and we hope this will find the attention of all members for whom a dinner meeting is more difficult to attend.

Just a couple of additional quick reminders:

On March 21, we will have our annual Judges' Night, featuring an excellent Judges Panel, including CAFC Judge Gajarsa, also our keynote speaker.

From June 3 to 6 our annual Spring Seminar will take place in the famous "Del" on Coronado Island in San Diego. We have teamed up with the San Diego Intellectual Property Law Association (SDIPLA). LAIPLA's and SDIPLA's planning Committees are already working full steam ahead on this program. We believe that LAIPLA and SDIPLA are a very good match for this project and hope that this alliance makes it even more attractive for both groups to attend.

## Event Summary: Washington in the West

By: Josue Villalta & David Weiss
Knobbe Martens Olson & Bear LLP

The 2011 Washington in the West conference was held at the Luxe Hotel on Thursday, January 27th and featured a great line-up of speakers from the United States Patent and Trademark Office, private practice and academia. Approximately 70 attendees benefitted from the many useful insights provided in the conference sessions. We would like to thank the conference sponsors, Knobbe Martens Olson & Bear, Sheppard Mullin, Lucas Group, Lexis Nexis and Netscribes for their generous support.

James Dwyer (USPTO Assistant Deputy Commissioner) and Robert Sachs (Fenwick & West) kicked off the conference with a discussion on the examination of software patent applications, including how In re Bilski has been implemented by examiners and issues raised by the recent RCT v. Microsoft case. They were followed by Bill Bunker (Knobbe Martens) and Patrick Jewik (Kilpatrick Townsend Stockton), who discussed the Accelerated Examination (AE) program, providing useful practice tips and discussing how AE can be used strategically in conjunction with litigation and reexamination to obtain additional patents more quickly than using the normal examination route.

In the next session, Matt Bryan (WIPO) discussed work sharing and examination initiatives endorsed by WIPO. Carl Oppedahl discussed the patent prosecution highway (PPH) program and how it can be used to speed up the examination of US national phase applications if the PCT written opinion was favorable and the US claims sufficiently correspond to the PCT claims.

Lunch was held outdoors at the Luxe under sunny skies. Unfortunately, weather on the east coast prevented USPTO Director David Kappos from traveling to LA at the last minute. However, Director Kappos was able to participate via teleconference and provided a valuable update on USPTO policies and programs, including discussion of the Ombudsman program available to practitioners and a new "fast track" examination program that promises a decision on allowability in 12 months, but differs from the AE program in that it does not require a special search or support document.

After lunch, Chief Administrative Trademark Judge Gerard Rogers and Administrative Trademark Judge Lorelei Ritchie discussed the accelerated case resolution program and tips for its use. Finally, a panel consisting of USPTO Deputy General Counsel Raymond Chen, and Rachel Krevans and Mehran Arjomand of Morrison & Foerster, discussed the inequitable conduct standard, and the possible effects of a change in the standard in light of the recent en banc review of Therasense v Becton. All in all, a fantastic day!

# Article: Supreme Court Patent Cases: Past and Pending

By: Clifton E. McCann
Venable LLP

The view and opinions expressed in this article are those solely of the author(s) and are not of the Los Angeles Intellectual Property Law Association or its members.

Law360, New York (January 5, 2011) — On Nov. 29, 2010, the U.S. Supreme Court granted certiorari in Microsoft v. i4i LP, in which Microsoft asks the court to lower the standard for proving that a patent is invalid. The case is important because, if the court accepts Microsoft's position, a patent challenger can more easily prove invalidity where the U.S. Patent and Trademark Office issued a patent without considering the most relevant prior art. Alleged infringers often find more relevant prior art than that which was considered by the USPTO, and a lowered standard would diminish the strength of many if not most patents that are litigated. Equally important is the Supreme Court's willingness, as demonstrated by its review of Microsoft and other patent cases over the last five years, to reexamine the most basic and, until now, most hallowed, principles on which patent rights are determined.

Historically the U.S. Supreme Court has shown little interest in disputes over patent rights. This lack of interest became more pronounced after 1982, the year Congress established the U.S. Court of Appeals for the Federal Circuit and gave it exclusive appellate jurisdiction over patent disputes. For most of the 23 years following the Federal Circuit's creation, from 1982 to 2005, the Supreme Court seemed content to let the new patent appeals court have the final say. The Supreme Court issued only seven opinions construing substantive patent law issues during that period. Patent rights were generally strengthened by decisions of the Federal Circuit, and patent lawsuits in recent years have resulted in some of the country's largest damages awards and settlements.

The case of NTP v. Research in Motion got the Supreme Court's attention in 2005. Patent owner NTP Inc. sued Blackberry manufacturer Research in Motion Ltd. (RIM) for infringement of its wireless e-mail patents. NTP prevailed and was awarded $53 million in damages. Citing a "general rule" that courts should grant injunctions to prevailing patentees "absent exceptional circumstances," the Federal Circuit held that NTP was entitled to an injunction against further infringement by RIM. If implemented, the injunction would have brought Blackberry service to an immediate halt. RIM's efforts to stay the injunction failed in 2005 and early 2006.

Meanwhile, Blackberry users desperately sought alternatives and the U.S. Department of Defense warned that a shutdown would compromise national security. Service disruption was avoided when RIM agreed to pay $612 million to settle in March 2006, over 10 times the amount of the district court's damages and attorneys' fee award.

The important commercial and national defense implications of NTP v. Research in Motion appear to have spurred the Supreme Court to take a more active role in shaping U.S. patent law. In June 2005, the court granted certiorari in the case of Illinois Tool Works v. Independent Ink and in November 2005 it granted certiorari in the case of eBay Inc. v. MercExchange. The court was not asked to consider the test for injunctive relief in NTP v. Research in Motion, but when the Federal Circuit's test for injunctive relief was questioned in eBay v. MercExchange, the court took no time addressing the issue. It heard arguments within four months of granting cert and issued a decision rejecting the Federal Circuit's test on May 15, 2006.

The court's decisions in Illinois Tool Works and eBay marked the beginning of an exceptional five-year period in which the Supreme Court has issued an unprecedented seven opinions on patent law. Three more opinions are likely to issue next year. The court's recent decisions have significantly changed the rights accorded patentees, including the right to demand injunctive relief, and they have markedly altered the test for patentability. The opinions of the court are summarized below.

**Illinois Tool Works v. Independent Ink (2006)**

*Pro patentee holding:* Courts should not presume that a patent confers market power when assessing claims of anti-competitive behavior under Section 1 of the Sherman Act.

ITW owned a patent for bar code technology, and it required that licensees of its technology purchase its unpatented ink. To show an actionable restraint of trade under Section 1, an accuser must show that the party accused of restraining trade possesses sufficient market power to accomplish the restraint.

ITW's accuser, relying on prior court decisions, had argued that ITW's power in the relevant market should be presumed from the existence of its patent. The Supreme Court disagreed. In a win for patentees, it held that such a presumption was unwarranted. The decision makes it more difficult for alleged infringers to show illegal restraints of trade based on a tying of patented and unpatented sales.

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**EBay v. MercExchange (2006)**

*Pro patent challenger holding:* A plaintiff that proves patent infringement is not automatically entitled to a permanent injunction against future infringement.

Vacating the decision below by the Federal Circuit, the Supreme Court rejected the "general rule" that the Federal Circuit had relied upon and remanded the case in order for the district court to apply the traditional four-part test governing awards of injunctive relief.[1]

This decision issued within three months of the settlement in NTP v. Research in Motion, and overturned long-standing Federal Circuit precedent that had practically guaranteed a successful patentee permanent injunctive relief. The opinion effectively denies nonpracticing entities such as NTP and MercExchange the ability to use their patents to successfully demand enormous settlement or royalty payments by claiming an automatic right to shut down sales of infringing products and services.

**KSR v. Teleflex (2007)**

*Pro patent challenger holding:* A patent can be found invalid as obvious even when the prior art does not show an explicit teaching, suggestion or motivation to combine elements to make the invention.

The Federal Circuit had required that, to show obviousness, an alleged infringer needed to show some teaching, suggestion or motivation to combine elements to make the invention. The Supreme Court acknowledged that this so-called "TSM" test could provide useful guidance when assessing obviousness, but rejected the idea that such a showing was required. In addition, the Supreme Court critiqued Federal Circuit law on obviousness and, on balance, called for more rigorous testing of obviousness in the USPTO and in the courts.

In the wake of the KSR opinion, the allowance rate for U.S. patent applications dropped and the number of district court decisions invalidating patents rose. But more recent decisions of the Federal Circuit have moderated KSR's impact, especially for inventions in the less predictable fields of invention, such as chemistry, biology and pharmaceuticals.

**MedImmune v. Genentech (2007)**

*Pro patent challenger holding:* A licensee is not required to terminate or breach its license agreement before seeking a declaratory judgment of patent invalidity, unenforceability or noninfringement.

In the past a licensee was required to breach the agreement before seeking declaratory relief. If the licensee's request for declaratory relief was denied, the patentee was then entitled to claim damages and possibly attorneys' fees for the period of the licensee's breach.

As a result of MedImmune, alleged infringers can challenge the validity of patents while maintaining their rights under patent licenses. The decision limits their damages exposure and makes it more likely that some licensees will challenge patentees who license their patent rights.

**Microsoft v. AT&T (2007)**

*Pro patent challenger holding:* Notwithstanding that Section 271(f) of the U.S. Patent Act allows a U.S. patent owner to block the export of components that can be assembled abroad to produce an infringing device, a manufacturer does not violate a U.S. patent by exporting a master software disk that is used abroad to install software on computers at the point of assembly.

AT&T had accused Microsoft of infringing its software patent by exporting a master disk and using it to install software on computers that were being manufactured in Europe. According to the Supreme Court, because Microsoft only exported a master disk and not the software copies that were actually added to the infringing computers, Microsoft did not export "components" of those computers, as would have been necessary to constitute infringement under Section §271(f).

The opinion allows U.S. companies an effective way to avoid infringement of a U.S. software patent when installing copies of the patented software in devices that are manufactured abroad. The opinion may also, by extension, allow companies to avoid infringement in other technologies. For example, the reasoning in this opinion may apply to a situation in which a

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DNA fragment, which is a component of a patented invention, is created in the U.S., exported to and replicated in a foreign country, and then combined abroad with other components to form the invention.

**Quanta v. LG Electronics (2008)**

*Pro patent challenger holding:* The doctrine of patent exhaustion applies to method patents, and the owner's right to exclude using a method patent is "exhausted" upon making the first sale of equipment that practices the method.

In this case, patent owner LG granted its licensee the right to use its patented method for managing computer memory, and therefore authorized the licensee's sale of computer parts that practiced the patented method. Under the exhaustion doctrine, the Supreme Court decided that LG had no right to complain when the purchaser, Quanta, used the licensed parts to make and sell a computer system that practiced LG's method.

**In re Bilski (2010)**

*Pro patentee holding:* Business methods can constitute patentable subject matter.

While there is no bright-line test for patentability, a patentable business method must be more than a mere abstract idea, and examples of business methods that generally qualify as patentable subject matter include: A business method combined with a machine for performing that method, or a method that transforms an article to a different state or thing.

Some had expected that the Supreme Court would prevent or severely restrict the availability of business method patents on the grounds that they generally obstruct rather promote technological advances. Instead, by a 5-4 vote, the court ensured the viability of properly crafted business method patents for the foreseeable future.

Additional Supreme Court decisions on patent law can be expected in the next year. The decisions may change the standard for proving inducement to infringe, the ownership of patent rights that result from government-sponsored research, and the presumption of validity where the USPTO issued a patent without considering the most relevant prior art:

**Global-Tech Appliances v. SEB (Certiorari Granted Oct. 12, 2010)**

*Question raised:* Is the level of intent required to support a claim of inducing patent infringement one of "deliberate indifference of a known risk" of infringement, or is it instead one of "purposeful, culpable expression and conduct" to encourage infringement?

Many believe the Federal Circuit went too far when it relaxed the level of proof needed to establish liability for inducement to infringe, and held that the requisite intent can be shown merely by proving deliberate indifference to potential patent rights. Global-Tech wants the Supreme Court to require evidence of a purposeful, culpable expression and conduct by the defendant encouraging infringement.

If the court adopts Global-Tech's view, some patent owners may find it more difficult to extract value for their patents. For example, if a company recklessly but not purposefully encourages its customers to practice a patented process, that company could escape liability for inducement to infringe, while it could be impractical and/or unwise for the patent owner to sue the customers.

**Stanford v. Roche (Certiorari Granted Nov. 1, 2010)**

*Question raised:* Who has original rights to an invention developed in whole or in part using federal funding — the recipient of the government grant or an inventor employed by the recipient?

The U.S. Constitution gives inventors rights in their inventions, and on that basis the Federal Circuit ruled that Roche had received good title to an invention assigned to it by a Stanford University scientist who had developed the invention using government grants. Stanford argues, however, that the Bayh-Dole Act provides that Stanford, as the recipient of the grant, held the original rights to that invention, and that the assignment to Roche therefore had no effect.

If the Supreme Court decides for Roche, Stanford and other research institutions will need to check and revise their agreements to ensure that their researchers are contractually committed in advance to assign all invention rights to the institutions. In the case of existing contracts, like the one at issue, the researchers may be unavailable or unwilling to revise the agreements.

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**Microsoft v. i4i (Certiorari Granted Nov. 29, 2010)**

*Question raised:* How much deference must a court give to the USPTO's decision to grant a patent?

Under U.S. patent law an issued patent is presumed to be valid, and in this case the Federal Circuit held — in keeping with an unbroken line of precedent dating back to 1984 — that Microsoft was required to prove invalidity by "clear and convincing evidence," even though the prior art relied upon by Microsoft to challenge i4i's patent in court had never been considered by the USPTO.

Microsoft, supported by 11 amicus curiae briefs, seeks to overturn a $290 million damages judgment against it by convincing the Supreme Court to require only that an alleged infringer prove invalidity by a "preponderance of the evidence" where, as is often the case, the USPTO has not considered the most relevant prior art. The requested change in the law would significantly diminish the strength of many patents where more relevant prior art is discovered during litigation.

Several of the Supreme Court decisions issued over the last five years can be viewed as reducing the strength of patents, especially eBay v. MercExchange, and KSR v. Teleflex. Fortunately for patent owners, the impact of eBay is tempered by the fact that they can continue to demand an accounting for future royalties, and the impact of KSR has been reduced, especially in less predictable arts, by subsequent Federal Circuit decisions as discussed above.

Partly as a result, the overall statistics for patent prosecution and patent litigation have not markedly changed since 2006. The number of patent applications has continued to increase (from 296,000 in 2000 to 391,000 in 2005 to 456,000 in 2009). The number of issued patents has also increased (from 157,000 in 2000 to 144,000 in 2005 to 167,000 in 2009).[2]

The allowance rate for patent applications declined in the three years after KSR, from 70 to 80 percent in 2007, to 48 percent in 2009, but that rate has rebounded to 65 percent in 2010.[3] According to Price Waterhouse Coopers, the number of patent lawsuits was off 6 percent in 2009, but the median damages award was about $9 million in 2009, not much less than the all-time high of $10.5 million in 2001 when adjusted for inflation.[4]

**Recommendations**

What does it all mean? In the years since RIM and its Blackberry customers dodged the bullet in 2006, U.S. patent law has been in a state of flux. Changes to the law have affected the scope of patent rights and the chances of success in patent litigation, and strategies that made sense in the past may no longer make sense in the future. A decision in Microsoft v. i4i could have important ramifications for most patent cases.

In this unsettled environment, technology-based companies need to be especially mindful of the changes in the law and how they have affected patentability and enforcement options — and thus the scope and value of patent rights. Companies that pay attention will be able to implement strategies to compensate for or overcome disadvantages that these changes to the law might bring. We recommend the following:

1. Make sure those involved in your company's patent policies and procedures are aware of the recent changes in the law. Patent counsel for companies with substantial technology concerns should be willing to present periodic patent tutorials designed for inventors and management.

2. For patent applicants, help ensure that you satisfy the tests for nonobviousness under a post-KSR analysis by making a more thorough presentation of objective evidence of nonobviousness during prosecution, or by presenting such evidence to the U.S. District Court for the District of Columbia for de novo review (35 USC §145). Also during prosecution, present prior art and arguments in a way that any resulting patent may withstand a challenge under the "preponderance of the evidence" test that is being considered by the Supreme Court in Microsoft v. i4i.

3. For manufacturers and service providers, exercise reasonable care when recommending that customers use products or services in a certain way. If there is a concern that recommendations or advertising may cause customers to infringe a competitors' patent, resolve the concern before going forward.

4. For companies that have entered into patent assignments or licenses, consider whether the recent opinions affect the ownership of or licensed rights in those patents, and ensure that corrections are made to ensure the integrity of the company's position.

5. Whether a patentee or an alleged infringer benefits from these changes in the law, it's important to know the score. Understand recent developments before deciding whether it's worth investing in patent protection, buying or selling patent rights, or enforcing or resisting enforcement of claims of patent infringement.

# Article: Omega v. Costco and Gray Market Goods

By: Kerry A. Brennan & Sean F. Kane
Pilsbury Winthrop Shaw Pittman LLP



Law360, New York (January 11, 2011) — The U.S. Supreme Court is evenly divided on the propriety of resale in the U.S. market of foreign-manufactured gray market goods under the Copyright Act. Costco Wholesale Corp. v. Omega SA, 562 U.S. __, 2010 BL 294179 (U.S. Dec. 13, 2010) (No. 08-1423)(per curiam), aff'g by an equally divided court Omega SA v. Costco Wholesale Corp., 541 F.3d 982 (9th Cir. 2008). The Supreme Court's Dec. 13, 2010, decision is not precedential and leaves intact the Ninth Circuit's ruling that Costco could be liable for its sale of copyrighted Omega watches manufactured abroad and that Costco was not entitled to assert a defense under the "first sale doctrine." Omega sued Costco alleging that the warehouse retailer violated the act by selling in the U.S. watches bearing Omega's copyrighted globe logo that were made abroad and intended for resale in Europe and not the U.S. Costco countered that the watches were genuine, identical to Omega watches sold in the U.S. and there was nothing restricting U.S. retailers from selling them. The district court's original determination that Costco had a defense under the first sale doctrine was reversed by the Ninth Circuit. The case will now go back to the district court for further proceedings on Omega's claims. At least for now, within the Ninth Circuit, the Copyright Act may provide a remedy to prevent the importation into, and distribution within, the U.S. of foreign-made gray market goods.

Gray market goods are generally understood to be genuine goods produced for sale in authorized markets that are imported for sale into unauthorized markets. For instance, a copyright owner may sell a product to distributors outside the U.S. at a lower price than to U.S. distributors to address certain market conditions. A copyright holder also may sell similar but different quality products exclusively in certain markets outside the U.S. and prohibit the distributors from selling the goods outside of designated foreign markets. Despite such arrangements, goods intended for one market often are imported into another market for sale in competition with more expensive or different quality goods.

It is undisputed that Costco did not import the watches at issue; rather Costco obtained the Omega watches from a supplier in New York after the watches had been imported. Omega commenced an action under § 106 and § 602 of the Copyright Act. Section 602(a) of the act provides that "[i]mportation into the United States, without the authority of the owner of the copyright under this title, of copies … of a work that have been acquired outside of the United States is an infringement of the exclusive right to distribute copies … under section 106." 17 U.S.C. § 602.

In its answer, Costco alleged that Omega's claim was barred under § 109 of the act, which provides that "the owner of a particular copy … lawfully made under this title … is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy." 17 U.S.C. § 109. Section 109 codifies the first sale doctrine, which provides that once a copyright owner consents to the sale of a copy of a work, it may not thereafter exercise the distribution right with respect to such copy. Although the district court initially granted a preliminary injunction against Costco, it later granted Costco's summary judgment motion, and Omega appealed.

The Ninth Circuit reversed and opined that § 109 of the act provides no defense under § 602 with respect to foreign-made copies of a U.S. copyrighted work. The Ninth Circuit relied on BMG Music Inc. v. Perez, 952 F.2d 318 (9th Cir. 1991), which had ruled that § 109 protection extends "only to copies legally made and sold in the United States." Additionally, the Ninth Circuit reasoned, among other things, that "the application of § 109(a) to foreign-made copies would impermissibly apply the Copyright Act extraterritorially in a way that the application of the statute after foreign sales does not." 541 F.3d at 988. The Supreme Court then granted Costco's request for certiorari.

The Supreme Court's prior decision in Quality King Distributors Inc. v. L'anza Research Int'l Inc., 523 U.S. 135 (1998) led many retailers to view the sale of certain gray market goods as legitimate. In that case, the Supreme Court addressed whether the importation into the U.S. of certain U.S.-made goods that were designated for sale in a foreign market violated the Copyright Act.

L'anza Research International, a California-based manufacturer, sold numerous U.S.-manufactured beauty products bearing its copyrighted labels to a distributor in Malta with the understanding that the products would be offered for sale only outside the U.S. L'anza charged substantially lower prices for its goods outside the U.S. market. After the shipment made its way back to the U.S., L'anza sued the salons that had purchased and resold the unauthorized products.

The Supreme Court determined that § 602 "does not categorically prohibit the unauthorized importation of copyrighted materials. Instead, it provides that such importation is an infringement of the exclusive right to distribute copies 'under Section 106.'" Id. at 144. The Supreme Court also found that "[a]fter the first sale of a copyrighted item 'lawfully made under this title,' any subsequent purchaser, whether from a domestic or from a foreign reseller, is obviously an 'owner' of

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that item. Read literally, § 109 unambiguously states that such an owner 'is entitled, without the authority of the copyright owner, to sell' that item." Id. at 145. The court noted that "[t]he whole point of the first sale doctrine is that once the copyright owner places a copyrighted item in the stream of commerce by selling it, he has exhausted his exclusive statutory right to control its distribution." The court noted, however, that the first sale doctrine "applies only to copies that are 'lawfully made under this title.'" Id. at 154. Justice Ruth Bader Ginsburg also noted in a concurring opinion: "I join the court's opinion recognizing that we do not today resolve cases in which the allegedly infringing imports were manufactured abroad." Id. at 154.

It is clear that Quality King stands for the proposition that the Copyright Act does not provide a remedy for copyright owners to control distribution rights of goods manufactured in the U.S. but designated for sale outside the U.S. Quality King did not, however, address whether or not the act provides a remedy to prevent U.S. distribution of copyrighted goods made outside the U.S.

Costco contends that the copies it distributed were "lawfully made" under the Copyright Act because Omega as a copyright owner sanctioned the manufacture of the watches. It is Costco's position that it is irrelevant that the goods were made in a foreign country. Costco argued that its U.S. resale of the watches is protected under the first sale doctrine in § 109 because its distribution of the watches in the U.S. does not involve extraterritorial application of the act.

Court briefs supporting Costco were filed by eBay Inc., consumer advocate groups and mass market retailer associations. The amici contend that the first sale doctrine codified in § 109 is broad in scope and that there was no intent that the defense of § 109 extends only to the resale or disposition of goods manufactured domestically and not those manufactured abroad. They argued that buyers and sellers need confidence that lawfully produced and purchased goods may be resold free from claims of copyright infringement. Some have suggested that the Ninth Circuit's decision could have the unintended negative consequence of encouraging overseas manufacturing so that a copyright owner can better control distribution of copyrighted goods in the U.S. market.

Based on its statutory construction, Omega argued that goods manufactured overseas for distribution overseas do not implicate any rights under the Copyright Act. Omega's position was supported by the U.S. solicitor general and various associations that advocate on behalf of the rights of intellectual property owners. (Supreme Court Justice Elena Kagan recused herself from the decision because she was U.S. solicitor general at the time the government's brief was filed.)

The Ninth Circuit's reading of the Copyright Act may provide a remedy for copyright owners to prevent the sale in the U.S. of gray market goods manufactured abroad and intended for sale outside the U.S. In particular, unlike current protections under trademark laws discussed below, it would provide redress in those instances where the foreign manufactured gray market goods are identical in quality to authorized goods in the U.S. market.

Because of the long terms of protection for works under the Copyright Act, copyright registration may provide an inexpensive and enduring remedy to prevent the importation of foreign-made gray market goods. The Ninth Circuit's ruling may not be followed in other circuits. If the Copyright Act cannot be used to stop gray market goods manufactured overseas from being imported and resold in the U.S., retailers would be insulated from claims under the Copyright Act for the sale in the U.S. of copyrighted goods identical to those intended for the U.S. market.

Preventing importation of gray market goods into the U.S. market has been an increasingly expensive issue for intellectual property owners. If license and distribution agreements with foreign distributors of copyrighted goods contain provisions expressly prohibiting the distributor and any affiliated parties from exporting to, or selling in, the U.S. market, the manufacturer can sue the distributors who violate the agreements.

Omega also may have contract claims against its foreign distributor. Because oftentimes companies do not want to pursue litigation in foreign courts, consideration should also be given to including exclusive U.S. court jurisdiction or arbitration provisions permitting enforcement in the U.S. and U.S. governing law clauses in any agreement with a foreign distributor. Contract claims, however, are not available against other parties in the distribution stream such as distributors and retailers who acquire and resell gray market goods.

Retailers as well as manufacturers should be aware that trademark law also may be used to prevent the sale of certain gray market goods in the U.S. The resale of genuine trademarked goods generally does not constitute a trademark infringement. Similar to the first sale doctrine under the Copyright Act, trademark protections under the Lanham Act are generally exhausted after the owner's first authorized sale of a product.

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The doctrine, however, does not hold true with respect to the sale of trademarked goods that do not meet the trademark owner's quality standards or are materially different from those sold by the trademark owner, in a given market. Societe Des Produits Nestle SA v. Casa Helvetia Inc., 982 F.2d 633, 644 (1st Cir. 1992). Such differences can include, for example, quality of ingredients or components, removal of serial numbers or bar codes, products without standard warranties, maintenance and safety information only in a foreign language and components that fail to comply with U.S. federal regulations.

Manufacturers that sell different products in different jurisdictions should consider employing and enforcing quality control and tracking systems to distinguish authorized goods in a one market from unauthorized goods imported from another market. Under certain circumstances, trademark owners also can register their marks with the U.S. Customs Service to prevent unlawful importation of gray market goods into the U.S. market.

It is estimated that gray market goods sales total in the billions of dollars annually. Copyright and trademark owners, as well as traditional and e-retailers, will benefit from predictability and uniformity of laws and decisions governing gray market goods. Until the Supreme Court addresses this issue in a comparable case, retailers should consider the consequences of reselling gray market goods as set forth in the Ninth Circuit's ruling. In addition, prior to purchasing trademarked foreign-made goods for resale in the U.S., retailers should examine whether such goods are the same quality as goods sold in the U.S. Copyright and trademark owners need to develop strategies for addressing gray market goods that are tailored to their products, manufacturing practices and market distribution.

## Article: Specimens of Use: In Re Anpath Group Inc.

By: Ralph A. Dengler
Fitzpatrick Cella Harper & Scinto

The view and opinions expressed in this article are those solely of the author(s) and are not of the Los Angeles Intellectual Property Law Association or its members.

Law360, New York (January 18, 2011) — In re Anpath Group Inc. involved an appeal from the U.S. Patent and Trademark Office's refusal to register the mark "Anpath" (in standard character form) for use on certain cleaning preparations. In initially filing for the mark, the applicant had submitted a "scanned pamphlet" as its specimen to evidence use of the mark. The trademark examining attorney rejected the specimen because he viewed it as mere advertising. The applicant argued that the pamphlet was provided to customers in conjunction with the product, and that the pamphlet contained a toll-free telephone number for ordering product. The examining attorney was not persuaded.

After a final refusal, the applicant submitted a substitute specimen identified as "product ordering information," together with its request for reconsideration and notice of appeal, and in support of this specimen argued that it was a mechanism for purchasing goods sold under the mark. Again, the examining attorney was not convinced, concluding that the substitute specimen, too, was nothing more than advertising. The examiner's reasoning was that the specimen did not contain sufficient information for a prospective customer to actually order product, despite the specimen's prominent inclusion of a toll-free telephone number.

The board, in ultimately affirming the refusal, began its opinion by reviewing the statutory parameters of "use in commerce," noting that § 45 of the Trademark Act (15 U.S.C. § 1127) and related regulations focused on affixation of the mark to the goods, or a close physical association such as on tags, labels or containers for the goods. In addition to the mark identifying the source of the goods to the consuming public, the rules also mandate that the specimen must demonstrate a "sufficient association" between the trademark and the identified goods. The board explained that the applicant's "pamphlet" and subsequent "product ordering information" did not purport to show affixation on a label or tag, and at no point did the applicant argue that the proffered specimens functioned as labels or were part of shipping documents associated with the goods.

In attempting to persuade the board, the applicant argued that the statutory definition of "use in commerce" (and applicable case law) also recognized that displays associated with the goods — such as "point of purchase" or "point of sale" displays — had been routinely accepted as specimens. In response, the board pointed out that the legislative history leading to the Lanham Act (and subsequent case law) clearly distinguished between mere advertising materials and point-of-purchase promotional materials. It was this demarcation that was at the crux of the board's analysis in Anpath.

The board disagreed with the applicant's attempts to analogize its specimens to those found to be acceptable in other cases, such as a print catalog (containing detailed descriptions and pictures with the subject marks prominently displayed

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## Article: Specimens of Use: In Re Anpath Group Inc.

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near the goods, along with prices, colors, sizes and a detailed order form), or a digital display of product information on a website. Of note, the board made clear that such Web pages could be acceptable as displays associated with goods where the screen prints submitted as specimens contained adequate information for "routinely and easily placing orders for the goods via the Internet." In other words, the board held that the threshold inquiry as to a specimen's suitability, whether in the online world of a website or the physical world of a print catalog, was the point-of-sale nature of the display; that is, whether the display provided a potential purchaser with the detailed information normally associated with ordering products of that kind. In so scrutinizing the applicant's specimens, the board noted that the applicant's purported sales "flyer" lacked a sales form and ordering information, such as minimum quantities, cost of goods and payment and shipment methods. Accordingly, the board found that a hypothetical consumer of the applicant's goods, when faced with the submitted flyer, "is simply not yet at the point of purchase" and would need to contact the applicant for additional information before placing an order.

The board contrasted the limited information contained in the applicant's specimens with that available to a consumer in a local "brick-and-mortar" retail store, noting the likely information available and the likely interaction such person would enjoy with the product. In view of this, the board held that the applicant's potential purchaser, when viewing the submitted specimen, was simply not viewing the equivalent of a catalog with a detailed order form to be mailed, faxed or called in to the prospective vendor.

Lastly, the board also distinguished the applicant's specimens from those cases involving online purchasing, where specimens of Web pages have traditionally been found to be acceptable. The board again observed that in contrast to an online purchase situation, the hypothetical purchaser of the applicant's product, looking at the specimens, was not viewing an interactive screen with information about the product (e.g., price, quantities, payment, or shipping and handling methods), and with the option of completing the transaction by clicking on items and adding them to a website shopping cart. Rather, the applicant's specimens were bereft of the information needed to make a purchase (or even a purchase decision), and thus were mere advertisements, insufficient to show use of the Anpath mark as a trademark. The board further explained that this was so even though the specimens listed the applicant's website URL and a telephone number for contacting a sales representative. Such information also was inadequate: it did not create a point-of-sale situation (such as a detailed catalog capable of allowing a consumer to complete a physical order); a detailed Web page; or even a situation with an option to place a telephone order based on the detailed information contained in the proffered specimen. Tellingly, the board remarked that the mere listing of the URL of a website or a telephone number for the sales office "cannot turn what is otherwise an ordinary advertisement into a point-of-sale display, into a 'display associated with the goods'" sufficient to show trademark use under the Lanham Act.

Under the holding in Anpath, applicants considering the type of specimen to submit with a statement of use should ensure the specimen goes beyond mere advertising or literature touting a product's benefits. Ideally, if the mark is not affixed to or closely associated with the product, the specimen should include detailed information and the means — whether in a printed order form or on a website — for a potential customer to consummate a purchase.

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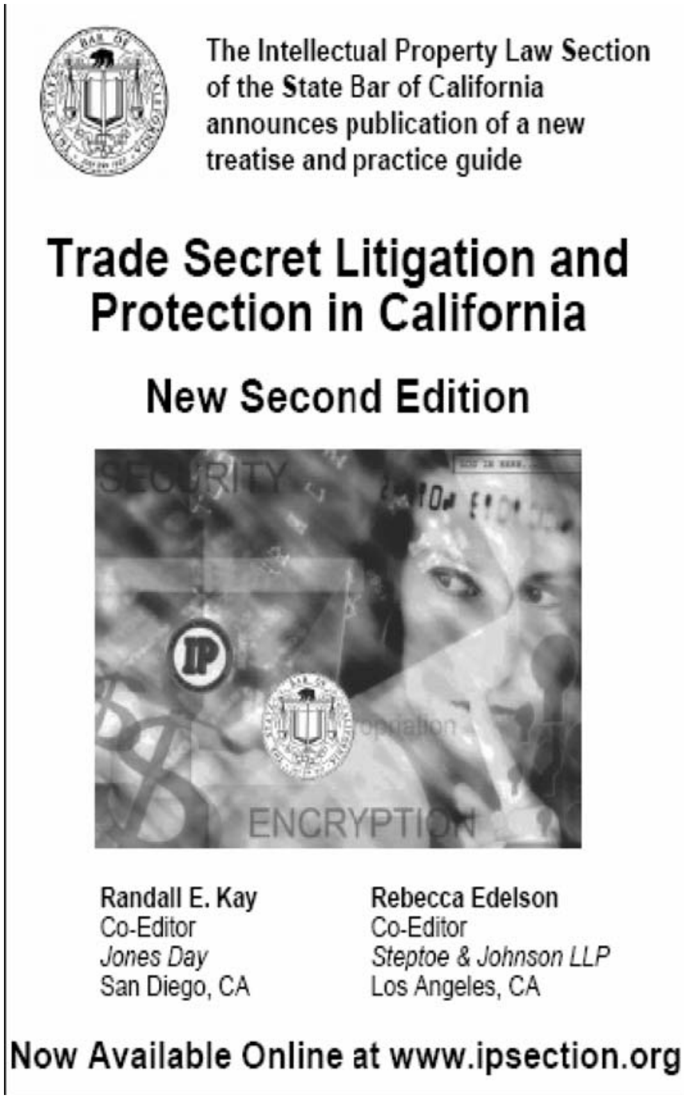


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LOS ANGELES INTELLECTUAL PROPERTY LAW ASSOCIATION

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## Judicial Treatment of Non-Practicing Entities and Its Impact on the Secondary Market for Patents

***Robert P. Merges***
U.C. Berkeley School of Law

***Brent D. Sokol***
Jones Day

### Friday, February 25, 2011

Jones Day
555 S Flower St # 5000,
Los Angeles, CA 90071
**Dress Code: Business Attire**

Registration - 12:15 p.m. * Lunch - 12:30 p.m. * Program - 1:00 p.m.

LAIPLA is pleased to announce its upcoming roundtable lunch meeting: "Judicial Treatment of Non-Practicing Entities and Its Impact on the Secondary Market for Patents." The lunch meeting will be held on February 25th from 12:15 to 2:00 pm at the Los Angeles office of Jones Day. A light lunch and refreshments will be provided.

To what extent should courts be involved in reining in the activities of non-practicing entities ("NPE") that threaten technological innovation and commercialization? The legitimate secondary market, in which patent rights are bought and sold in ways that compensate real innovators is distinguished from the more questionable market for the settlement of lawsuits involving weak, outdated or irrelevant patents, and which threaten true innovation. The current political climate make Congress a long shot to address the problem, leaving the courts, and in particular the Federal Circuit, with the task.

Brent D. Sokol of Jones Day will moderate a discussion with you and featured speaker Robert P. Merges, Professor of Law and Technology at U.C. Berkeley School of Law and co-director of Berkeley Center of Law and Technology. In his new book, "Justifying Intellectual Property", Professor Merges establishes a sophisticated and balanced rationale for the most vital form of modern property, IP rights, and answers the many critics who contend that these rights are inefficient, unfair, and theoretically incoherent. Professor Merges argues instead that IP rights are based on a solid ethical foundation, and that, when subject to judicious equitable limits, these rights form an indispensable part of a well-functioning socio-economic system. The result is a vigorous and thorough defense of IP, but also a call for appropriate constraints and boundaries in this crucial field of law: IP as real rights, but with real limits.

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Opportunities are available to sponsor this event. Contact Keith Newburry at keith_newburry@edwards.com for details.

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## *Judicial Treatment of Non-Practicing Entities and Its Impact on the Secondary Market for Patents*

Friday February 25, 2011

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