



OCPLA NEWSLETTER

Orange County Patent Law Association

www.ocpla.org

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April 2005

APRIL LUNCHEON MEETING

Please join us at our next luncheon meeting on Wednesday, April 27, 2005, when we are pleased to present R. Scott Feldmann of Crowell & Moring, LLP, and Henry J. Kupperman, Senior Managing Director and Regional Counsel Western Region, Kroll Associates, who will speak on "What To Do When Your Trade Secrets Are Stolen"

The lunch will be held at noon at the Wyndham Garden Hotel.

MAY BOARD MEETING

On May 4, 2005 the OCPLA Board of Directors is holding its monthly meeting at noon at the offices of Cohen Sakaguchi & English LLP in Irvine. Members who wish to present items for the Board's consideration should contact our president, Margaret Kivinski, to have their item placed on the agenda, and to verify the time and location of the meeting.

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| May 25, 2005 | ITC Actions and the Eveready Battery Case |

MESSAGE FROM THE PRESIDENT



BY MARGARET KIVINSKI
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It was great to see so many of you come out for the annual Spring Seminar in March. We had a great turnout this year, perhaps partly because it was conveniently located at the Balboa Bay Club in Newport Beach. Feedback received from the participants was overwhelmingly positive. All of the speakers did a fantastic job and the Saturday night harbor cruise was an enjoyable outing for all who attended. A very special thanks goes to John King for an exceptional job planning and executing the entire weekend.

Early planning is underway for another terrific Spring Seminar in 2006. Details will be released in the coming months, so watch your newsletter for the dates and additional details.

In April, we will have our regular lunch meeting. This month, our speakers will tell us what we can do when we learn our client's trade secrets have been stolen. Scott Feldmann of Crowell & Moring and Harry Kupperman of Kroll Associates will be the presenters. I hope you are able to join us.

E-MAIL DISTRIBUTION OF THE NEWSLETTER



The Newsletter is now being transmitted solely by electronic mail. If you know of anyone who should be, but is not getting this e-mail distribution, please have them contact Neal Cohen at nmc@cohen-sak.com.

RSVP ON TIME FOR MONTHLY LUNCHESES

To reduce the likelihood of additional rate increases associated with last minute reservations, and attendance without advance reservations, we encourage you to RSVP early, i.e., no later than by noon on the Friday preceding the meeting, so that we can provide more accurate numbers of luncheon attendees to the hotel. Your efforts to register at least five days in advance of the lunches will be greatly appreciated, both by the hotel and the OCPLA Board of Directors.

In addition, the OCPLA is pleased to announce that the costs for the monthly luncheon meetings for student members has been reduced. Student members can attend the monthly luncheon meetings for \$15 beginning in January 2005.

2005 MEMBERSHIP RENEWAL

Dues for 2005 will remain at \$35 for attorneys and agents and entitle you to receive the monthly OCPLA newsletter, frequent announcements, and reduced rates for the monthly luncheons and seminars. A membership form is included in this month's newsletter and is also available on our website, at www.ocpla.org. Please renew early to reduce delays in processing your application.

MINUTIAE

BY NEAL M. COHEN
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The Patent Act of 2005 - Definitely NOT Minutiae

Our Congress has been hard at work on some major revisions to Title 35 (you know, Patents).

On April 14, 2005, the smoke signal went up, and a "Committee Print" version of an unnumbered bill was published known as the "Patent Act of 2005". This is a bill, only a bill, sitting on Capitol Hill. So don't panic - yet.

The "Patent Act of 2005" was originally titled the "OK, THE U.S. WILL CHANGE ITS LAWS TO BE LIKE THE REST OF THE WORLD SO STOP BUGGING US ACT (A.K.A. SORRY LITTLE GUYS)". But that title was too long

(and too accurate), so after much debate, with all members and their housekeeping help sworn to secrecy, the bill was announced as the "Patent Act of 2005".

I expect that the Patent Act of 2005 could serve as the source of Minutiae Articles for decades to come, especially if it (or a beefed up or watered down version of it) passes. So don't be surprised if this Act indeed becomes the focus of Minutiae for a while. And although, as the title of this article states, the Act is definitely not minutiae, I'm not going to change the title of my column. Just consider this fair warning, and don't be misled.

OK, back to the Act. For now, let me just set forth a brief summary of some of the major revisions. Hopefully, you will see why the original title of the Act makes more sense.

SOME PROPOSED CHANGES

1. U.S. becomes a first-to-file nation.
2. One-year grace period to file with respect to worldwide knowledge stemming from inventor.
3. Absolute novelty with respect to other worldwide knowledge.

[Note that 1, 2 and 3 combined could result in no party receiving a patent in a situation in which inventor 1 discloses his invention before filing, and inventor 2 files for and discloses the same invention in the interim.]

4. Non-inventor (e.g., assignee) could apply for a patent.
5. Best mode requirement eliminated.
6. Inequitable conduct decisions vested exclusively with PTO (but could be referred to PTO by a court **if and only if** court enters judgment of invalidity, and satisfies other conditions), and PTO could fine violators up to \$5,000,000.
7. "Without deceptive intent" eliminated throughout the law, including correction of inventorship, and reissue declaration.
8. Commissioner authorized to require detailed oath of inventorship and invention.
9. Factors to consider for increased damages based on willful infringement codified, and negative inference from lack of written opinion not allowed.

10. Applicants cannot obtain any claim broader than the broadest claim published or issued in a parent case which the PTO considered under § 102 and § 103 [the specific language used for this change is ambiguous regarding the “and”s and “or”s, but no matter how it’s interpreted, it should change the way we prosecute]

11. Post-grant opposition proceedings allowed within nine months of issue based on double-patenting, impermissible broadening in a reissue (but not in a reexamination), and/or §§ 101, 102, 103, and/or 112; burden of proof is only preponderance of the evidence; opposer is estopped by an adverse decision; opposition can be dismissed by filing settlement, optionally confidential.

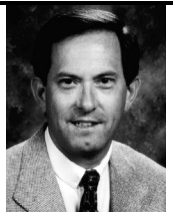
12. Some changes effective one year from enactment; others effective on date of enactment.

If you would like a copy of the 52-page pdf file containing the Act, please visit the “Current IP News” link at my firm’s website www.cohen-sak.com, or email me at the address below.

Please e-mail any questions, comments, or submissions for future Minutiae columns, to Neal M. Cohen, at nmc@cohen-sak.com. (Note: all submissions must be approved by the Editor prior to publication).

RECENT INTERESTING IP CASES

BY LEONARD R. SVENSSON
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1. REASONABLE APPREHENSION OF SUIT BASED ON ACTIVITY WHICH COULD CONSTITUTE INFRINGEMENT SUFFICIENT TO SUE FOR DECLARATORY JUDGMENT

Sierra Applied Scis., Inc. v. Advanced Energy Indus., Inc., 363 F.3d 1361, 70 U.S.P.Q.2d (BNA) 1577 (Fed. Cir. Apr. 13, 2004)

Issue: Can a patent suit seeking a declaratory judgment of noninfringement or invalidity satisfy the case-or-controversy requirement of Article III of the U.S.

Constitution where there is a reasonable apprehension of suit based on activity which could constitute infringement?

Answer: Yes.

Facts: Advanced Energy Industries, Inc. ("AEI") and Sierra Applied Sciences, Inc. ("Sierra") manufacture power supplies. In December 1995, AEI's counsel sent Sierra a letter forwarding AEI's U.S. Patent No. 5,427,669 (the '669 patent) and outlining AEI's belief that Sierra's 2 kW power supply infringes the '669 patent. In January 1996, Sierra's counsel informed AEI that Sierra had sold less than five of the 2 kW power supplies, was no longer manufacturing this power supply and had no plans to do so in the future.

In December 1999, AEI's counsel sent Sierra another letter reiterating their concerns and attaching copies of several patents, including U.S. Patent No. 5,718,813 (the '813 patent). In response, Sierra's counsel sent AEI a letter stating that Sierra was not currently selling power supplies.

In September 2001, Sierra filed suit against AEI for declaratory judgment of invalidity or non-infringement of the '813 patent. In October 2002, AEI's experts, after inspecting the 2 kW power supply, concluded that it did infringe several of AEI's patents. The district court dismissed Sierra's declaratory judgment complaint against AEI for lack of case-or-controversy. Sierra appealed.

Argument: AEI argued that whatever apprehension Sierra had over the 2 kW power supply should have subsided when AEI stated in trial that they did not care about Sierra's internal use of the 2 kW power supply. Such statements by AEI were enough to create an estoppel against AEI from suing Sierra for in-house use of the 2 kW power supply. This estoppel removed any controversy with respect to in-house use. However, that did not alleviate reasonable apprehension of suit for other possible activities which could be construed as infringing, including the knowledge that Sierra had sold five of the 2 kW power supply units in 1995.

Reasoning: In deciding case-or-controversy patent-based declaratory judgment suits, the Federal Circuit applies the following test:

There must be both (1) an explicit threat or other action by the patentee, which creates a reasonable apprehension on the part of the declaratory plaintiff that it will face an infringement suit, and (2) present activity which could constitute infringement or concrete steps taken with the intent to conduct such activity.

BP Chems. Ltd. v. Union Carbide Corp., 4 F.3d 975, 978, 28 U.S.P.Q.2d (BNA) 1124, 1126 (Fed. Cir. 1993).

AEI's initial 1995 letter to Sierra gave Sierra a "reasonable apprehension of suit", which should have diminished over the four years between this letter and AEI's second letter in 1999. However, the 1999 letter did not refer to any specific power supply so Sierra had reason to believe that all of its activities could have been cause for suit.

The next section of the case-or-controversy test addresses present activity which can be construed as infringing. The Patent Act does limit the claim or counterclaim for infringement damages to six years. Sierra's only possible infringing activity with respect to the 2 kW power supply occurred in 1995. These sales took place within the relevant time period, thus establishing Article III jurisdiction to adjudicate whether the '813 patent is invalid.

Conclusion: The district court's decision to dismiss Sierra's declaratory judgment complaint with respect to the '813 patent is reversed.

2. MARKET POWER MAY BE PRESUMED WHEN ASSESSING WHETHER A PATENT TYING ARRANGEMENT VIOLATES SECTION 1 OF THE SHERMAN ACT

Indep. Ink, Inc. v. Ill. Tool Works, Inc., 396 F.3d 1342, 73 U.S.P.Q.2d (BNA) 1705 (Fed. Cir. Jan. 25, 2005)

Issue: When determining whether a patent license, which ties sale of a patented product to sale of a non-patented product, illegally

restrains trade in violation of section 1 of the Sherman Act, may the court presume that the patentee has market power in the market of the patented product?

Answer: Yes.

Facts: Trident, Inc. ("Trident"), a wholly-owned subsidiary of Illinois Tool Works, owns U.S. Patent No. 5,343,226 ("the '226 patent"), directed to an ink jet printhead device and an ink supply system. Trident manufactures printheads and ink that is usable in the patented printheads. Trident's typical licensing agreement includes an explicit tying clause, which conditions the sale of the patented printhead on the purchase of Trident ink.

Independent Ink, Inc. ("Independent") manufactures ink that is useable in Trident's printheads. Independent filed suit against Trident seeking a declaratory judgment of patent non-infringement and invalidity and amended their complaint to allege that Trident's standard license constitutes an illegal restraint on trade in violation of section 1 of the Sherman Act. The district court granted Trident's motion for summary judgment of no Sherman Act violation, concluding that "for patent tying to constitute a violation of the antitrust laws, the plaintiff must affirmatively prove market power." The district court determined that Independent submitted no affirmative evidence defining the relevant market or proving Trident's power within such a market. Independent appealed.

Reasoning/Conclusion: The CAFC looked at Supreme Court precedent dealing with the legality of tying arrangements, and concluded that the Court's decision in [*United States v. Loew's, Inc.*](#), 371 U.S. 38, 83 S. Ct. 97, 9 L. Ed. 2d 11, 135 U.S.P.Q. (BNA) 201 (1962), clearly established that, when a tying arrangement involves a tying product that is patented or copyrighted, market power may be presumed rather than proven. Therefore, the district court should not have required Independent to prove Trident's power in the printhead market (i.e., the relevant market of the tying product), and instead should have presumed that such market power exists.

The case was remanded to permit Trident the opportunity to rebut the presumption that they possessed power in the printhead market, such that the licensing agreement does not restrain trade in violation of section 1 of the Sherman Act.

3. "CRITICAL PERIOD" FOR ON-SALE BAR CANNOT PREDATE CONCEPTION OF CLAIMED INVENTION

Sparton Corp. v. United States, No. 03-5169 (Fed. Cir. Feb. 28, 2005)

Issue: Can the "critical period" for the on-sale bar of 35 U.S.C. sec. 102(b) predate the date of conception?

Answer: No.

Facts: Sparton Corp. ("Sparton") owns U.S. Patent Nos. 3,921,120 and 4,029,233 ("the '120 patent" and "the '233 patent," respectively), directed to technology for sonobuoys--electroacoustic devices used to locate underwater sound sources such as submarines. The '120 patent claims a sonobuoy deployment system, and the '233 patent claims a sonobuoy release plate. Claims in both patents specify a single piece release plate design.

Sparton sued the United States ("the government") for unlicensed use of the inventions claimed in the '120 patent and the '233 patent. The government moved for summary judgment, asserting that the claimed subject matter was on sale more one year prior to the earliest U.S. filing date, and thus invalid under 35 U.S.C. sec. 102(b). As a basis for this motion, the government cited an Engineering Change Proposal ("ECP") submitted by Sparton to the Navy before the "critical date" (i.e., more than one year before the filing dates of the subject patents) under an existing contract, proposing a sonobuoy with dual depth operating capability and detailing a particular release plate design for deploying the sonobuoy.

The United States Court of Federal Claims granted the government's summary judgment motion. Sparton appealed.

Reasoning: The release plate mechanism claimed in the '120 and '233 patents, with a single piece design, was not described in the EPC relied on by the Court of Federal Claims to invalidate the subject claims. Although Sparton ultimately incorporated the claimed release plate design into the device delivered to the Navy under the ECP, there is no evidence that the new release plate design was offered to the Navy under the contract prior to the critical date. In fact, Sparton did not achieve conception of the new release plate until after the alleged offer for sale took place. It is illogical to conclude that a claimed invention had been offered for sale prior to its conception date. Therefore, the record does not support the lower court's ruling that the subject claims are invalid under the on-sale bar of 35 U.S.C. sec. 102(b).

Conclusion: Because the record does not support a finding that the claimed invention was on sale prior to the critical date, summary judgment on invalidity is reversed and the case is remanded for further proceedings.

4. COMMENTS IN SPECIFICATION EMPHASIZING ADVANTAGES OF INVENTION AND CRITICIZING PRIOR ART CAN SURRENDER POSSIBLE EQUIVALENTS OF CLAIMED INVENTION

Gaus v. Conair Corp., 363 F.3d 1284, 70 U.S.P.Q.2d (BNA) 1380 (Fed. Cir. Apr. 1, 2004), cert. denied, ___ U.S. ___, 125 S. Ct. 346, 160 L. Ed. 2d 226 (Oct. 12, 2004)

Issue: Can comments in a patent specification emphasizing advantages of 'the invention' and criticizing the prior art preclude a finding that an accused device, which does not provide such advantages, infringes under the Doctrine of Equivalents? **Answer:** Yes.

Facts: Dr. Harry Gaus is the owner of U.S. Patent No. 4,589,047 ('the '047 patent'), directed to a safety mechanism that prevents fatal shocks to those using a hairdryer or other electrical appliances. The mechanism works as "a pair of spaced-apart electrically exposed conductive probe networks," which are separate from voltage-carrying operating

portions of the device and stop the flow of electricity when water is present, thereby sparing the user of the hairdryer an electric shock. Although Conair sells a hairdryer with a safety mechanism that prevents fatal shocks to its users, the Conair mechanism has a single conductive probe, which is not separate from the voltage-carrying operating portion. Dr. Gaus filed suit against Conair alleging infringement of the '047 patent.

The trial court granted Conair's motion for summary judgment of no literal infringement based on a claim limitation specifying a pair of probe networks, but denied Conair's motion for Summary Judgment of no infringement under the Doctrine of Equivalents. After a jury trial, Dr. Gaus was awarded \$37 million for Doctrine of Equivalents infringement. Conair appealed.

Argument: Conair argued that the '047 patent requires that the safety mechanism contains a "pair of ... probe networks" which are separate or independent from the voltage-carrying section of the device and that a mechanism like that of the Conair hairdryer, having a probe that is not separate from the voltage-carrying section, is excluded from coverage by the '047 patent. Dr. Gaus argued that the feature of a protective device being separate from the voltage-carrying section of the hairdryer is only a preferred embodiment and that the claims are not limited to that one preferred embodiment.

Reasoning: The claim language of the '047 patent recites an "electrical operating unit" and the "pair of ... probe networks" as separate elements and does not suggest that the probes are connected to the electrical operating unit in any way. The language of the specification, which emphasizes the independence of the probe networks from the electrical operating unit as a significant aspect of the 'the invention' and criticizes the prior art for lacking such an arrangement, confirms that the probes are separate from the voltage-carrying portion. The '047 patent clearly disavows coverage of probes acting in conjunction with an electrical unit. Therefore, Dr. Gaus cannot invoke the

Doctrine of Equivalents to assert infringement by Conair's safety mechanism.

Conclusion: Conair does not infringe the '047 patent under the Doctrine of Equivalents. The district court's decision is reversed.

NEW MEMBERS

We are pleased to welcome the following new members to the ranks of the OCPLA. His/her workplace and sponsors are listed.

New Member/Org.	Sponsors
Tim Santori National Trademark Investigators	Margaret Kivinski Len Svensson

OCPLA WEBSITE

Check the OCPLA website at www.ocpla.org for copies of the OCPLA newsletter, for membership information and for current events of interest to members. Let us have your comments. We will be making changes and improvements as time passes, and your comments will be useful in knowing what to change and what to leave alone. Send comments to "webmaster@ocpla.org."

OCPLA POLICY

Although we are open to comments and suggestions, present policy concerning publication of advertisements in this newsletter is as follows: (1) "Positions Wanted," "Positions Available," and other similar ads will be printed free of charge and, unless otherwise requested, will run for two months; (2) Other ads such as word processing, legal support services, and firm announcements will be published for \$15 per issue or \$150 per year (for all 12 issues), payable in advance. We reserve the right to edit each advertisement. Please contact the Newsletter editor to place your ad or with your comments and suggestions.

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OCPLA NEWSLETTER

Orange County Patent Law Association

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

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

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POSITIONS AVAILABLE

Patent Associate: Shimokaji & Associates needs a full-time patent associate for OC offices. Duties include mechanical and electrical patent preparation and prosecution. Must have at least 5 years US and PCT experience, and ability to work as primary client contact. Technical background is preferably EE, physics or mechanical.

Litigation Associate: Shimokaji & Associates needs a full-time litigation associate for OC offices. Duties include managing infringement litigation from inception through trial. Must have first or second chair trial experience. IP experience required.

Patent Writer: Would you like to work from any location? Shimokaji & Associates needs Virtual Patent Associates. Duties include mechanical, chemical and electrical patent preparation and prosecution. Must have at least 5 years US and PCT experience with ability to work as primary client contact.

Please email Jill Swedo, swedo@shimokaji.com, if you are interested.

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**POSITION AVAILABLE
PATENT ATTORNEY**

BLAKELY, SOKOLOFF, TAYLOR & ZAFMAN LLP, Orange County office, seeks a patent attorney, preferably with an electrical or computer science background. Candidates should have at least 1-3 years experience in patent prosecution. The candidate will be responsible for all preparation and prosecution of U.S. and foreign patent applications.

The firm offers a collegial environment, competitive salary and benefits. If you would like to be considered for this opportunity, please send resume, transcripts and writing samples to:

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Orange County Patent Law Association

April Meeting

Date: Wednesday, April 27, 2005

Time: 12:00 Noon; Lunch will be served promptly at 12:15 p.m.

Location: Wyndham Garden Hotel
3350 Avenue of the Arts
Costa Mesa, California

Topic: What To Do When Your Trade Secrets Are Stolen

Speakers: R. Scott Feldmann, Crowell & Moring, LLP
Henry J. Kupperman, Senior Managing Director and Regional Counsel
Western Region, Kroll Associates

Cost: \$30 for members, \$15 for students (proof of student status required), and \$35 for non-members

Reservations: Please make reservations by filling out the form below and mailing it with a check to T.J. Singh to reach his office address given below, by the Friday before the meeting. If time is short, please also email T.J. at tjsingh@koslaw.com or call in your reservation to the OCPLA Reservations Line number at (949) 955-1920.

The Orange County Patent Law Association certifies that this activity has been approved for minimum Continuing Legal Education credit by the State Bar Association of California in the amount of 1.0 hour. The Orange County Patent Law Association certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing Minimum Continuing Legal Education. The Orange County Patent Law Association is a State Bar of California MCLE-approved provider.

Reservation Form

Enclosed is a check for \$_____ payable to ORANGE COUNTY PATENT LAW ASSOCIATION for the OCPLA General Membership luncheon on Wednesday, April 27, 2005 for the following person(s):

This form and check should be mailed to:

T.J. Singh
Attention: OCPLA Lunch Reservations
Klein, O'neill & Singh, LLP
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Orange County Patent Law Association

WWW.OCPLA.ORG • P.O. Box 7632 Newport Beach, CA 92658

2005 MEMBERSHIP APPLICATION/RENEWAL FORM

This is an application for (please circle one): **Membership Renewal or New Membership**

Member / Applicant Information:

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Firm/Employer: _____

Address: _____

E-mail Address (required to receive newsletter): _____

Telephone No.: _____ Facsimile No.: _____

Professional Information:

	Yes	No	
Are you a member of the California bar?	___	___	Bar No. _____
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Are you registered to practice before the U.S.P.T.O.?	___	___	Reg. No. _____
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Please circle not more than TWO committees in which you would like to participate:

Annual Seminar	Law Office Management	Membership
Copyright Practice	Legislation	Patent Practice
Federal Courts	MCLE	Trademark Practice
International Practice	Meetings/Programs	Trade Secret/Unfair Competition

Dues Membership Year 2005 (please circle one):

		(New Member After 07/01/05)
Regular Membership (attorneys, agents):	\$35.00	\$17.50
Student Membership	\$17.50	\$ 8.75
Associate Membership (other)	\$35.00	\$17.50

New Applicants please complete the following:

I believe I qualify for membership in the Orange County Patent Law Association.

Applicant's Signature: _____ Date: _____

Printed Name: _____

Send Application to OCPLA P.O. Box 7632 Newport Beach, CA 92658

Two OCPLA member sponsors are required for new applicants. Two undersigned members hereby recommend the above-signed applicant for membership into the Orange County Patent Law Assn.

Sponsor Signature: _____ Date: _____

Printed Name: _____

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Printed Name: _____

2005 OCPLA EVENTS SCHEDULE

Date	Location	Speaker/Event	Topic
April 27, 2005	Wyndham Garden Hotel	R. Scott Feldmann Crowell & Moring, LLP, Henry J. Kupperman, Senior Managing Director and Regional Counsel Western Region, Kroll Associates	What to Do When Your Trade Secrets Are Stolen
May 25, 2005	Wyndham Garden Hotel	Wei-ning Yang and Bill Thompson Hogan & Hartson	ITC Actions and the Eveready Battery Case



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