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OCPLA NEWSLETTER

Orange County Patent Law Association

www.ocpla.org

Vol. 9, No. 5

May, 2003

MAY LUNCHEON MEETING

Please join us at our next luncheon meeting on Wednesday, May 28, 2003, when we are pleased to present Professor Tyler Ochoa of Whittier Law School. Professor Ochoa will speak on "Hot Topics in Copyrights". The lunch will be held at noon at the Wyndham Garden Hotel.

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.

JUNE BOARD MEETING

On June 11, 2003, the OCPLA Board of Directors is holding its monthly meeting at noon at Stout, Uxa, Buyan & Mullins, LLP.

Members who wish to present items for the Board's consideration should contact our president, Stefan Kirchanski, to have their item placed on the agenda, and to verify the time and location of the meeting.

2003 MEMBERSHIP RENEWAL

Don't wait to renew your membership in OCPLA. Dues for 2003 will remain at \$35 for attorneys and agents. A membership form is included in this month's newsletter and is also available on our website, at www.ocpla.org.

MARK YOUR CALENDARS . . .

- May 28, 2003** **Hot Topics in Copyrights**
- June 25, 2003** **Madrid Protocol**
- July 23, 2003** **Chemical Dependency**
- August 27, 2003** **Tips From the Bench on Handling IP Cases**

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E-MAIL DISTRIBUTION OF THE NEWSLETTER



For the past two years, many members have been receiving paper and electronic copies of the newsletter. Our analysis shows that transitioning to electronic distribution can save the OCPLA nearly \$6,000 annually. **Thus, effective with the June Newsletter, the OCPLA Board of Directors will begin distributing the Newsletter entirely by electronic mail.** To help with the transition, we ask that you please provide your e-mail address when renewing your membership. Please check with your IT person/department to ensure that your anti-spam software does not prevent receipt of the newsletter

MINUTIAE

BY NEAL M. COHEN
LAW OFFICES OF NEAL M. COHEN

NO TREBLE DAMAGES FOR DESIGN PATENT INFRINGEMENT

35 U.S.C. § 284 authorizes the court to increase damages in a patent infringement action “up to three times the amount found or assessed” (a.k.a. treble damages). So if your client is found liable for infringement of a design patent, should you expect to have to defend against an argument for treble damages?

If you ever find yourself in such a situation, you will be happy to know the law is on your side. Simply stated, the increased damages clause of Section 284 does not apply to design patent cases. (Braun Inc. v. Dynamics Corporation of America, 975 F.2d 815 (Fed. Cir. 1992).

I was surprised to learn this bit of design patent law, and so were many of my colleagues. The statutes don't seem to

support such a conclusion, and the Federal Circuit's reasoning in Braun may not be very persuasive. But then again, it doesn't have to be. That's the law.

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

THE MADRID PROTOCOL

GET TUNED, NOVEMBER 3 IS CLOSER
THANK YOU THINK!

BY ALEXANDER R. SCHLEE
VIERING, JENTSCHURA & PARTNERS

From November 3, 2003 on, U.S. applicants will be entitled to file applications under the Madrid Protocol, the progeny of the very old Madrid Agreement going back as far as 1891. The Madrid Protocol was finalized in 1989 but did not become effective in any country before 1995. Nowadays, most but not all Madrid Agreement member countries are Madrid Protocol members as well. Not so vice versa: There are a number of Madrid Protocol-only countries, the United States being one of these.

U.S. applicants might have some questions.

What qualifies for protection under the Madrid Protocol?

- The Madrid Protocol application has to be based on a domestic U.S. “home” application or registration. Therefore, the requirements are fairly similar to a U.S. Trademark Application.

Where do Madrid Protocol applications have to be filed?

- At the USPTO, forwarding the application to the International Bureau (IB) in Geneva, Switzerland, often called WIPO.

Who can be the applicant?

- Any legal entity domiciled in the U.S.
- Any U.S. citizen, even if not domiciled in the U.S.
- Any individual, domiciled in the U.S.

When should a Madrid Protocol application be filed?

- No specific deadline, but as early as possible for preventing third parties from establishing older rights in any of the designated countries.

What are the special requirements for a Madrid Protocol application?

- A pending domestic U.S. trademark application or a registered U.S. trademark. The Madrid Protocol application has to be based thereon and is dependent on this domestic U.S. trademark application or registration for 5 years from the registration date under the Madrid Protocol.

What is the grace period for use?

- Depends on national laws of the designated countries. Many countries have implemented a 5-year grace period, running from registration of the Madrid Protocol trademark registration. The consequence of non-use might be vulnerability to a cancellation action against the effect of the Madrid Protocol registration in the

respective designated country, or unenforceability. In most countries, this can be healed through later use if no intervening rights are established by third parties during the non-use period.

What priority may the applicant claim?

- A 6-month priority can be claimed from any prior trademark application in any of the Paris Convention countries.

Which territories are covered by a Madrid Protocol application?

- 57 Madrid Protocol countries can be designated. The Madrid Protocol system requires specific designation of countries, also requiring payment of fees. An updated list of the possible countries can be found at <http://www.wipo.org/madrid/en/index.html>. Caution: Neither Madrid Agreement-only countries nor the United States itself can be covered by a U.S.-based Madrid Protocol application.

What is the maximum duration?

- The Madrid Protocol registration can be renewed in 10-year intervals.

What are the costs?

- Moderate compared with the number of covered countries, but not low! Help on fee calculation can be found at <http://www.wipo.org/madrid/en/index.html>. The official fees have to be calculated as a somewhat complicated mix of WIPO fees depending on the number of designated countries and International Classes into which the goods and services fall, and the

more substantial national fees charged by most designated countries. In many countries, the national fees depend on the number of covered classes.

What are the biggest risks?

- A “central attack” against the underlying “home application or registration” is possible within 5 years from registration under the Madrid Protocol. Invalidating the home application or registration during this 5-year period invalidates the entire Madrid Protocol registration. However, conversion into national applications is possible, so that the risk of a central attack is reduced to a cost risk.
- National Patent Offices are entitled to raise absolute or relative objections against registration. This would trigger national proceedings in the respective designated country, usually requiring the appointment of a local representative. If such objections are not raised, the Madrid Protocol registration becomes effective in the respective designated country without further national fees or procedures.
- National laws may require proof of use. National grace periods for use vary or may be non-existent. Since no local representative is appointed, the applicant may not become aware of any requirements and miss deadlines, resulting in irreversible termination of the effect of the Madrid Protocol registration in the respective country. It is therefore important to clarify which national requirements apply.

WANT MORE INFORMATION?

Come to the OCPLA Luncheon on June 25th, when the topic will be “The Madrid Protocol”.

RECENT INTERESTING IP CASES

BY LEONARD R. SVENSSON
BIRCH, STEWART, KOLASCH & BIRCH, LLP

1. Applicant's Listing of Own Work in an Information Disclosure Statement Not Considered Prior Art by Admission

Riverwood Int'l Corp. v. R.A. Jones & Co., Nos. 02-1030, -1154 (Fed. Cir. Mar. 31, 2003)

Issue: By listing his/her own work in an Information Disclosure Statement, does an applicant admit that such work is “prior art,” absent a statutory basis? **Answer:** No.

The CAFC has held that a statement by an applicant during prosecution identifying the work of another as “prior art” is an admission that the identified matter is indeed prior art. However, the fact that a reference can become prior art by admission is inapplicable when the subject matter at issue is the inventor's own work. One's own work may not be considered prior art in the absence of a statutory basis, and a patentee should not be “punished” for being overly inclusive in an IDS.

Furthermore, the CAFC stated that, just as a patent issued to the same inventive entity cannot be prior art by admission, a prior application that issued to the same inventive entity cannot be prior art under section 102(e). The CAFC held that the district court erred by not deciding who invented the relevant portion of the subject

matter disclosed in the '806 patent to determine if this earlier patent constituted prior art under section 102(e). Accordingly, the CAFC vacated the district court's holding of non-infringement and remanded to the district court for further consideration of inventor issues related to whether the '806 patent is prior art under section 102(e).

2. Claim Term that Does Not Use "Means" Language Presumed Not to Be a "Means-Plus-Function" Limitation

Apex Inc. v. Raritan Computer, Inc., No. 02-1303 (Fed. Cir. Apr. 2, 2003)

Issue: Absent proof that a claim term does not recite a definite structure, should a claim term that does not use the word "means" be interpreted as a "means-plus-function" limitation? **Answer:** No.

Means-plus-function limitations, as defined by 35 U.S.C. sec. 112, para. 6, allow applicants to claim an element of a combination functionally, without reciting structures for performing those functions. A claim limitation that uses the word "means" raises the presumption that sec. 112, para. 6, applies, whereas a claim that does not use "means" raises the presumption that sec. 112, para. 6, does not apply.

The CAFC noted that none of the claim limitations in question contain the term "means," and that Raritan failed to meet the evidentiary burden of showing that sec. 112, para. 6 did indeed apply. The CAFC cited Greenberg v. Ethicon Endo-Surgery, Inc., 91 F.3d 1580, 1583, 39 U.S.P.Q.2d (BNA) 1783, 1786 (Fed. Cir. 1996), noting that "[t]he fact that a particular [claim term] is defined in functional terms is not sufficient to convert a claim [limitation] into a 'means for performing a specified function' within the meaning of 112(6)."

3. Is The Taq Polymerase Patent Doomed for Inequitable Conduct?

Hoffmann-La Roche, Inc. v. Promega Corp., No. 00-1372 (Fed. Cir. March 31, 2003)

Issue A: Is the use of "past tense" in describing a prophetic example in a patent an intentional, material misrepresentation? **Answer:** Yes.

Inequitable conduct requires misrepresentation or omission of a material fact, together with an intent to deceive the U.S. Patent & Trademark Office ("USPTO"). In addition, "the material misrepresentations or omissions [must be] sufficiently serious in light of the evidence of intent to deceive, under all circumstances, to warrant the severe sanction of holding the patent unenforceable." The CAFC upheld the district court's finding on summary judgment that the use of "past tense" in a prophetic example is an intentional misrepresentation to the USPTO. In addition, if "there is a substantial likelihood that a reasonable examiner would consider it important in deciding whether to allow the application to issue," a misrepresentation is material. Given, the applicants' reliance on the data in Example VI in arguing patentability of the Taq polymerase, the CAFC upheld the finding that the improper use of the "past tense" in the specification was a material misrepresentation.

Issue B: Is such a misrepresentation enough to render a patent unenforceable for inequitable conduct? **Answer:** Maybe.

Because the district court did not make a formal determination as to whether the misrepresentation in Example VI was sufficiently serious in light of the evidence of intent to deceive, under all circumstances, to warrant holding the

patent unenforceable, the case has been remanded for such analysis.

4. Copyright Registration of a Compilation Extends to Component Parts

Xoom, Inc. v. Imageline, Inc., No. 02-1121 (4th Cir. Mar. 21, 2003)

Issue A: Does the copyright of a computer software package containing multiple clip-art images extend to the individual images contained in the software? **Answer:** Maybe.

"[W]here an owner of a collective work also owns the copyright for a constituent part of that work, registration of the collective work is sufficient to permit an infringement action of the constituent part." Thus, if the individual images in a clip-art compilation can be registered by the owner for copyright protection, registration of only the entire software package is sufficient to cover individual component images.

Issue B: Does the copyright of a computer-generated image extend to the computer programs used to create the image? **Answer:** No.

The copyright of the images does not extend to the computer programs. Copyright protection of a computer program requires compliance with the U.S. Copyright Office requirements set forth in U.S. Copyright Office, Circular 61: Copyright Protection for Computer Programs. Since Imageline failed to comply with the Circular 61 requirements they do not hold copyright in the programs.

5. Lack of Formal Offer Under Contract Law is Not an On-Sale Bar

Lacks Indus., Inc. v. McKechnie Vehicle Components USA, Inc., Nos. 01-1371, -1395, -1396 (Fed. Cir. Mar. 13, 2003)

Issue: Can an activity that is not a formal offer under contract law principles constitute an offer for sale under 35 U.S.C. sec. 102(b)? **Answer:** No.

The CAFC stated that the Special Master erred by applying the wrong legal standard in determining whether there was an offer for sale under sec. 102(b). In Group One, Ltd. v. Hallmark Cards, Inc., 254 F.3d 1041, 1048, 59 U.S.P.Q.2d (BNA) 1121, 1126 (Fed. Cir. 2001), cert. denied, 534 U.S. 1127, 122 S. Ct. 1063, 151 L. Ed. 2d 967 (2002), the CAFC held that "[o]nly an offer which rises to the level of a commercial offer for sale, one which the other party could make into a binding contract by simple acceptance (assuming consideration), constitutes an offer for sale under [sec.] 102(b)." In so holding, the CAFC noted that Federal Circuit law, not state contract law, would control and that the CAFC would look to the Uniform Commercial Code ("UCC") for guidance as to whether a particular communication rose to the level of a "commercial offer for sale."

6. District Court Takes Wrong Bus on Claim Interpretation

Northrop Grumman Corp. v. Intel Corp., Nos. 02-1024, -1182 (Fed. Cir. Mar. 31, 2003)

Issue: When interpreting a means-plus-function claim element, can the court interpret the element to include disclosed structure not clearly associated with performing the function? **Answer:** No.

Under 35 U.S.C. sec. 112, para. 6, a structure disclosed in the specification is a "corresponding" structure "only if the specification or the prosecution history clearly links or associates that structure to the function recited in the claim." *B. Braun Med., Inc. v. Abbott Labs.*, 124 F.3d 1419, 1424, 43 U.S.P.Q.2d (BNA) 1896, 1900

(Fed. Cir. 1997). The CAFC held that the district court erroneously identified additional elements as the structure corresponding to the "means for monitoring" limitation. The CAFC stated that a court may not import into the claim features that are unnecessary to perform the claimed function.

comments will be useful in knowing what to change and what to leave alone. Send comments to "webmaster@ocpla.org."

WELCOME NEW MEMBERS

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

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Pursuant to Section 3.2 of the by-laws of the Orange County Patent Law Association, anyone having reason to believe that a new member is not qualified for membership may file a written objection with the Secretary within 30 days after this notice. If you are interested in joining our association, the amount due annually for Regular or Associate Membership is \$35 and for Student Membership is \$17.50. Annual dues are due in January of each year.

OCPLA ORG WEB PAGE

Check the OCPLA web site 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

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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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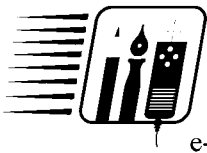
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Fax or email cover letter and resume to Susan Crockett, Esq., Crockett & Crockett, fax #949 588 6172, email Susancrockett@crockett-crockett.com.

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Duties include, 1) full time support for partner primarily in prosecution, 2) maintain database of contacts, 3) heavy preparation and filing of PTO related documents, including patent and trademark, 4) answering phones, 5) billing clients using Timeslips. Need exceptional familiarity with Outlook and MS Word. Email letter and resume to: shimokaji@dsattorneys.com at DiPinto & Shimokaji, P.C. No phone calls or faxes please.

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Busy Newport Beach patent law firm seeks a full-time legal secretary who is self motivated, detail oriented, and able to handle multiple tasks. MS Office word processing and patent/trademark experience required. Fax resume to Lynne at 949-718-6756 or email to jboisineau@jmhlaw.com.

**BUSINESS LAW INTERNATIONAL
CONFERENCE OF THE INTERNATIONAL
BAR ASSOCIATION
14-19 SEPTEMBER 2003
SAN FRANCISCO, USA**

The Section on Business Law is pleased to announce that a limited number of scholarships will be awarded to young lawyers from the USA, Canada and parts of Asia to attend the Conference in San Francisco.

The scholarship covers the cost of registration fees and will contribute towards accommodation and travel expenses. In addition the successful candidate is given 2 years free membership of the IBA, SBL, 2 specialist committees, a waiver of IBA / SBL Conference Registration fees for 1 year and free membership to the Scholarship Alumni.

This is a wonderful opportunity for any young lawyer embarking on an international career. Scholarships will be awarded on merit, selected by the SBL's Scholarship Committee. All applicants will be notified with the result of their application by the end of June 2003.

To obtain scholarship criteria and an application form please visit:

<http://www.ibanet.org/buslaw/EduProg.asp>

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Recent Law Graduate and U.S. Registered Patent Agent seeking Immediate Full Time or Contract Work in the area of Patent and Trademark Prosecution. Resumes and References will be provided upon request. Please contact John D. Tran 714-719-4927 or john.316@juno.com.

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Duties include 1) about 30 hours/week support for partner primarily in prosecution, 2) maintain database of contacts, 3) heavy preparation and filing of PTO related documents, including patent and trademark, 4) answering phones, 5) billing clients using Timeslips. Need exceptional familiarity with Outlook and MS Word.

Email letter and resume to: DiPinto & Shimokaji, P.C., shimokaji@dsattorneys.com. No phone calls or faxes please.

SITUATION SOUGHT

Patent Agent with 15 years experience and about 200 pending applications in U.S., Europe and elsewhere, wishes to merge with existing IP firm for load leveling and eventual retirement (2-3 years) with residual income arrangement. Phone: 714/668-3815 as a personal call for Mr. Jones. BEE, MIA, 27 yrs. hands-on engineering with fortune 500 companies.

Orange County Patent Law Association

MAY MEETING

Date: Wednesday, May 28, 2003

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: Hot Topics in Copyrights

Speaker: Professor Tyler Ochoa of Whittier Law School

Cost: \$30 for members and \$35 for non-members

Reservations: Please make reservations by filling out the form below and mailing it with a check to Greg Hollrigel to reach his office address given below, by the Friday before the meeting. If time is short, please also email Greg at gsh@patlawyers.com or call in your reservation to the OCPLA Reservations Line number at (949) 450-1759 x231.

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Reservation Form

Enclosed is a check for \$_____ payable to ORANGE COUNTY PATENT LAW ASSOCIATION for the OCPLA General Membership luncheon on Wednesday, May 28, 2003 for the following person(s):

This form and check should be mailed to:

Greg S. Hollrigel
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Orange County Patent Law Association

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2003 MEMBERSHIP APPLICATION/RENEWAL FORM

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

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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:

- | | | |
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| International Practice | Meetings/Programs | Trade Secret/Unfair Competition |

Dues Membership Year 2003 (please circle one):

Regular Membership (attorneys, agents):	\$35.00	(New Member After 07/01/03) \$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: _____

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Sponsor Signature: _____ Date: _____

Printed Name: _____

2003 OCPLA EVENTS SCHEDULE

Date	Location	Speaker/Event	Topic
May 28, 2003	Wyndham Garden Hotel	Professor Tyler Ochoa, Whittier Law School	Hot Topics in Copyrights
June 25, 2003	Wyndham Garden Hotel	Catherine J. Holland Knobbe, Martens, Olson & Bear, LLP	Madrid Protocol
July 23, 2003	Wyndham Garden Hotel	Jeannie Griffin	Chemical Dependency
August 27, 2003	Wyndham Garden Hotel	Magistrate Nakazato	Tips From the Bench on Handling IP Cases



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