



# OCPLA NEWSLETTER

Orange County Patent Law Association

[www.ocpla.org](http://www.ocpla.org)

Vol. 11, No. 5

May 2005

## MAY LUNCHEON MEETING

Please join us at our next luncheon meeting on Wednesday, May 25, 2005, when we are pleased to present **Wei-ning Yang and Bill Thompson** of Hogan & Hartson, who will speak on "ITC Actions and the Eveready Battery Case"

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

## JUNE BOARD MEETING

On June 1, 2005 the OCPLA Board of Directors is holding its monthly meeting at noon at the offices Klein O'neill & Singh, 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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## MARK YOUR CALENDARS . . .

May 25, 2005	ITC Actions and the Eveready Battery Case
June 22, 2005	One Tiger, Two Robots & Three Stooges: Recent Right of Publicity Expansions and Limitation

## MESSAGE FROM THE PRESIDENT



BY MARGARET KIVINSKI  
THEROX, INC.  
[mkivinski@therox.com](mailto:mkivinski@therox.com)

For our April meeting, we were fortunate to have R. Scott Feldmann of Crowell & Moring LLP address our group on what to do when our clients' trade secrets have been stolen. Scott gave us lots of practical tips and useful information about ways to safeguard against theft of trade secrets and creative ways to deal with a misappropriation if it should happen, ranging from enlisting the help of the FBI to litigation. Scott arranged for us to also hear from Ken Mate of investigative services firm Kroll Inc. It was particularly interesting to hear Ken's perspective on trade secret investigation and his creative investigative techniques to gather evidence on the target of an investigation. It was entertaining as well as enlightening to hear about successful investigations Ken has been involved in and the innovative and sometimes surprising methods used to catch the bad guys, sometimes mid act.

For our May lunch meeting, we will have Wei-ning Yang and Bill Thompson from Hogan & Hartson LLP speak to us on ITC actions in general and their success in the Eveready battery case. I hope you will join us for what promises to be another informative session.

A big thank you goes out to all members who have given us feedback regarding the various events that have been put on this year. The response has been very positive and helps us with planning for future events. If you have any ideas or suggestions for upcoming lunch meeting topics or other events, please do not hesitate to e-mail me at [mkivinski@therox.com](mailto:mkivinski@therox.com).

### 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](mailto:nmc@cohen-sak.com).

### RSVP ON TIME FOR MONTHLY LUNCHES

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.

### PASSING OF AN OC PATENT ATTORNEY HOWARD R. LAMBERT 1929 - 2005

Howard was born on May 30, 1929, in Sydney New York. Many OCPLA members knew him. He earned his engineering degree from the University of Miami in 1956, his Physics degree from Georgia Tech in 1957, his J.D. from the University of California in 1972, and his patent Law Degree in 1973. Over the course of his career as a patent attorney, he was affiliated with private law firms and private companies, and in 1998 opened the Howard Lambert Law Office where he continued his practice until his untimely death from an abdominal aneurysm on January 19, 2005. Howard loved cameras, target shooting, classical concerts, and all kinds of complicated gadgets. Howard is survived by his wife of 47 years, Julie, and will be sorely missed by her, by his dog Bonnie, and by his many other family, friends, colleagues, and clients.

### 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](http://www.ocpla.org). Please renew early to reduce delays in processing your application.

### MINUTIAE

BY NEAL M. COHEN  
COHEN SAKAGUCHI & ENGLISH LLP  
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### The Patent Act of 2005

OK, I gave fair warning that the Patent Act of 2005 might be the subject of many Minutiae columns to come. But now that the Act has been out there for comment and review for about a month, it seems almost boring. In fact, hearings were televised on C-SPAN!

In any case, the thought of the week relates to the proposed change to § 283 regarding Injunctions. Currently, there is this crazy notion (actually, it's the law) that irreparable harm is presumed from patent infringement. The Act, on the other hand, would require the patent owner to actually **prove** irreparable harm to obtain an injunction. Why is everyone up in arms? What's the big deal? Proof of irreparable harm is a fundamental prerequisite to obtaining an injunction in every other area of the law. Why not with patents?

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](http://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](mailto:nmc@cohen-sak.com). (Note: all submissions must be approved by the Editor prior to publication).*

**RECENT INTERESTING IP CASES**

BY LEONARD R. SVENSSON  
BIRCH, STEWART, KOLASCH &  
BIRCH, LLP  
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**1. Close Shave for Gillette**

*Gillette Co. v. Energizer Holdings, Inc.*,  
No. 04-1220 (Fed. Cir. Apr. 29, 2005)

**Issue:** When a patent claim is directed to a device having a "group of first, second, and third" elements, is the claim necessarily limited to an arrangement with a group of exactly three elements in consecutive order?

**Answer:** No.

**Facts:** The Gillette Company ("Gillette") owns U.S. Patent No. 6,212,777 ("the '777 patent"), directed to a wet-shave safety razor with multiple blades. The '777 patent discloses an embodiment in which blade spacing and elevation parameters are varied to reduce drag forces created by having multiple exposed blades. Claim 1 of the '777 patent recites a safety razor blade unit comprising a guard, a cap, and "a group of first, second, and third blades with parallel sharpened edges." Language in claim 1 defines elevation and positioning of each blade, such that the first and third blades are the leading and trailing blades, respectively, and the second blade is positioned between the first and third blades.

Gillette sued Energizer Holdings, Inc. ("Energizer") in U.S. district court, alleging that Energizer's QUATTRO® safety razor, which has a guard, a cap, and four exposed blades, infringes the '777 patent. The district court denied Gillette's motion for preliminary injunction, concluding that Gillette failed to show a reasonable likelihood of prevailing on the issue of infringement because the '777 patent claims should be construed as limited to three-bladed razors. Gillette appealed.

**Reasoning and Conclusion:** The CAFC disagreed with the district court's ruling on claim construction, concluding that the '777 patent claims cover razors with more than

three blades. Although the preferred embodiment described in the '777 patent has exactly three blades, the claims use the open-ended terms "a group of" and "comprising." The numerical terms "first," "second," and "third" were used to designate different blades, not to limit the number of blades to only three or to denote consecutive ordering. In other words, specifying a razor having "a group of first, second, and third blades," wherein the "first" and "third" blades are end blades and the "second" blade is in the middle, does not exclude blade arrangements having multiple middle blades, i.e., multiple "second" blades such as in the QUATTRO®.

Because the district court's ruling on Gillette's motion for preliminary injunction was based on an erroneous claim interpretation, the ruling was vacated and the case remanded.

\*\*\*\*\*

**2. Kit Comprising Instructions for a New Use of a Known Product Is Not Novel**

*In re Ngai*, 367 F.3d 1336, 70 U.S.P.Q.2d (BNA) 1862 (Fed. Cir. May 13, 2004)

**Issue:** Is a kit comprising a new set of printed instructions together with a known product novel when the printed instructions are not functionally related to the product?

**Answer:** No.

**Facts:** The Ngai patent application contained allowed claims drawn to a method of amplifying RNA. Rejected claim 19 of the application reads:

A kit for normalizing and amplifying an RNA population, said kit comprising instructions describing the method of claim 1 and a premeasured portion of a reagent selected from the group consisting of: oligo dT biotinylated primer ... buffers and nucleotides. (Emphasis added.)

Ngai acknowledged that the prior art teaches kits comprising instructions and a buffer. The Board of Patent Appeals and Interferences ("Board") agreed with the Examiner that the only difference between the prior art and claim 19 is the content of the instructions. The Board found that the content of the instructions was not "functionally related" to the kit, and held claim 19 to be anticipated by the prior art. Ngai appealed.

**Argument:** Ngai argued that the addition of new printed matter to a known product made the product patentable. Ngai further argued that because the prior art did not teach a limitation of "instructions describing the method of claim 1" combined with an amplification kit, claim 19 could not be anticipated. Ngai relied on the language of an earlier decision relating to printed matter, *In re Gulack*, 703 F.2d 1381, 217 U.S.P.Q. (BNA) 401 (Fed. Cir. 1983), which stated that the "[d]ifference[s] between an invention and the prior art cited against it cannot be ignored merely because those differences reside in the content of the printed matter." The Board's argument was essentially that claim 19 merely teaches a new use for an existing product. Thus, according to the Board, Ngai could claim the method, but not the product.

**Reasoning:** The court agreed with the Board. In order to qualify under *Gulack*, the printed matter must be functionally related to the underlying object. In *Gulack*, the invention consisted of a band, ring, or set of concentric rings, a plurality of individual digits imprinted on the band or ring at regularly spaced intervals, and an algorithm by which the appropriate digits were developed. The court in *Gulack* found that the number printed on the band had a functional relationship to the band itself.

In the present case, however, the addition of a new set of instructions to a known kit did not interrelate with the kit in the same way as the numbers interrelated with the band of *Gulack*. The court noted that in *Gulack* the printed matter would not achieve its purposes without the band, and the band

without the printed matter would similarly be unable to produce the desired result. In the present case, however, according to the court,

the printed matter in no way depends on the kit, and the kit does not depend on the printed matter. All the printed matter does is teach a new use for an existing product.

The court supported its decision by stating that

[i]f we were to adopt Ngai's position, anyone could continue patenting a product indefinitely provided that they add a new instruction sheet to the product.

**Conclusion:** The Board's decision was supported by substantial evidence and thus affirmed. Printed matter must be functionally related to the underlying object in order to impart patentable novelty to the combination.

\*\*\*\*\*

### 3. "Inhibitor or Activator" of a Protein Not Limited to Compounds that Directly Interact with the Protein

*Housey Pharm., Inc. v. AstraZeneca UK Ltd.*, 366 F.3d 1348, 70 U.S.P.Q.2d (BNA) 1641 (Fed. Cir. May 7, 2004)

**Issue:** Is a claim that recites an "inhibitor or activator" of a protein necessarily limited to compounds that directly interact with the protein?

**Answer:** No.

**Facts:** Housey Pharmaceuticals, Inc. ("Housey") is the owner of several patents directed to "Method of Screening for Protein Inhibitors or Activators." A representative claim recited "[d]etermining whether a substance is an inhibitor or activator of a protein...." The parties disputed whether "an inhibitor or activator of a protein" is a

substance that must directly interact with the protein.

**Argument:** Housey argued that an "activator or inhibitor of a protein" is limited to substances that "directly interact [with], i.e., bind to, the target protein." (Housey stipulated if the claims were not limited to substances that directly interact with the protein, the patents would be invalid and not infringed.) The district court definition included within the scope of an "inhibitor or activator of a protein", substances that inhibit or activate the biological activity of protein in a cell without necessarily binding to the protein itself.

**Conclusion:** The language of the claims supports the district court's construction of the claims as encompassing substances that inhibit or activate the biological activity of protein in a cell without necessarily binding to the protein itself. In addition, extrinsic evidence submitted by Housey with regard to the plain meaning of "inhibitor or activator of a protein" does not support the inclusion of the direct-binding property as a limitation on the claimed method. Finally, the specification and prosecution history affirmatively demonstrate that Housey intended the broader meaning that is not limited to direct binding to the protein.

### OCPLA WEBSITE

Check the OCPLA website at [www.ocpla.org](http://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](mailto: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.

### 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

**Kyhm Penfil**  
U.C.I.

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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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Costa Mesa, CA 92626.

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Cohen Sakaguchi & English LLP (CS&E) is a small IP law firm located in Irvine, by John Wayne Airport. We offer competitive salaries, benefits, a flexible work schedule, and a family-friendly life-style. We are seeking the following full-time employees:

\*\*\*\*\*

**Patent Associate:** Ideal candidate has 1-3 years patent prosecution experience, high academic credentials. Duties include primarily patent prosecution, and would also include trademark prosecution, and litigation support.

**Experienced Patent Legal Assistant:** Ideal candidate has 5+ years experience as legal assistant for patent attorneys, knowledge of U.S. and foreign prosecution, federal court litigation, and is familiar with all aspects of PTO website, PAIR, docketing procedures, and Microsoft Word. Knowledge of trademark prosecution a plus. Duties include providing primary legal support for two partners, and part-time support for up to three other attorneys, all with permanent part-time assistance and support.

\*\*\*\*\*

Please visit our website at [www.cohen-sak.com](http://www.cohen-sak.com) for more information about our firm.

Send resume by mail only to:

COHEN SAKAGUCHI & ENGLISH LLP  
ATTN: OCPLA AD XAFT0601.  
2040 Main Street, 9th Floor  
Irvine, CA 92614

Short inquiries may be e-mailed to Neal Cohen at [nmc@cohen-sak.com](mailto:nmc@cohen-sak.com).

Ad: xaft0601

## Orange County Patent Law Association

May Meeting

**Date:** Wednesday, May 25, 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:** ITC Actions and the Eveready Battery Case

**Speakers:** **Wei-ning Yang** of Hogan & Hartson  
**Bill Thompson** of Hogan & Hartson

**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](mailto:tjsingh@koslaw.com) or call 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, May 25, 2005 for the following person(s):

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This form and check should be mailed to:

**T.J. Singh**  
**Attention: OCPLA Lunch Reservations**  
**Klein, O'neill & Singh, LLP**  
**2 Park Plaza, Suite 510**  
**Irvine, CA 92614**  
**Tel: (949) 955-1920**  
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**E-mail: [tjsingh@koslaw.com](mailto:tjsingh@koslaw.com)**



# 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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Address: \_\_\_\_\_

E-mail Address (required to receive newsletter): \_\_\_\_\_

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	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):**

		<b>(New Member After 07/01/05)</b>
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: \_\_\_\_\_

Sponsor Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Printed Name: \_\_\_\_\_

**2005 OCPLA EVENTS SCHEDULE**

<b>Date</b>	<b>Location</b>	<b>Speaker/Event</b>	<b>Topic</b>
<b>May 25, 2005</b>	Wyndham Garden Hotel	<b>Wei-ning Yang and Bill Thompson</b> Hogan & Hartson	ITC Actions and the Eveready Battery Case
<b>June 22, 2005</b>	Wyndham Garden Hotel	<b>Scott L. Whiteleather</b> Whiteleather & Associates	One Tiger, Two Robots & Three Stooges: Recent Right of Publicity Expansions and Limitation.



**Orange County Patent Law Association**  
P.O. Box 7632  
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