



OCPLA NEWSLETTER

Orange County Patent Law Association

www.ocpla.org

Vol. 13, No. 5

May 2007

MAY 2007 LUNCHEON

Please join us on Wednesday, May 23rd, to hear Francis G. Rushford of The Eclipse Law Group LLP speak on the topic of Generating Revenue from Patent Portfolios through sales, licenses and litigation.

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

CALL FOR SPEAKERS

Topic suggestions may be submitted to the Board by contacting Greg Hollrigel at ghollrigel@coopervision.com or at 949-597-4700 x3341.

JUNE BOARD MEETING

The June board meeting will be held on June 7, 2007 at noon at the offices of Christie Parker & Hale in Newport Beach. Members who wish to present items for the Board's consideration should contact our president, Greg Hollrigel, to have their items placed on the agenda, and to verify the time and location of the meeting.

2007 SPRING SEMINAR

This year's Spring Seminar will be held on June 8-10 at the Ritz Carlton Hotel in Dana Point. Please visit <http://www.laipla.org> for flyer and registration information.

NEW MEMBERS

We are pleased to welcome the following new member(s) to the OCPLA:

Aaron Salo - Student

Debra D. Condino (Allergan Inc.)

Claude Nassif (Allergan Inc.)

PLEASE RSVP ON TIME FOR MONTHLY LUNCHEONS

To reduce the likelihood of additional rate increases associated with last minute reservations, please RSVP early, i.e., no later than noon on the Friday preceding the meeting, so that we can provide more accurate numbers of luncheon attendees to the hotel. Your effort to register at least five days in advance of the lunches is greatly appreciated by the hotel and the OCPLA Board.

The cost for the monthly luncheon meetings for student members is \$15.

PREDICTABLE RESULTS: The New Standard for Obviousness

**BY MARK H. PLAGER & JEFFREY TRAVIS
PLAGER LAW OFFICES, PC
WWW.PLAGERLAW.COM**

To obtain a United States patent, the invention must meet three requirements: new, useful, and unobvious. See 35 U.S.C. §§101-103. The first two requirements are generally understood without much dispute.¹ However, a test that determines whether an invention is unobvious in light of prior art references is more difficult because invention differences from the prior art references, even subtle ones, can result in opposite conclusions between patent examiners, attorneys, judges, or juries based on their overall impression of those differences. Consequently, the third requirement of patentability has been the subject of much debate resulting in the April 30, 2007 decision of United States Supreme Court involving obviousness. See *KSR International, Inc. v. Teleflex, Inc.*, No. 04-1350, 550 U.S. ___ (2007).

35 U.S.C Section 103 of the United States Patent Act provides “[a] patent may not be obtained . . . if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.” In 1966, the Supreme Court set out a framework for “objectively” applying this statutory language. See *Graham v. John Deere Co. of K.C.*, 383 U.S. 1 (1966). This framework sets forth three questions for determining obviousness: what is the scope and content of the prior art; what are the

differences between the prior and the claimed invention; and finally, what is the level of a person of ordinary skill in the pertinent art? Once these questions are answered, a patent office examiner or judge of a court can weigh the prior art against the claimed invention for determining obviousness.

However, because it is conceivable that even where subtle differences could be novel, the *Graham* decision (and its progeny) set forth additional, secondary factors to assist Examiners and courts in weeding out the inventive from the non-inventive discoveries. These factors include evidence of commercial success; long felt but unsolved need; failure of others to solve the problem; and copying by others.

Because of the absence of a clear line of demarcation between obvious and unobvious and because examiners would often make determinations of obviousness with “hindsight reconstruction,” the United States Court of Appeals for the Federal Circuit (“CAFC”)² created a bright line standard in 1999. This standard is referred to as “teaching, suggestion, or motivation” test (“TSM test”). *Al-Site Corp. v. VSI Int’l, Inc.*, 174 F.3d 1308 (Fed. Cir. 1999). The TSM test states that if “some motivation or suggestion to combine the prior art teachings” can be expressly found in the prior art, the invention is obvious. If not, the claimed invention would be deemed unobvious. This test placed the burden on examiners to “prove” during patent examination that there was some explicit teaching, motivation or suggestion to combine the prior art references. This was not always possible because express language to combine references was rarely within the references. Unhappy with the CAFC’s rigid standard, the Supreme Court accepted an invitation to review it.

¹ To be new, the invention must not be identically disclosed to the public more than one year prior to the effective patent application date. See 35 USC §102. Usefulness requires the invention to carry out a function to provide an end result. See 35 U.S.C. §101.

² The United States Court of Appeals for the Federal Circuit is the sole appellate court chartered to hear appeals of patent cases from Federal District Courts throughout the United States and its territories, and appeals from the United States Patent Office.

The Supreme Court held that the TSM test is far too rigid and violative of the flexible nature of its original obviousness test set forth in 1966. To re-establish flexibility for determining obviousness to combine known elements by a patentee or applicant, the courts and patent examiners must examine (1) interrelated teachings of multiple patents; (2) the effects of demands known by the design community or in the present marketplace; and (3) the background and knowledge by a person having ordinary skill in the art. To facilitate this analysis, the court or patent examiner "need not seek out precise teachings directed to the specific subject matter" but should also take into account "inferences and creative steps that a person of ordinary skill in the art would employ."

Under this revised analysis, neither the courts nor the Patent Office need to seek out explicit teachings to make a rejection based on obviousness of the claimed invention. Consequently, "the combination of familiar elements according to known methods is likely obvious when it does no more than yield predictable results" regardless if applied within or, outside the same technical field. Furthermore, the mere substitution of one element for another known in the field must do more than yield a predictable result. By contrast, "when the prior art teaches away from combining certain known elements, discovery of a successful means to combine them is more likely to be nonobvious."

What has changed then as a result of the KSR decision? The answer is the application of a flexible standard in lieu of a rigid bright line standard. Consequently, if an examiner is not initially convinced that the invention represents an innovation over the prior art, it is an uphill battle to convince them otherwise. This is why a practitioner who can persuasively convey an invention's substantive novelty has been and will be so important to the prosecution of a patent application.

This column is for informational purposes. The statements contained herein are not intended to be comprehensive or academic. The suggestions and recommendations are general in scope. The readership is encouraged to consult with a legal professional for advice on how to handle a particular situation.

Questions and comments may be directed to the authors at: mplager@plagerlaw.com or Jtravis@plagerlaw.com.

INTERNET SIGHTINGS

BY JIM HAWES

This column highlights some of the more notable recent internet newsletters and blogs dealing with IP prosecution issues. For more info go to the site cited. If your favorite site isn't here email Jim at onejehawes@aol.com.

Hal Wegner's newsletter – hwegner@foley.com

- *4/6/07 reports a British attempt to explain the current state of claim construction in the U.S., with a copy attached. See another posting on the same date of the Bass Pro decision's claim construction.
- another posting on 4/6/07 discusses "joint" patent infringement.
- 4/12/07 issue discusses the dissent in the recent Acumed CAFC decision and the delightful time attorneys can have when helping a court with claim construction issues in oral argument. (If you believe this, you haven't been paying attention.)
- in another 4/12/07 email Hal reports that the Acumed split continues an alarming trend. Split CAFC panels on claim constr. issues now occur at about 9 per year, while the pre Phillips rate was about 4 per year, and 0.7 during the Markey era. How can anyone predict claim construction now?

- The 4/13/07 issue focused on Japanese patent litigation: about 90% of litigated Japanese patents loose, and an 80% loss affirmance on appeal.
- The 4/14/07 issue explains that the low Japanese patent enforcement rate was due to the low patentability standards of an earlier era.
 - The 4/16/07 issue lists Hal's top 10 patent cases currently on appeal.
- *The 4/18/07 issue cites the Classen case now before the CAFC concerning patentable subject matter and the scope of section 101.
- The 4/19/07 issue discusses the proposed Patent Reform Act of 2007.
- The 4/22/07 issue discusses why the Patent Reform Act is DOA.
- *The 4/23/07 issue presents the Omeprazole CAFC decision re inherent anticipation, and the inherent disagreement this topic triggers there.
- *The 4/24/07 issue discusses restriction practice, the Haas decisions, and why MPEP §803.02 is wrong.
- *The 4/25/07 issue discusses the Air Measurement case and applicable standards for legal malpractice in patent matters.
- The 4/27/07 issue surveys the committee hearing on the patent reform bill.
- Another 4/27/07 issue cites where the newly proposed continuation and claims announcements now under review can be found on the internet.
- *The 4/30/07 issue discusses the Supreme Court's just issued KSR and Medimmune decisions, and updates the Top Ten list.
- *Obviously from this list I cite almost every posting by Hal. Thus, in the future I plan to only cite the major postings, such as those with a * above.

Patently-O – a blog written by Dennis Crouch – patent@gmail.com

- 4/4/07 blog discusses a claiming strategy Dennis favors.

- 4/5/07 blog considers the Anderson CAFC decision and claim differentiation.
- 4/11/07 blog cites the new continuation rules reported by Charles Van Horn to the DC bar; Charles also reported them to the AIPLA's PTO committee on this date. Expect a public announcement in about August.
- 4/17/07 blog discusses the just released FTC/DOJ joint report – 217 pp. – on the relation between patent rights and antitrust policy – a must read for licensors.
- 4/18/07 blog surveys the just introduced Patent Reform Act of 2007.
- 4/20/07 blog discusses the Intamin CAFC decision and the claim construction mess. How can anyone practice in this confusion?

IP law 360 – a newsletter covering all IP, but focusing mainly on litigation – web address: www.iplaw360.com

- a 4/5/07 discussion of strategies for responding to unsolicited license inquiries in view of recent decisions.
- the 4/12/07 issue has a guest column that discusses the best practices for handling manuscript copyright issues – registration, clearance, etc.

The Invent blog – also from feedblitz@mail.feedblitz.com

- 4/6/07 blog reports their legal job site, and a reduced fee special.

Daily Dose of IP – a blog by Mark Reichel – www.dailydoseofip.blogspot.com –

- an ongoing series mostly summarizing recent notable CAFC decisions.
- The 4/12/07 issue discusses the ongoing trademark dispute between Martha Stewart and Katonah village.
- On 4/13/07 the dose concerned the new Utah “electronic” trademark law creating a registry to prevent competitors from capturing search engine queries of a rival's registered electronic mark.

OTHER –

- on 4/12/07 careerbuilder.com reported ten cringe-worthy email blunders.

- if you are thinking of using a blog to help develop your practice, read the 4/13/07 post@technolawyer.com.

RECENT IP CASES

BY IRFAN LATEEF
KNOBBE, MARTENS, OLSON & BEAR

In *Central Admixture Pharmacy Services, Inc., et al. v. Advanced Cardiac Solutions, P.C., et al.*, Case No. 06-1307, the Federal Circuit reversed the district court's finding that a certificate of correction applied to the patent-in-suit, thus vacating the district court's summary judgment of infringement. The Court also affirmed the district court's judgments that the patent was not invalid, the plaintiff was not liable for false marking or false advertisement, ACS could not file an amended answer raising patent misuse or alter its pleadings with respect to inequitable conduct, and dismissing ACS's inequitable conduct defense.

The patent at issue claims a chemical solution used during heart surgery. CAPS applied, pursuant to 35 U.S.C. § 255, for a certificate of correction to replace all instances of the word "osmolarity" in the patent with the word "osmolality." The Court stated that invalidating a certificate of correction for impermissible broadening requires proof of two elements: (1) the corrected claims are broader than the original claims; and (2) the presence of the clerical or typographical error, or how to correct that error, is not clearly evident to one of skill in the art. Because a certificate of correction is part of a duly issued patent, the Court held that the party seeking to invalidate it must meet "the clear and convincing standard of persuasion." Here, the Court found that the corrected claims using the term "osmolality" are broader than the claims using the term "osmolarity." Moreover, the Court found the word "osmolarity" is spelled correctly and reads logically in the context of the original claim and patent. Accordingly, the certificate to correct

that term is not valid and the patent therefore continues to read as it did prior to the issuance of the certificate. Because the district court's summary judgments of infringement and willfulness were both explicitly contingent on the validity of the certificate of correction, the Court vacated those judgments and remanded the infringement inquiry under the original "osmolarity" version of the claims.

In *Acumed LLC v. Stryker Corporation, et al.*, Case No. 06-1260, the Federal Circuit affirmed the district court's judgment, after a jury trial, of infringement and willfulness, but vacated the permanent injunction and remanded for reconsideration in light of the Supreme Court's decision in *eBay Inc. v. MercExchange, LLC*, 126 S. Ct. 1837 (2006).

The patent at issue was directed to an orthopedic nail for the treatment of fractures in the humerus (the upper arm bone which ends in the shoulder ball at top and the elbow joint at the bottom). During claim construction, the Court refused Stryker's request to limit the term "curved shank" to cover the preferred embodiment only. The Court noted that claim differentiation supported a broader construction because the presence of a dependent claim that added a particular limitation raised a presumption that the limitation in question was not found in the independent claim.

Stryker also argued that the district court's use of the phrase "without sharp corners or sharp angles" in its construction renders the construction insufficiently definite, because the court did not specify precisely how "sharp" is too sharp. The Court held that a sound claim construction "need not always purge every shred of ambiguity." The Court noted that the resolution of some line-drawing problems, like this one, is properly left to the trier of fact.

The Court also refused to construe the term "transverse" narrowly to mean perpendicular even though every description of

the transverse holes in the patent contemplates a perpendicular hole.

With respect to willfulness, the Court held that substantial evidence supports the finding because, despite a favorable November 2003 opinion letter, Acumed provided evidence of an initial unfavorable opinion, continued marketing by Stryker in light of that unfavorable opinion and evidence that Stryker “confiscated” instructions from a hospital on the use of the Acumed nail.

Judge Moore dissented with respect to the construction of “transverse.” She was troubled by the district court’s reliance on a common English language dictionary, published ten years after the patent issued to construe the term “transverse.” She also argued that the term should be limited to the preferred embodiment.

In *Bass Pro Trademarks v. Cabella’s*, Case No. 06-1276, the Federal Circuit vacated the district court’s contempt order and accompanying sanctions for violation of a settlement agreement and Consent Judgment from a previous patent infringement suit. The district court had based the contempt order on Cabella’s new redesigned device. The Court reversed the district court’s claim construction and held that Cabella’s redesigned device could not reasonably be found to literally infringe the subject patent.

In *Intamin, LTD. v. Magnetar Technologies, Corp.*, Case No. 05-1546, the Federal Circuit vacated and remanded the district court’s summary judgment of non-infringement of a patent on magnetic brake systems used on amusement rides. The claim at issue required “an intermediary disposed between adjacent pairs of ... magnetic elements.” Applying claim differentiation, the Court held that the term “intermediary” could itself be another magnet and remanded to the district court to reevaluate infringement under the revised claim construction. The Court also

refused to find that the district court abused its discretion in refusing to award sanctions under Rule 11 for failure to determine the internal structure of the accused device during its pre-filing investigation.

In *In re Omeprazole Patent Litigation*, Case No. 04-1621, the Federal Circuit affirmed the district court’s judgment that the ’281 patent was infringed but invalid, and reversed the judgment that the inequitable conduct issues were moot. The suit involved claims of patent infringement against several pharmaceutical companies that were seeking permission from the FDA to market generic versions of Prilosec®.

The ’281 patent claimed “a water soluble salt.” A defendant argued that the district court erred in finding that its product infringed because it included a layer composed of “almost 50% talc” which is not water soluble, but only disintegrates in water. The Court held that the district court correctly discerned that this language permits the inclusion of talc.

With respect to invalidity, the Court held that some claims were anticipated through inherency even though the artisans of ordinary skill would not have recognized the inherent characteristics or functioning of the prior art reference.

The Court held that the inequitable conduct claim was not technically moot, because it would have rendered the entire ’281 patent unenforceable, rather than just the claims that were held invalid. Nonetheless, the Court found the record contained no support for the argument that the ’281 patent inventors’ conduct before the PTO constituted inequitable conduct.

Judge Newman dissented with respect to the invalidity holding. Judge Newman argued that inherent anticipation requires clear evidence that the missing descriptive matter is necessarily present or described in the

reference, and that it would be so recognized by persons of ordinary skill.

In *Pods, Inc. v. Porta Stor, Inc., et al.*, Case No. 06-1504, the Federal Circuit reversed the district court's judgment of literal infringement as based on an erroneous claim construction and of infringement under the doctrine of equivalents as barred by prosecution history estoppel. PODS is the assignee of a patent which claims an apparatus and method for lifting a storage container from the ground onto a transport vehicle or vice versa.

The claim construction issue was whether the phrases "carrier frame" and "around" in Claim 29 should have the same meaning as they undisputedly have in Claim 1, despite the fact that Claim 29 omits additional descriptive language found in Claim 1. In finding that they should carry the same meaning, the Court relied on the "presumption that the same terms appearing in different portions of the claims should be given the same meaning unless it is clear from the specification and prosecution history that the terms have different meanings at different portions of the claims." The Court then determined that there could be no literal infringement under this claim construction.

With respect to infringement under the doctrine of equivalents, the Court found that statements made during prosecution to distinguish a prior art patent barred assertion of infringement by equivalents.

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

NEWSLETTER VIA EMAIL ONLY



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 Tom Dao at tom.dao@cph.com.

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.

OCPLA WEBSITE

Check the OCPLA website at www.ocpla.org for current and archived copies of the OCPLA newsletters, membership information, current events of interest to members, and online reservations for OCPLA events. Let us have your comments. We will be making changes and improvements as time passes, and your

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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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EXP 03/08

OFFICE ADMINISTRATOR SOUGHT

Part time office administrator sought for law firm in Irvine Spectrum. About 4 to 8 hours per week. Primary duties include oversight of billing functions, bookkeeping functions, insurance, equipment, and personnel. Should be familiar with Timeslips and Quickbooks. Duties are to be carried out in-house, not remotely, two days per week. Send cover letter and resume to mshimokaji@shimokaji.com

EXP 05/07

**Patent Researcher, Part-Time
Canon USA, Inc**

Responsibilities: Conduct patent searches in technology areas specified by the Intellectual Property Division; create a patent map based on the results of the conducted patent searches and follow through on the process. Other duties include updating patent searches and administrative support for the IP team.

Qualifications: The ideal candidate will have an Associate degree or junior level education with a concentration of study in Engineering. Must be detail oriented, have excellent communication and computer skills (MS Word, Excel, Power Point and Access). Previous IP experience a plus! 20 hours a week, work hours are flexible.

To be considered for this position, please visit www.usa.canon.com and apply to Job Code 06-300. This position pays approximately \$16 - \$17/hour.

EXP 06/07

Orange County Patent Law Association

Date: Wednesday, May 23, 2007

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: Generating revenue from patent portfolios through sales, licenses and litigation

Speakers: Francis G. Rushford of The Eclipse Law Group LLP

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

Reservations: Please make reservations by using our online system at www.ocpla.org or by filling out the form below and mailing it with a check to Stacey Halpern at her office address given below. If time is short, please also email Stacey at ocpla@kmob.com or call in your reservation to her at [949-721-7654](tel:949-721-7654).

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 23, 2007 for the following person(s):

This form and check should be mailed to:

Stacey R. Halpern
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2040 Main Street, 14th Floor
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2007 OCPLA MEMBERSHIP APPLICATION/RENEWAL FORM

This is an application for (please check one):

- Membership Renewal**
 New Membership

Member / Applicant Information:

Name: _____
 Firm/Employer: _____
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 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. _____
Are you a member of the bar of another state or the District of Columbia?	___	___	Jurisdiction/Bar No. _____
Are you registered to practice before the U.S.P.T.O.?	___	___	Reg. No. _____
Are you a student?	___	___	School: _____

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 2007 (please circle one):

Regular Membership (attorneys, agents):	\$35.00	(New Member After 08/01/07) \$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

2007 OCPLA EVENTS SCHEDULE

Date	Location	Speaker/Event	Topic
May 23, 2007	Wyndham Garden Hotel	Francis G. Rushford of The Eclipse Law Group LLP	Generating revenue from patent portfolios through sales, licenses and litigation
June 8-10	Ritz Carlton Hotel, Dana Point, CA	2007 SPRING SEMINAR	See attached seminar flyer
July 25, 2007	Wyndham Garden Hotel	TBD	TBD
August 22, 2007	Wyndham Garden Hotel	TBD	TBD
Sept. 26, 2007	Wyndham Garden Hotel	TBD	TBD