



# OCPLA NEWSLETTER

Orange County Patent Law Association

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

Vol. 10, No. 12

December 2004

## DECEMBER HOLIDAY PARTY

This year's annual OCPLA holiday party is being hosted at Club 33 at Disneyland on **December 15, 2004**. Although we have received many reservations, some spaces still remain for any of you who may be interested in attending and who did not RSVP by the initial deadline. A reservation form is included with this newsletter, and if you wish to attend and have not RSVP'd, please send your reservation form and payment to Greg Hollrigel **by December 8, 2004**. If you have any questions regarding space availability, please email Greg at [gsh@patlawyers.com](mailto:gsh@patlawyers.com).

The Party will begin at 6:00 p.m. with hors d'oeuvres and a cash bar. At 7:00 p.m. dinner will be served. We look forward to celebrating the 2004 holiday season with you and a guest at Club 33.

## JANUARY BOARD MEETING

On January 5, 2005, 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, Matthew Weil, to have their item placed on the agenda, and to verify the time and location of the meeting.

## INSIDE THIS ISSUE . . .

ITEMS	PAGE
PTO Update .....	2
Minutae .....	2
Recent Interesting IP Cases.....	3
Services .....	7
Holiday Party Reservation Form.....	9
2005 Membership Renewal Form.....	10

## MARK YOUR CALENDARS . . .

- December 15, 2004** OCPLA Annual Holiday Party (Club 33)
- January 26, 2005** Valuing Intellectual Property and IP Damages
- February 23, 2005** TBA
- March 18-20, 2005** OCPLA/SDIPLA Annual Spring Seminar

## 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 Greg Hollrigel at [gsh@patlawyers.com](mailto:gsh@patlawyers.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.

### 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.

### PTO UPDATE

BY GREG S. HOLLRIGEL  
STOUT, UXA, BUYAN & MULLINS,  
LLP  
[gsh@patlawyers.com](mailto:gsh@patlawyers.com)



### New USPTO Fees

In the near future, perhaps this week, it is likely that new fees for patent applications and trademark applications will come into effect.

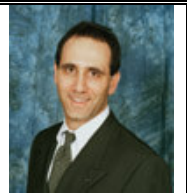
The changes to patent application fees include (i) revised patent fees; (ii) a separate fee for filing a patent, searching a patent, and examining a patent (all of which are due on filing); and (iii) an additional fee for any patent application whose specification and drawings exceed 100 sheets of paper ("application size" fee).

These fees will become effective when the Consolidated Appropriations Act, 2005 is signed by the president. We suggest you monitor the USPTO website regularly to keep apprised of these fee changes.

Additional information can be found at the following website:  
<http://www.uspto.gov/web/patents/hr4818/advancenotice.htm>

### MINUTIAE

BY NEAL M. COHEN  
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### Reduced Search Fees for PCT Applications

If a PCT application claims priority to a U.S. application, is the applicant entitled to a reduced international search fee? Most practitioners would say "yes". But the answer is "it depends" (of course). PCT-SAFE / EASY users may recognize a box that can be checked on one of the screens indicating that a prior search has been performed (or something to that effect), which then results in a reduced search fee. But what if the U.S. search has not yet actually been performed? No worries. That language in PCT-SAFE is just worded that way to comply with the language of the Treaty, but as long as a prior U.S. search has been requested, the applicant is entitled to the reduced search fee. All you have to do is supply the serial number of the U.S. application.

Now that brings us to an interesting point. Specifically, what if the serial number is not yet known? The answer can be found in 37 C.F.R. §1.445(a)(1)(i) (amended effective January 1, 2004), which provides for the reduced fee "If a corresponding prior United States National application filed under 35 U.S.C. 111(a) with the filing fee under § 1.16(a) has been filed and the corresponding United States National application is identified by application number, if known, or if the application number is not known by the filing date, title, and name of applicant (and preferably the application docket number), in the international application

or accompanying papers at the time of filing the international application.”

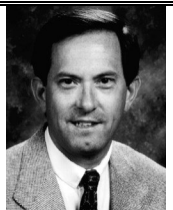
Note that the U.S. application must be prior, and that the U.S. filing fee must have been paid. Assuming that is the case, now that brings us to another interesting point. Since PCT-SAFE does not provide any reasonable means for entering in the required information if the serial number is unknown, the information cannot be included “in the international application”. So what is one to do? The answer, according to Rule 445(a)(1)(i), is to simply file an “accompanying paper” with the PCT-SAFE documents, providing the required information of the prior U.S. application, and indicate that the applicant requests a reduced search fee pursuant to Rule 445(a)(1)(i). The “accompanying paper” can even be the transmittal letter.

If a practitioner attempts to obtain the reduced fee through PCT-SAFE, and therefore is required to enter a bogus serial number for the prior U.S. application, that may be worth mentioning in the paper as well. However, the other option is not to request the reduced search fee through PCT-SAFE at all, but instead use only the “accompanying paper” option. If the full fee is charged, the applicant can always seek a refund (see Rule 446).

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  
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### 1. FEDERAL LAW PREEMPTS STATE-LAW TORT CLAIMS RELATING TO PATENT ENFORCEMENT UNLESS THE PATENTEE'S INFRINGEMENT CLAIM IS OBJECTIVELY BASELESS

***Globetrotter Software, Inc. v. Elan Computer Group, Inc.***, 362 F.3d 1367, 70 U.S.P.Q.2d (BNA) 1161 (Fed. Cir. March 23, 2004)

**Issue:** When a patentee's assertions of infringement are made in good faith, are state-law tort claims based on such assertions preempted? **Answer:** Yes.

**Facts:** Globetrotter Software, Inc. ("Globetrotter") owns three patents directed to a license management system, which enables a software purchaser to use a particular application on multiple network computers while protecting the purchaser against copyright infringement. While negotiating to purchase outstanding shares of Elan Computer Group, Inc. ("Elan"), Rainbow Technologies, Inc. ("Rainbow") received an e-mail from Globetrotter, suggesting that Rainbow investigate whether the Elan products infringe Globetrotter's patents. Although Elan was later acquired by Rainbow, its former majority shareholder, Ken Greer, filed state-law claims against Globetrotter alleging tortious interference with prospective economic advantage and unfair competition. More specifically, Greer alleged that Globetrotter's e-mail to Rainbow was sent in bad faith, which resulted in Rainbow paying a lower acquisition price.

The district court granted summary judgment to Globetrotter on the state-law counterclaims, concluding that Globetrotter's patent infringement assertions were not objectively baseless. Greer appealed.

**Argument:** Greer argues that Globetrotter acted in bad faith because the timing of their e-mail to Rainbow was designed to interfere with Rainbow's pending purchase. Greer further argues that Globetrotter knew its patents to be invalid at the time of assertion.

**Reasoning:** Federal patent law preempts state-law tort liability for a patentee's good faith conduct in asserting patent infringement and warning about potential litigation. State-law claims are not preempted by federal patent law only to the extent that those claims are based on a showing that the patentee's assertions were made in "bad faith." A finding that the

patentee's assertions were made in bad faith requires a finding that the assertions were objectively baseless, e.g., because the patents were obviously invalid or plainly not infringed. Greer failed to prove that Globetrotter's claim of infringement was objectively baseless.

**Conclusion:** Because Greer failed to prove that Globetrotter's assertions of patent infringement were objectively baseless, state-law tort claims relating to Globetrotter's communications regarding potential patent litigation are preempted by federal patent law. Therefore, the district court's grant of summary judgment on such state-law tort claims is affirmed.

## 2. LICENSEE IN GOOD STANDING CANNOT FILE DECLARATORY JUDGMENT TO CHALLENGE PATENT

*Gen-Probe, Inc. v. Vysis, Inc.*, 359 F.3d 1376, 70 U.S.P.Q.2d (BNA) 1087 (Fed. Cir. March 5, 2004)

**Issue:** Can a licensee that continues to pay royalties file for declaratory judgment under the Declaratory Judgment Act? **Answer:** No.

**Facts:** Vysis owns U.S. Patent No. 5,750,338 ("the '338 patent"), which claims methods and kits for use in nucleic acid diagnostic assays that test blood for DNA found in the HIV or hepatitis C viruses. Vysis informed Gen-Probe that it may be infringing the '338 patent. To avoid litigation, Gen-Probe took a nonexclusive license to the '338 patent on June 22, 1999. On December 22, 1999, Gen-Probe filed a declaratory judgment lawsuit, alleging that its tests do not infringe the '338 patent and that the '338 patent is invalid. Gen-Probe, however, continued to pay the royalties due under the license. Vysis filed a motion to dismiss for lack of subject matter jurisdiction since Gen-Probe was a licensee in good standing and could not have a reasonable apprehension of suit. The district court denied the motion to dismiss, and the jury decided in favor of Gen-Probe on issues of invalidity and noninfringement. Vysis appealed.

**Argument:** Gen-Probe argued that the Declaratory Judgment Act authorizes a suit

where the parties dispute the rights and obligations under the license and pay royalties only under protest.

**Reasoning:** The Declaratory Judgment Act only supports jurisdiction in the event of an "actual controversy." The court must evaluate the totality of the circumstances in light of precedent to discern the presence or absence of an actual, and thus triable, controversy within the meaning of the Declaratory Judgment Act. Gen-Probe did not cease paying royalties or otherwise materially breach its license agreement with Vysis, and Vysis did not file a breach of contract action. Gen-Probe was a licensee in good standing that continued paying royalties throughout the lawsuit and expressly acknowledged its desire to maintain the status quo of remaining a faithful licensee.

**Conclusion:** Under these circumstances, Gen-Probe had no reasonable apprehension of being sued by Vysis. Thus, there was no actual controversy to support jurisdiction under the Declaratory Judgment Act. Because the district court and the Federal Circuit lack jurisdiction to hear the merits of the case, the Federal Circuit vacated the district court's judgment and remanded the case to the district court with instructions to dismiss.

## 3. MEASUREMENTS FROM SPECULATIVE MODEL BASED ON PRIOR ART DRAWINGS NOT USEABLE FOR CHALLENGING VALIDITY

*Nystrom v. TREX Co.*, 374 F.3d 1105, 71 U.S.P.Q.2d (BNA) 1241 (Fed. Cir. June 28, 2004)

**Issue:** Can measurements taken from a model prepared from prior art patent drawings form the basis for challenging validity of patent claims? **Answer:** No.

**Fact:** Nystrom is the inventor and owner of U.S. Patent No. 5,474,831 ("the '831 patent") which is directed to construction material for use in flooring surfaces. TREX is a manufacturer of exterior decking planks. Nystrom filed suit alleging TREX infringed the '831 patent. TREX counterclaimed for, among other things, invalidity of the '831 patent. To

support its invalidity claim, a TREX employee prepared a software model of boards shown in a prior art patent, and then performed computations on the modeled boards to come up with the allegedly invalidating curvature-to-width ratio.

The district court determined that the measurements taken from the model anticipated the claims, and therefore granted summary judgment of invalidity. The district court considered the correct inquiry to be whether a person of ordinary skill in the art would use measurements taken from the prior art reference to ascertain the degree of curvature.

**Argument:** Nystrom argues that the district court erred in its invalidity determination because it was not based on the disclosure of the prior art itself. Nystrom contends that the district court erred in relying on extrinsic evidence in invalidating the '831 patent.

**Reasoning:** CAFC precedent in *Hockerson-Halberstadt, Inc. v. Avia Group Int'l, Inc.*, 222 F.3d 951, 55 U.S.P.Q.2d (BNA) 1487 (Fed. Cir. 2000), states that "patent drawings do not define the precise proportions of the elements and may not be relied on to show particular sizes if the specification is completely silent on the issue." Under this principle, the speculative modeling premised on unstated assumptions in the prior art patent drawings cannot be the basis for challenging the validity of claims reciting specific dimensions not disclosed directly in such prior art.

**Conclusion:** The CAFC reversed the district court's grant of summary judgment of invalidity which was based on the TREX model made from drawings in the prior art patent.

## 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.

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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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 4 Venture, Suite 300  
 Irvine, CA 92618  
 email: gsh@patlawyers.com  
 Tel: 949-450-1750  
 Fax: 949-450-1764

### SERVICES, ANNOUNCEMENTS, WANT ADS

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#### IP LEGAL SECRETARY FOR COSTA MESA LAW FIRM:

Paul, Hastings, Janofsky & Walker LLP seeks an IP legal secretary with a minimum of 5 years patent prosecution and litigation experience. Must have excellent written and verbal communication skills. Proficiency in Microsoft Word and general knowledge of PowerPoint and Excel. Please send resumes to [marilynradley@paulhastings.com](mailto:marilynradley@paulhastings.com) or direct fax to 714 668-6570.

**PATENT SECRETARY**

Klein, O'Neill & Singh LLP of Irvine, California, a growing and collegial intellectual property law firm seeks a patent secretary with at least one year of patent/trademark prosecution experience. Must be familiar with USPTO and PCT procedures. Must be proficient in MS Word, Outlook, PowerPoint and Excel. Salary based on experience. Please apply in confidence via fax at 949-955-1921 or via email: [acalumpang@koslaw.com](mailto:acalumpang@koslaw.com).

**Office Available**

Sublease 12' by 14' fully furnished window office available in patent law suite. Join a patent attorney, patent agent and a patent drafter as 4th party. Phone, fax, DSL, high speed copier/printer, computer work station, postage meter. JW airport area, easy parking, close to 405, 55 and 73 freeways. Call: 714/668-1900

Shimokaji & Associates is looking for full-time litigation and patent prosecution associates. Please email Jill Swedo at [swedo@shimokaji.com](mailto:swedo@shimokaji.com), if interested.

**Litigation Associate**

Shimokaji & Associates is looking for a full-time associate who can handle both litigation and patent prosecution. Duties include managing infringement litigation from inception through trial, including oversight of junior associates. Must have first or second chair trial experience. IP experience required. Technical background is preferably EE, physics, or mechanical.

**Patent Associate**

Shimokaji & Associates is looking for a full-time associate for patent prosecution. 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. Please indicate the # of patents written.

# 2004 OCPLA Holiday Party

Wednesday, December 15, 2004

Club 33, 33 Royal Street, New Orleans Square, Disneyland

The OCPLA is pleased to invite you and your guest to the 2004 OCPLA Holiday Party. The party will be held on Wednesday, December 15, 2004 at Club 33, Disneyland. On this day of traditional OCPLA holiday frivolity, your holiday party ticket entitles you to dinner and free entry into Disneyland and California Adventure Park. We encourage all to spend the afternoon enjoying the amusement park. At 6:00 p.m., kindly make your way to the New Orleans Square for dinner and the OCPLA "Fez" - tivities. Enter through the door marked "33".

6:00 p.m. –7:00 p.m. No Host Bar & Hors D'oeuvres – *Teriyaki Skewers with Pineapple Jus; Saga Blue on Toasted Muffin with Arugula; and Olive Tepanade Crustini with Dill Cream Cheese*

7:00 p.m. - ? Dinner - *The Club 33 Mizuna House Salad. Choice of Chateaubriand & Contessa Shrimp; Honey Glazed Chicken Breast; or Truffled Risotto Cake. Exotic Pabana Mousse, and complimentary Coffee/Tea and Soft Drinks. Shortly following dinner the OCPLA "Fez" – tivities will begin.*

Cost: \$50.00 per person, OCPLA members and guests.

RSVP: Before December 8, 2004. (Limited to first 100 reservations.)

## Reservation Form

NAME: \_\_\_\_\_

GUEST: \_\_\_\_\_

FIRM/CO: \_\_\_\_\_ TELEPHONE NUMBER: \_\_\_\_\_

ADDRESS: \_\_\_\_\_

Street

City

State

Zip Code

### CHOICE OF ENTRÉE:

Self

Guest



**Chateaubriand & Contessa Shrimp**



**Honey Glazed Chicken Breast**



**Truffled Risotto Cake**

### PARK ENTRY GUEST LIST:

Self

Guest



**Amusement Park Day Entry and OCPLA Holiday Party at Club 33**



**Evening Entry for OCPLA Holiday Party at Club 33 Only**

Complete and return with your check payable to OCPLA to Greg S. Hollrigel, Stout, Uxa, Buyan & Mullins, LLP, 4 Venture, Suite 300, Irvine, CA 92618 **by December 8, 2004** - Please e-mail any questions to [gsh@patlawyers.com](mailto:gsh@patlawyers.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:

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

Firm/Employer: \_\_\_\_\_

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

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

Telephone No.: \_\_\_\_\_ Facsimile No.: \_\_\_\_\_

**Professional Information:**

Are you a member of the California bar?      Yes      No      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 2005 (please circle one):**

Regular Membership (attorneys, agents):	\$35.00	<b>(New Member After 07/01/05)</b> \$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: \_\_\_\_\_

## 2004/2005 OCPLA EVENTS SCHEDULE

Date	Location	Speaker/Event	Topic
December 15, 2004	Club 33 at Disneyland		OCPLA Annual Holiday Party
January 26, 2005	Wyndham Garden Hotel	<b>Mimi Justice and Jay Jesclard</b> Deloitte & Touche Financial Advisory Services	Valuing Intellectual Property and IP Damages
February 23, 2005	Wyndham Garden Hotel	TBA	TBA
March 18-20, 2005	Balboa Bay Club	TBA	OCPLA/SDIPLA Annual Spring Seminar



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