



2ND ANNUAL SUMMIT ON INTELLECTUAL PROPERTY
FOR WIRELESS TECH & NEW MEDIA

Patent Reform & Changes in Case Law Impacting the Wireless & New Media Industries

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What We Will Cover

- The Courts
 - *Quanta* – Supreme Court
 - *Sandisk v. STMicro* – effect on patent assertions
 - *Seagate* – how the district courts are applying the case
 - *Bilski, Nuijten* – including Fed. Cir. arguments
- Congress
 - Patent Reform Update



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Quanta Computer v. LG Electronics

- Patent Exhaustion – once a patented widget has been sold, purchaser is free to use or sell without further claim from patentee
- Rooted in Supreme Court precedent dating back to 1853 (*Bluemer v. McQuewan*)

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Quanta v. LG Electronics

- LG licensed Intel under three patents to sell microprocessors
- Under separate agreement, Intel agreed to give written notice to its customers that its license does not extend to licensees who combine Intel and non-Intel parts
- Intel sold to Quanta, a computer maker who combined Intel microprocessors with non-Intel components

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Quanta v. LG Electronics

- District Court: held patent exhaustion applied because components had no reasonable noninfringing use, but subsequently limited its ruling by holding exhaustion does not apply to method claims
- Federal Circuit: agreed patent exhaustion does not apply to method claims; in the alternative, it concluded exhaustion did not apply because LG did not license Intel

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Quanta v. LG Electronics

- Supreme Court: Intel's authorized sale of chip components to Quanta exhausted LG's patent rights

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Quanta v. LG Electronics

■ Holdings:

- method claims can be subject to exhaustion
- products that do not fully practice the invention still trigger exhaustion when
 1. the incomplete product has no reasonable and intended use other than practicing the patents, and
 2. the incomplete product “substantially embodies” the patent or “all but completely practice[s] the patent”
- exhaustion only defeats a patent claim, not necessarily other rights under contract

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Quanta v. LG Electronics

■ Lesson for licensors: narrow the license grant

- Sup. Ct.:
 - Intel’s license “broadly permits Intel to ‘make, use, [or] sell’”
 - Only requirements (in the second agreement) was that licensee provide notice to its customers that they are not licensed
 - “No conditions limited Intel’s authority to sell products substantially embodying the patents.”

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Quanta v. LG Electronics

- Clues in opinion
 - “Intel’s authority to sell its products embodying the LGE Patents was not conditioned on the notice or on Quanta’s decision to abide by LGE’s directions in that notice”
 - condition the license on the notice?
 - condition the license to Intel on whether Intel’s customer abide by the restriction?” LG’s license to Intel could have limited Intel’s ability to sell to computer makers who combined with non-Intel parts

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Quanta v. LG Electronics

- Clues in opinion
 - use restrictions?
 - “for the sole purpose” restrictions?
 - “class of customer” restrictions?
- What will the licensee accept?

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Sandisk v. STMicro

- When does a “case or controversy” arise in the context of patent assertions?
 - Prior to *Sandisk*, test required: “reasonable apprehension of suit”
 - threatening suit
 - but not merely offering a license

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Sandisk v. STMicro

- Notice letters – could put a party on notice of patent without triggering DJ jurisdiction
- Patentees could assert patents without triggering DJ jurisdiction, provided they were careful

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Sandisk v. STMicro

- MedImmune decision criticized the “reasonable apprehension of suit” test
 - Concluded it conflicts with its prior precedent

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Sandisk v. STMicro

- *Sandisk* court
 - “We hold only that where a patentee asserts rights under a patent based on certain identified ongoing or planned activity of another party, and **where that party contends that it has the right to engage in the accused activity without license**, an Article III case or controversy will arise and the party need not risk a suit for infringement by engaging in the identified activity before seeking a declaration of its legal rights.”

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Sandisk v. STMicro

- Concurrence called it “a sweeping change in our law regarding declaratory judgment jurisdiction” and “allowing declaratory judgment actions in virtually any case in which the recipient of an invitation to take a patent license elects to dispute the need for a license and then to sue the patentee.”

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Sandisk v. STMicro

- STMicro’s promise not to sue did not help it avoid DJ jurisdiction
- Parties could seek “agreement to the terms of a suitable confidentiality agreement”

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Sandisk Impact on Wireless Industry

- Common to engage in license negotiations before suit
- As patentee, know that license discussions may be cut short since licensee can choose to initiate litigation

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In re Seagate

- Willful infringement
- Changed the standard of “due care” to two-part test:
 1. “the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent”
 - state of mind is not relevant
 2. “this objectively-defined risk (determined by the record developed in the infringement proceeding) was either, known or so obvious that it should have been known to the accused infringer”

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In re Seagate

- “Because we abandon the affirmative duty of due care, we also reemphasize that there is no affirmative obligation to obtain opinion of counsel.”

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In re Seagate

- “It would be an understatement to say that the Federal Circuit rewrote decades of case law interpreting the requirements for demonstrating willful infringement in a patent case.” *Broadcom Corp. v. Qualcomm Inc.*, (C.D. Cal, Nov. 21, 2007) (Judge Selna)

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District Court Decisions Applying Seagate – *Reviewed Nine of These Decisions*

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Focus on the Closeness of the Infringement and Validity Questions

- *Lucent Technologies, Inc. v. Multimedia Patent Trust* (C.D. Cal., October 30, 2007)
 - “an objectively high likelihood of infringement may require a risk substantially greater than that associated with a ***merely careless reading of the patent.***”
 - “Pre-Seagate decisions on willfulness also considered contentions of invalidity and unenforceability, though in a more subjective light than now required by the first prong of the Seagate inquiry.”

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Focus on the Closeness of the Infringement and Validity Questions

- “While Lansa was ultimately unsuccessful in defending against infringement or proving invalidity with regard to the '075 Patent, ***its arguments in these areas were substantial, reasonable, and far from the sort of easily-dismissed claims*** that an objectively reckless infringer would be forced to rely upon.”
ResQNet v. Lansa, 533 F.Supp. 2d 397 (SDNY, Feb. 1, 2008)

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Focus on the Closeness of the Infringement and Validity Questions

- *Franklin Electric Co., Inc. v. Dover Corp.*, (W.D. Wis., Nov. 15, 2007).
 - “Defendant’s failure to seek advice of counsel, ...efforts to obtain a license,...customer demand, ...and letters from the patentee accusing defendant of infringement ***goes to the second component of the Seagate test – what defendant knows or should have known with respect to the likelihood of infringement.***”

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State of Mind Still Relevant to the Second Inquiry

- “[The patent] issued almost two years before Ivax began selling its Metformin ER product. ***A reasonable party would therefore have had ample time to investigate and discover the relevant patent.***” *Depomed, Inc. v. Ivax Corp.* (N.D. Cal., Dec. 12, 2007) (s.j. motion for no willfulness denied)

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Totality of the Circumstances Still Used

- “We agree with plaintiff that the court's decision in *Seagate* did not alter the requirement that the totality of the circumstances must be taken into account when determining whether infringement was willful.” *Trading Technologies Int'l v. eSPEED Inc.* (N.D. Ill, Jan. 3, 2008);
- Cf. *Depomed, Inc. v. Ivax Corp.* (N.D. Cal., Dec. 12, 2007) (finding it “unsettled”)

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Totality of the Circumstances Still Used

- *Cohesive Technologies, Inc. v. Waters Corp.*, (D. Mass., Aug. 31, 2007)
Court found:
 - 1) a bona fide disagreement,
 - 2) obtained an opinion of counsel in good faith,
 - 3) no copying of a competitor's product,
 - 4) defendant engaged in sufficient due diligence

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Totality of the Circumstances Still Used

- “Given the *attempt to design around* the "essentially one piece" requirement in the '889 *patent*, the court finds that Berg did not act with "an objectively high likelihood that its actions constituted infringement of a valid patent.” *Rhino Associates, L.P. v. Berg Manufacturing and Sales Corp.* (M.D. Pa., Nov. 14, 2007)

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Opinion of Counsel Must Still Be Thorough and Well-Reasoned

- *Ball Aerosol v. Limited Brands, Inc.* (N.D. Ill., Mar. 27, 2008) opinion letters were insufficient – “Such letters amounted, in effect, to mere legal statements that no infringement could occur without a finding of infringement.”
 - Defendant told court it stopped infringing, but continued to infringe (post-litigation conduct considered in willfulness determination)

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Seagate Impact on Wireless Industry

- Industry has a flood of overlapping patents
- Patent clearance or “freedom to operate” activity is costly
- *Seagate* did not help much with the “knowledge” prong – if you know or should have known of a patent, expected to not be objectively reckless
- *Seagate* did help with the issue of how strong your position needs to be – not objectively reckless, careless, etc.

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In re Bilski: Universe of Patent Eligible Subject Matter

- Subject Matter Eligibility: Main Issue
 - What is the proper standard in determining whether a process is patent-eligible subject matter under Section 101?
 - Need physical transformation of an article or be tied to a machine to be patent-eligible subject matter?
 - Overrule or modify *State Street Bank* and/or *AT&T v. Excel Comm.*?

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In re Bilski: Universe of Patent Eligible Subject Matter

- Subject Matter Eligibility: Main Issue
 - What is the proper standard in determining whether a process is patent-eligible subject matter under Section 101?
 - Whether the claimed subject matter is not patent-eligible because it constitutes an abstract idea or mental process. When does a claim that contains both mental and physical steps create patent-eligible subject matter?

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In re Bilski: Universe of Patent Eligible Subject Matter

- Bilski's claimed method at issue: A method practiced by a commodity provider for managing (i.e., hedging) the consumption risks associated with a commodity sold at a fixed price – gather particular information and enter into various contracts

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In re Nuijten and *In re Comisky*

- Rehearing en banc denied in *In re Nuijten*, No. 2006-1371 (Fed. Cir. Feb. 11, 2008), where Federal Circuit panel had upheld a rejection on subject matter grounds of claims directed to a signal that has been encoded in a particular manner.
- In *Comisky*, Federal Circuit panel upheld rejection of claims directed to method and system for mandatory arbitration involving legal documents, such as contracts.

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Overrule *State Street Bank* Standard?

- Dissenting Justices in Supreme Court decision criticized “useful, concrete and tangible” result test of *State Street Bank Laboratory Corp. of America Holdings v. Metabolite Laboratories, Inc.*, 126 S. Ct. 2921, 2928 (2006) (Breyer, Souter, Stevens dissenting) (“That case does say that a process is patentable if it produces a “useful, concrete, and tangible result.” But this Court has never made such a statement and, if taken literally, the statement would cover instances where this Court has held the contrary.)

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Observations From *Bilski* Oral Argument

- Areas seemingly undisputed for “process”
 - Exceptions to patentable subject matter from the Supreme Court (abstract idea, law of nature, and natural phenomenon)
 - Physical transformations (e.g., chemical reactions)
- What is the meaning of the proposed tests?
 - What is a transformation?
 - What is tied to machine?
 - What does useful, concrete and tangible mean?

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Observations From *Bilski* Oral Argument

- Is transformation *required* under *Diehr*:
“Transformation and reduction of an article ‘to a different state or thing’ is the clue to the patentability of a process claim that does not include particular machines.”
- What does “transformation” mean and what kinds of transformations qualify?
 - Physical transformation is acceptable
 - Data transformation more difficult – does it need to be tied to a machine? How about information transformation?
 - Any kind of transformation, e.g., throwing a baseball?

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Observations From *Bilski* Oral Argument

- What does “tied to machine” really cover?
 - Necessity of having machine carry out the method
 - Computer carrying out method in some non-traditional way?
- Just having a computer doing part of the steps that could be carried out by hand could be problematic.
- Aren’t computers just carrying out mental processes?

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Observations From *Bilski* Oral Argument

- Useful, concrete, tangible:
 - Mostly questioned appellant about this standard
 - Strongly questioned meaning of the individual words
 - Demonstrated some lack of clarity of words “concrete” and “tangible”

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Observations From *Bilski* Oral Argument

- Policy Considerations:
 - Judge Newman saw the different previous SC cases dealing with new technologies, such as biotechnology and computer software.
 - Judge Moore queried if software be considered such a new area, like biotech and computers
 - Protecting innovation in the Information Age versus the Industrial Age
 - U.S. PTO must examines such cases – Chief Judge Michel indicated that the standard should not be narrow (examiner can reject easily) and not to be too broad

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Observations From *Bilski* Oral Argument

- Impact for Wireless Industry:
 - Software protection can find its way into different structural contexts – What is a PDA? What is a hand-held device?
 - All the different ways for information exchange that can be affected
 - Technical manipulation is just one way of looking at the world of communication

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Observations From *Bilski* Oral Argument

- Policy:
 - Look at Section 101 broadly, recognizing the limitations imposed under 102, 103, and 112?
 - Can the Court really create more exclusions beyond “abstract idea, law of nature, or natural phenomenon”?

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The Case for Reform

- ***Poor quality patents create opportunities for abuse...***
 - 71% of patents for which reexamination requests are made are eventually either canceled or changed by the PTO.^[i]
 - A recent study of roughly 70,000 U.S. patents and their counterpart foreign applications found that foreign patent applications identical to those issued in the U.S. were only accepted by the European Patent Office 72.5% of the time and by the Japan Patent Office only 44.5% of the time.^[ii]

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The Case for Reform

- ***Resulting in an explosion of patent lawsuits...***
 - Nationwide, the number of patent lawsuits nearly tripled between 1991 and 2004.^[iii]
 - Four years ago, 32 patent lawsuits were filed in the Federal Eastern District of Texas, which includes Tyler, Texarkana and Marshall. In 2006, an estimated 234 cases were filed in the district, a majority of them in Marshall.^[iv]
 - Only the Central District Court of California, in Los Angeles, handled more patent infringement cases than the Eastern District of Texas, which includes Marshall, Texas.^[v]

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The Case for Reform

- ***Companies are spending resources on litigation instead of innovation...***
 - Companies spent 32 percent more on outside counsel for intellectual property litigation in 2003 than in the previous year.
 - For patent suits with less than \$1 million under contention, median discovery costs and legal fees are \$790,000; for suits between \$1 million and \$25 million these costs are \$3 million; and for suits with more than \$25 million at stake they rise to \$6.5 million.^[vi]

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The Case for Reform

- ***Jury awards are skyrocketing...***
 - Prior to 1990 there had been only one patent damages award in history larger than \$100 million^[vii]; in the past five years, there have been at least ten judgments and settlements in that category, and at least four that topped \$500 million.^[viii]

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The Case for Reform

- ***The current system is subject to abuse...***
 - Current law provides that a court may award treble (triple) damages and attorneys' fees if it finds that the defendant engaged in what is called "willful infringement."^[ix] Plaintiffs claim willfulness in more than ***ninety percent*** of all patent infringement claims.^[x]
 - The nature of patent litigation has changed fundamentally in recent years. As Supreme Court Justice Anthony Kennedy explained in the May 2006 eBay decision, "[i]n cases now arising . . . the nature of the patent being enforced and the economic function of the patent holder present considerations quite unlike earlier cases. An industry has developed in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees."^[xi]

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Footnotes

- [i] David O'Dell & David McCombs, The use of *Inter Partes* and *Ex Parte* Reexamination in Patent Litigation, Haynes & Boone LLP (2006).
- [ii] Paul H. Jensen, Alfons Palangkaraya & Elizabeth Webster, *Disharmony in International Patent Office Decisions*, 16 Fed. Cir. B.J. 679 (2006).
- [iii] PricewaterhouseCoopers, 2006 Patent and Trademark Damages Study, at 3 (2006) ("[i]n the past 15 years, the number of patent infringement cases filed increased every year, from 1,171 in 1991 to 3,075 in 2004").
- [iv] Susan Decker, *Texas District is Heaven for Patent Holders Under Siege; Speedy Docket, Friendly Juries*, The Seattle Times (May 1, 2006).
- [v] Susan Decker, *Texas District is Heaven for Patent Holders Under Siege; Speedy Docket, Friendly Juries*, The Seattle Times (May 1, 2006).
- [vi] Keith E. Maskus, *Reforming U.S. Patent Policy: Getting the Incentives Right*, CSR NO. 19: November 2006 (Council on Foreign Relations).
- [vii] William O. Kerr & Gauri Prakash-Canjels, Patent Damages and Royalty Awards: The Convergence of Economics and Law, in LES NOUVELLES at 83 (June 2003).
- [viii] Search of combined ALM VerdictSearch Jury Verdicts & Settlements database on Westlaw. Another database reports even more huge cases: over the next ten years (from 1990 through 1999) there were 13 judgments and settlements in that category, and in the next six years (between 2000 and 2005) there were 21, including one award for \$1.35 billion. Internet Patent News Service & Source Translation and Optimization Co., Table of Patent/copyright infringement lawsuits/licensing awards, at <http://www.iplaw-quality.com/economic/awards.htm>.
- [ix] 35 U.S.C. §§ 284 & 285.
- [x] Kimberly A. Moore. *Empirical Statistics on Willful Patent Infringement*, 14 Fed. Cir. B. J. 227, 232 (2004).
- [xi] *eBay Inc. v. MercExchange LLC*, 126 S.Ct. 1837, 1842 (2006) (Kennedy, J., concurring) (emphasis added). eBay addressed the standard for granting injunctive relief in patent infringement cases; the Court held that a district court should apply the traditional four-factor test in determining whether to exercise its discretion to grant an injunction.

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The Patent Reform Act of 2007

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Legislation

- On April 18, The Patent Reform Act of 2007 (PRA) was simultaneously introduced in the U.S. Senate (S.1145) and the U.S. House of Representatives (H.R. 1908.)
- This bipartisan legislation aims to modernize and strengthen the patent system to maximize U.S. innovation by:
 - Improving and ensuring patent quality
 - Restoring fairness and reducing uncertainty in the patent litigation system
 - Harmonizing U.S. patent law with other countries to ensure U.S. inventors are not disadvantaged

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Summary of major provisions of House and Senate versions of the PRA:

■ Calculating Damages Awards

- Under current laws, if a patent holder alleges infringement of the modem, it may demand damages based on the value of the entire computer.
- The PRA establishes a standard for calculating damages based on the actual value of the patented invention, not the value of a whole product that has many other components, unless the patent in question is predominantly responsible for the value of the product.

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Summary of major provisions of House and Senate versions of the PRA:

■ Determining Willfulness

- The PRA restores the traditional standard for “punitive damages” to determine when a patent has been infringed willfully, which can result in up to triple damages.

■ Choice of Venue

- Under current patent laws, there are essentially no limits to choosing a court.
- The PRA requires that cases are brought where either party resides or where the defendant has committed acts of infringement and has a regular place of business.

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Summary of major provisions of House and Senate versions of the PRA:

■ Post-Grant Review

- Under current law, there is no effective and timely method to review a patent.
- The PRA creates new processes to ensure improved patent quality by providing a fair and timely method for reviewing patents after they have been issued by the PTO. The system would allow such a review either immediately after the patent is granted, or in circumstances where a party can establish significant economic harm resulting from assertion of the patent (the so-called “second window”).

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Status of the Legislation

- H.R. 1908 was unanimously reported out of the full House Judiciary Committee on July 18
 - H.R. 1908 has 18 co-sponsors, four of which are from the California delegation including the bill’s chief sponsor Representative Howard Berman
 - Speaker of the House Pelosi included patent reform in her “Innovation Agenda” for the 110th Congress
- Full House passed H.R. 1908

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Status of the Legislation

- S. 1145 approved by Senate Judiciary Committee which is Chaired by the bill's sponsor Senator Patrick Leahy (D-Vt.)
- Currently being reviewed by full Senate

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