IP LITIGATION

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Legal News is part of our ongoing commitment to providing legal insight to our IP Litigation clients and colleagues.

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Alternative Rocket Dockets: The Western District of Wisconsin and the ITC

By Jeffrey A. Simmons

The patent lawsuit “rocket dockets” of the Eastern District of Texas and the Eastern District of Virginia are not what they used to be. The Eastern District of Texas has become a victim of its own popularity, with an exploding case load leading to significant decreases in the speed of its docket. At the same time, litigants in the Eastern District of Virginia run the risk of having their cases transferred to one of that court’s more leisurely paced divisions. Fortunately for patent owners looking for quick resolutions, there are some overlooked alternative rocket dockets.

The Western District of Wisconsin

The U.S. District Court for the Western District of Wisconsin and the International Trade Commission (ITC) are fast-paced venues that are not as well known as their more popular counterparts. The Western District of Wisconsin, based in Madison, the state capitol, consistently has been one of the fastest federal courts in the country. The latest *Federal Court Management Statistics* published by the Administrative Office of the U.S. Courts show that, in 2007, the Western District of Wisconsin was the country’s fastest district court in terms of the length of time from case filing to final disposition, and ranked second for length of time from filing to trial. The median time to disposition was just 4.4 months, and the median time to trial was 10.4 months.

By comparison, the Eastern District of Texas ranked 42nd and 14th nationally for time to final disposition and time to trial, with median times of nine months and 18 months, respectively. The Wisconsin court’s rocket docket status is nothing new. For the past 10 years, the court has consistently ranked between the first and fourth-fastest courts in the country in time to trial. In all but one of the last 10 years it has been among the top five district courts in time to disposition.

Even more significant for patent owners, recent studies by PricewaterhouseCoopers (Pricewaterhouse) have found that the Western District of Wisconsin has among the highest overall success rates for patent litigation plaintiffs. In its “2007 Patent and Trademark Damages Study,” Pricewaterhouse ranked the court first in the nation in terms of average plaintiff win rates both at trial and on summary judgment.

The ITC

For patent cases involving the importation of infringing goods, the ITC may be a very effective alternative to some of the better known district courts. ITC proceedings, known as "Section 337 investigations," are quasi-judicial proceedings to investigate and stop unfair trade practices, including the importation of infringing products. The vast majority of Section 337 investigations involve alleged patent infringement.

The ITC typically completes its investigations within 12 to 15 months. Proceedings are a hybrid of private litigation and government investigation. While the ITC has discretion as to whether to pursue an investigation, it generally does so in response to a request from a private party, similar to a complaint in a lawsuit. Investigations are presided over by administrative law judges who make recommendations to the ITC. Much of the discovery process is similar to that in civil litigation, with depositions, document requests, and other forms of discovery handled by private attorneys for the parties. However, the ITC also appoints its own attorney to represent the public interest and participate in the proceedings.

The primary remedy in Section 337 investigations is an exclusion order barring the importation of infringing goods. Orders similar to temporary restraining orders and preliminary injunctions also may be available in exceptional cases, and civil penalties may be imposed. Monetary damages, however, at not recoverable.

Foley and the Western District of Wisconsin and the ITC

Foley has significant experience litigating patent infringement cases in the Western District of Wisconsin and the ITC. Foley's Madison, Wisconsin office is the largest law office that city, with 70 attorneys and a large Litigation Department and Intellectual Property (IP) Litigation Practice. Similarly, Foley's litigators in its 155-attorney Washington, D.C. office have represented clients in scores of IP cases before the ITC for many years.

Two Big Cases on the Docket: Supreme Court and Federal Circuit Consider Patent Exhaustion and Business Methods

By Steven C. Becker, William T. Ellis, Scott R. Kaspar, and Steve Z. Szczepanski

The U.S. Supreme Court and the Court of Appeals for the Federal Circuit are continuing their recent trend of revisiting some of the fundamental doctrines of patent law. Currently, both courts are considering cases that may have significant impacts on established legal principles. The Supreme Court is debating the doctrine of patent "exhaustion," while the Federal Circuit is evaluating the rules governing business method patents.

The Supreme Court: *Quanta Computer, Inc. v. LG Electronics, Inc.*

On January 16, 2008, the Supreme Court heard oral argument in *Quanta Computer, Inc. v. LG Electronics, Inc.*, a case likely to affect the boundaries of the doctrine of patent exhaustion. The Court's decision may have a significant impact on a wide variety of industries — from the computer industry to the plant science market and on downstream or aftermarket sales of patented products.

Patent exhaustion, also known as the "first-sale doctrine," is an exception to the general rule that a patentee has the "right to exclude others from making, using, offering for sale, or selling the invention." 35 U.S.C. § 154(a). When a patentee sells a product covered by its patent, the patentee's rights are "exhausted" with respect to that individual product when the product "passes to the hands of the purchaser." *Bloomer v. McQuewan,* 55 U.S. (14 How.) 539, 549 (1853). In other words, after a patentee sells a patented product and receives compensation, the patentee may not assert its patent rights against a subsequent user or resale purchaser. While this rule has been followed uniformly by courts, questions arise as to whether a patentee may prevent application of the patent exhaustion doctrine by transferring products through arrangements other than outright sales and by imposing contractual restrictions on the purchaser.

In *Quanta Computer,* the patentee, LG Electronics (LG), sought to control downstream sales through a "conditional sale" arrangement whereby LG authorized Intel to sell microchips falling within the scope of LG's patents, but this authorization did not extend to Intel's customers and other downstream consumers. Rather, LG reserved a right to sue Intel's customers, including Quanta Computer, who have incorporated the microchips into computers sold to consumers. The Supreme Court agreed to hear the case to decide whether LG's patent rights were not exhausted by its license agreement with Intel and Intel's subsequent sales of products under the license.

The potential impact of the case on various industries and markets is evident from the numerous amicus curie briefs filed on behalf of

19 corporations, industry groups, and law associations. Nine of those briefs were filed in support of Quanta Computer and argue that the patent exhaustion doctrine should apply to "conditional sales" as well as outright sales. Only one brief, filed by the American Intellectual Property Law Association (AIPLA), squarely supports LG and argues that a conditional sale should not trigger patent exhaustion. The remaining four briefs purport to support neither party, so long as the Supreme Court's decision does not alter well-established principles of patent exhaustion that have been relied upon in various industries.

For instance, one industry group siding with Quanta Computer includes various computer manufacturers who are direct or downstream customers of Intel and other microchip manufacturers. If LG prevails, those manufacturers may be forced to pay licensing royalties to LG and other patent holders of microchip technology.

Another industry group in favor of Quanta Computer includes the automotive aftermarket, as represented by the Automotive Engine Rebuilders Association and the Automotive Parts Remanufacturing Association. Based on LG's success in the lower courts, equipment manufacturers in the automotive industry have begun applying restrictive post-sale patent notices in an attempt to lock out aftermarket sales and repair of patented devices.

Some biotechnology companies also have advocated in support of Quanta Computer on the belief that LG's licensing arrangement, if allowed, would stifle downstream competition and ultimately innovation.

The AIPLA, among the last to file its brief, has come out in support of LG, stating that "[t]here is no *per se* anti-competitive effect in allowing licensors and licensees the freedom to create such agreements." The AIPLA contends that "a patentee may, with adequate notice, require separate licenses at various stages along the downstream chain of sophisticated purchasers and users of its patented invention."

The plant science industry is among the few groups not taking a position in support of either Quanta Computer or LG, but rather seeking to protect other established principles of patent licensing upon which the plant science industry has come to rely. For instance, in its brief, CropLife International urged the Supreme Court "not to call into question the settled principle that inventors of self-replicating crop plants may rely upon the patent laws to enforce limitations upon making subsequent generations of plants and seeds from the patented originals." Similar briefs were filed by the American Seed Trade Association and the Biotechnology Industry Organization.

The Federal Circuit: *In re Bilski*

The U.S. Court of Appeals for the Federal Circuit has ordered rehearing en banc in *In re Bilski,* No. 2007-1130 (Fed. Cir. Feb. 15, 2008), to determine the extent to which "business methods" are eligible for patent protection under U.S. law. The court has indicated it might reconsider its landmark 1998 decision in *State Street Bank & Trust Co. v. Signature Financial Group, Inc.,* 149 F.3d 1368 (Fed. Cir. 1998), in which the court held there is no "business method" exception to patentable subject matter.

The Federal Circuit has asked the parties to address the following issues, among others:

- What standard should govern in determining whether a process is patent-eligible subject matter under 35 U.S.C. § 101?
- Whether the subject matter at issue is not patent-eligible because it constitutes an abstract idea or mental process.
- Whether the Federal Circuit's decision in *State Street Bank* should be overruled in any respect.

The claim at issue in *Bilski* relates to a method practiced by a commodity provider for managing (i.e., hedging) the consumption risks associated with a commodity sold at a fixed price. "Consumption risk" can refer to the need to use more or less energy due to the weather. The claim does not recite how the steps are implemented and is broad enough to read on performing the steps without any machine or apparatus.

The claim in *Bilski* differs from the claims in *State Street Bank.* The claims in that case involved a method of transforming data representing discrete dollar amounts into a final share price. Unlike *Bilski,* the claims in *State Street Bank* recited physical means for carrying out the processes it involved such as computer processor means, storage means, and other means corresponding to an arithmetic logic unit. The claim in *Bilski* recites no such physical means.

The controversy over business method patents has been brewing for several years, and has caught the attention of the Supreme Court. In their concurring opinion in *Ebay, Inc. v MercExchange, L.L.C.,* 126 S.Ct. 1837, 1842 (2006) (Kennedy, Stevens, Souter, Breyer concurring), four Justices expressed their skepticism of such patents while discussing the standard for granting injunctive relief to patent owner, writing:

> In addition injunctive relief may have different consequences for the burgeoning number of patents over business methods, which were not of much economic and legal significance in earlier times. The potential vagueness and suspect validity of some of these patents may affect the calculus under the four-factor test.

One month later, three of the same Justices dissented from the Court's dismissal of another appeal based on subject matter eligibility. In *Laboratory Corp. of America Holdings v. Metabolite Laboratories, Inc.,* 126 S. Ct. 2921, 2928 (2006) (Breyer, Souter, Stevens dissenting). The dissenting Justices stated:

> Neither does the Federal Circuit's decision in *State Street Bank* help respondents. 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.

It remains to be seen whether those minority, but influential, opinions will play a role in the Federal Circuit's decision.

Expected Dates for Decisions

The Supreme Court's decision in *Quanta Computer* could be issued as early as May 2008. The Federal Circuit does not hear oral argument in *Bilski* until May 8, 2008, with a written decision expected to follow several months later.

Medimmune's Impact on Patent Forum Selection

By Victor S. de Gyarfas

A U.S. Supreme Court decision from 2007, which reversed decades of patent law precedent, appears to have had a significant impact on patent lawsuit filings and, for the first time in years, the Central District of California is not the most popular district for filing patent lawsuits.

In its decision in *MedImmune, Inc. v. Genentech, Inc.,* 127 S. Ct. 764 (2007), the Supreme Court overruled the test that had been applied by the U.S. Court of Appeals for the Federal Circuit for determining when a declaratory judgment action could be brought. Under Federal Circuit precedent, patentees could write letters to potential patent licensees and engage in extended licensing negotiations with potential licensees without fear that the licensee would sue the patentee in an inconvenient forum for a declaratory judgment that a patent was invalid or not infringed. The Supreme Court reversed the Federal Circuit precedent and subsequent decisions have stated that certain practices previously used by patentees to approach potential licensees would give rise to jurisdiction for declaratory judgment actions.

For years, the Central District of California, which includes Los Angeles and Orange Counties, was the venue in which patent suits were brought most frequently. It is not surprising that the Central District of California would be the leading district for patent lawsuits, as Los Angeles is the largest manufacturing center in the country.

In light of *MedImmune,* some patent holders are employing new licensing strategies and dispensing with pre-lawsuit negotiations. Instead, they have adopted a policy of "sue first, ask questions later." In October 2007, Wi-LAN, Inc. sued 22 defendants in the Eastern District of Texas on patents relating to Wi-Fi technology and power consumption in digital subscriber line products. The president of Wi-LAN, Inc. was reported to have commented that in light of *MedImmune,* Wi-LAN chose the "sue first, ask questions later" approach to avoid being forced into other courts through declaratory judgment actions.

This strategy of suing first and asking questions later appears to have been adopted by a number of non-practicing entities, including entities that own, license, and sue on patents, but do not provide technology or services embodying their patents. For the first time, the Eastern District of Texas has surpassed the Central District of California to become the district in which patent cases are filed most frequently. The Eastern District of Texas appears to have become the most popular venue for patent infringement suits based on a perception by non-practicing entities that it provides the most favorable odds of a patentee winning a lawsuit. In 2007, the Eastern District of Texas appeared to have had 364 patent lawsuit filings, with 161 of those being filed by non-practicing entities, while the Central District of California had 272 patent lawsuit filings, with only 23 of those being filed by non-practicing entities. Further, the number of defendants sued in the Eastern

District of Texas in 2007 exceeded the number of defendants sued in the Central and Northern Districts of California, New York City, Chicago, Delaware, and New Jersey combined.

Thus, an unintended consequence of *MedImmune* may be a change in the center of gravity of patent lawsuit filings and an increase in the number of patent infringement suits filed by licensing entities who seek to ensure that if litigation ensues it will be in what is perceived to be a favorable forum.

QualComm Decision Highlights Dangers of Neglecting Discovery

By Ellia Ciammaichella

Failure to produce key documents in litigation can be costly. That is what QualComm Inc. and its retained attorneys discovered in *QualComm Inc. v. Broadcom Corp.,* No. 05-CV-1958-B (BLM), 2008 U.S. Dist. LEXIS 911,at *31 (Jan. 7, 2008), after the court found that the company and its outside litigation counsel deliberately failed to produce key documents in connection with the deposition of their corporate representative witnesses. The court imposed sanctions on QualComm of more than $8.5 million and reported QualComm's attorneys to the state bar.[1]

The case began as a fairly typical patent infringement action brought by QualComm against its competitor, Broadcom Corp. Broadcom asserted an affirmative defense that the patents were unenforceable due to waiver. That defense was based upon QualComm's participation in the Joint Video Team (JVT), a standards-setting body governing video coding. If Broadcom showed that QualComm had participated in the JVT, QualComm would have been required to license the patents in question royalty-free or under non-discriminatory, reasonable terms. Thus, participation in the standard-setting process would have prohibited QualComm from suing companies such as Broadcom that utilize the particular standard adopted by the JVT.

Throughout the case, QualComm aggressively argued that it did not participate in the JVT hearings during the creation of the standard. When QualComm was preparing one of its witnesses, however, QualComm's attorney discovered an e-mail to the witness sent from a JVT e-mail group during the time JVT was creating the standard. E-mails from any JVT e-mail group may have suggested that QualComm was participating in the JVT during the creation of the standard. Instead of producing this e-mail and searching for other e-mails sent from the e-mail group, QualComm and its attorneys decided not to take further action and crafted their direct examination of the witness to avoid revealing the existence of the e-mails they had discovered.

This strategy failed at trial when Broadcom's cross-examination revealed the existence of the e-mails. While QualComm argued that the e-mails were not responsive to Broadcom's discovery requests, the court found that "QualComm intentionally withheld tens of thousands of decisive documents from its opponent in an effort to win this case and gain a strategic business advantage over Broadcom." *Id.* at *32.

As a result, the court sanctioned both QualComm and its outside attorneys. The court concluded that "QualComm had the ability to identify its employees and consultants who were involved in the JVT, to access and review their computers, databases and emails, to talk with the involved employees and to refresh their recollections if necessary, to ensure that those testifying about the corporation's knowledge were sufficiently prepared and testified accurately, and to produce in good faith all relevant and requested discovery," but chose not to do so. *Id.* at *40. The outside attorneys were sanctioned for failing to adequately supervise the client's electronic document collection, failing to take appropriate steps when it became clear that QualComm's document collection had been inadequate, and for misleading the court in presenting evidence and arguments regarding the electronic discovery.

So what should a corporation do to prevent this from happening to them?

First, take seriously the Rule 30(b)(6) obligation to provide a properly prepared witness. Even though substantial time may be required, a corporation, its in-house counsel, and outside counsel must work together to identify and properly prepare every witness who is testifying as the corporation's most knowledgeable person

[1] The disciplinary sanctions against QualComm's outside counsel were recently vacated.

on a specific subject. Make a good faith endeavor to identify all of the individuals who are the most knowledgeable witnesses on specific subjects. The *QualComm* court emphasized that retained counsel often is not in the position to know enough about the organization to identify such knowledgeable witnesses; when the organization has an extensive legal staff, the legal staff is probably in a better position to identify such corporate representatives.

Second, when a witness is testifying as a corporate representative and the corporation's most knowledgeable person on a subject, the corporation has a good-faith duty to conduct a "reasonable investigation and review to ensure that the witness does possess the organization's knowledge." *Id.* at *37. Thus, the corporation and counsel have to prepare each witness to testify as to the corporation's knowledge on a specific subject. The preparation must include a sufficient search of the documents and, in the case of electronic documents, a sufficient analysis of search terms used and electronic locations searched.

Third, remember that efforts to save money by reducing outside counsel's involvement in electronic document collection and production may be short-sighted. The *QualComm* court emphasized that retained counsel have an obligation to supervise the production and are responsible for compliance with discovery obligations. If retained counsel are not involved early on, they may require that work be repeated so that the discovery obligations are met.

Fourth, remember that efforts to cover up mistakes only make things worse. If the corporation inadvertently fails to produce information requested in discovery and later discovers such failure, the material should be produced promptly, not hidden.

Finally, work closely with outside counsel to comply with discovery obligations. As the *QualComm* court explained, "attorneys and clients must work together to ensure that both understand how and where electronic documents, records and emails are maintained and to determine how best to locate, review, and produce responsive documents." *Id.* at *31.

Protecting Your Trademarks Online

By Jeffrey A. Kobulnick

Suppose you are sitting at your computer and you want to check something on your company's Web site. You enter YOURCOMPANYNAME.COM into your browser, only you accidentally mistype one letter in your own domain name (for example, YURCOMPANYNAME.COM). Instead of accessing your own company's Web site, you inadvertently find yourself at a completely unrelated Web site with a search engine and hyperlinks to dozens of categories of other Web sites — none of which are links to your own site, but many of which ultimately lead to competitor sites offering similar goods and services as your own company. Sound familiar? If so, you are not alone.

A number of brand owners are encountering this specific problem or realizing that they have other domain name issues. Just as the Internet has created many opportunities to market a brand worldwide, it unfortunately also has resulted in an exponential increase in unauthorized use of trademarks in a new medium. The good news, however, is that you can take steps to protect your trademarks against these domain name registrants. These steps can be categorized as: (1) prevention and (2) enforcement.

Preventive Recommendations to Protect Your Trademarks Online

Now is as good a time as any to develop and implement a domain name strategy to secure domain names that are either of interest or concern to your company. As part of that trategy, consider each of the following:

- Register all top level domain names (.com, .net, and so forth) consisting of your primary brands and company name
- Register domain names consisting of variations of your marks (typos, homophones, common misspellings)
- Register "wwwmark.com" domains (as it has become common for cybersquatters to register a company's domain name with the prefix www and without the ".")
- Register "negative" domain names such as YOURCOMPANYSUCKS.COM before someone else does and posts a Web site criticizing your company
- Enroll in a domain watch service, which informs you of newly registered domain names incorporating your marks
- Monitor your trademarks and service marks online periodically using available online search engines, e.g., Google® and Yahoo!®

Taking these steps will reduce the risk that cybersquatters and others will register or use domain names in an attempt to capitalize upon the goodwill associated with your trademarks.

Enforcement Options

There are a number of enforcement options available, including: sending a cease-and-desist letter, filing a complaint pursuant to the Uniform Domain Name Dispute Resolution Policy (UDRP), suing in court, or taking a "wait and see" approach while continuing to monitor the situation for possible future action.

The UDRP provides a cost-effective procedure for trademark owners to recover domain names from third parties when (1) the domain is identical or confusingly similar to your trademark or service mark; (2) the person who registered has no rights or legitimate rights to the name; and (3) the domain was registered and is used in bad faith.

A Story of Enforcement Strategy Success

Recently, Foley took action on behalf of mVisible Technologies, Inc. against Navigation Catalyst Systems (NCS). NCS is a company that routinely registers domain names in bulk via an automated computerized process, including domains that are variations of well-known trademarks. NCS had registered no fewer than 35 domain names consisting of common variations of mVisible's MYXER and MYXER TONES trademarks. Foley identified the problem and filed a UDRP complaint with the World Intellectual Property Organization (WIPO), one of the designated forums for filing UDRP complaints.

In response to the UDRP complaint, NCS argued that mVisible's trademarks were descriptive and not entitled to protection or enforcement against third parties. NCS also offered to transfer some, but not all, of the disputed domains. mVisible rejected the offer and the matter proceeded forward. Notwithstanding a strongly worded response filed by NCS, which argued (in part) that there could be no finding of registration in bad faith where the domain names were registered by such an automated process, the WIPO panel ordered the transfer of all 35 domain names at issue to mVisible.

This case is significant for several reasons. First, never before has NCS submitted substantive arguments in response to a UDRP complaint and lost. Similarly, although NCS has been a defendant in five federal lawsuits in various district courts around the country for trademark infringement and violations of the Anticybersquatting Consumer Protection Act, all of those cases settled before any court could address the merits of the respective claims.

Second, this decision on the merits against NCS already has opened the door for other trademark owners who may already be familiar with this cybersquatter. NCS has a history of registering domain names that include various trademarks, and then using those domain names by providing "landing pages." This cybersquatting method provides a page with links, sponsored by companies other than the trademark owner, which direct traffic to Web sites related, and in some cases directly competing with, the trademark owner's goods or services. This decision for mVisible provides a solid basis for future UDRP panels to stop NCS and others who engage in the same conduct in violation of trademark owners' rights.

Spotlight On: Catherine Sun

Foley clients attempting to navigate the legal maze of the world's fastest growing economy have an experienced guide in Attorney Catherine Sun. A native of the People's Republic of China, Catherine is the Chair of Foley's Asia Practice and the Managing Partner of Foley's Shanghai office.

Catherine knows her way around the diverse expanses of China, having lived in numerous locations from the very northern province Hei Longjiang, to the very southern pearl city Hong Kong, while growing up as a self-described military "brat" daughter of a Chinese Air Force officer. Now she divides her time between her home and Foley's first China office in Shanghai, and Foley's numerous offices in the United States.

Catherine is a great example of the new generation of Chinese business leaders who are helping to forge ties between businesses in that country and the United States. She is among China's best and brightest, having received her law degree from "the Harvard of China," Beijing University.

ABOUT FOLEY

Foley & Lardner LLP continually evolves to meet the changing legal needs of our clients. Our team-based approach, proprietary client service technology, and practice depth enhance client relationships while seeing clients through their most complex legal challenges. The BTI Consulting Group (Wellesley, Massachusetts) recently recognized Foley as one of the top four law firms shaping the U.S. legal market, while *CIO* magazine has named Foley to its CIO 100 list six times for our client-focused technology. Whether in the United States or around the world, count on Foley for high-caliber business and legal insight.

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Since graduating from law school, Catherine has focused her practice on IP issues, especially legal issues involving the software industry. She was a co-founder and former Deputy Secretary General of the China Software Alliance, that country's leading association of software manufacturers, at the age of 24. Before joining Foley, she led the Shanghai IP practice of another international law firm.

Despite her busy schedule, Catherine still finds time to raise three boys, aged nine, seven, and one. There's nothing she enjoys more than taking them on tours of China's historic sites, so they get an appreciation of the country's important traditions and culture during a time of rapid change.

Catherine is anxiously awaiting her opportunity to showcase Foley's new Shanghai office in June. The office was officially licensed/opened in November 2007. If you have business in China, she hopes to see you there.