



BOSTON PATENT LAW ASSOCIATION NEWSLETTER

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EDUCATION, SERVICE, COMMUNITY

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PRESIDENT'S MESSAGE

As we reach for a jacket on these crisp September mornings, the events of the summer fade to a memory. In the second week of August, 200 BPLA Red Sox fans assembled to watch the Sox play an exciting game against the Baltimore Orioles. The Sox won 9-2, and BPLA guests were treated to a "shout-out" on the big screen reading "THE RED SOX WELCOME MEMBERS & FAMILIES OF BOSTON PATENT LAW ASSOCIATION TO FENWAY PARK". What fun!

With summer winding down, CLE activities of the BPLA are gearing up. In keeping with our continuing collaboration with Suffolk University Law School, we are pleased to co-sponsor a program entitled "Tactics for Mastering Markman Issues: Claim Drafting to Hearings, Judicial and Litigation Perspectives" on October 20, 2006. The program highlights views from practitioners and features a mock Markman hearing presided by the Honorable William G. Young. Subsequent to the event, Suffolk University's Journal of High Technology Law will publish papers from the presenters in an issue of the journal devoted to the conference topics. The course can also be attended online at www.law.suffolk.edu/als.

Kicking off the fall program of BPLA committee-sponsored events, Cynthia Johnson Walden and John Welch of the Trademark Committee will host their annual seminar entitled "Trademark Year in Review" on October 26. The Advanced PCT Practice Seminar will be held on November 29 at the Holiday Inn near Government Center. Carol Bidwell, now a consultant with the Office of the PCT, for-

mer official in the US Receiving Office, and long time speaker at BPLA sponsored events, and Matthia Reishcle, head of the PCT Legal Affairs Section, will lead this comprehensive program on strategies for procuring US and foreign patent protection via the Patent Cooperation Treaty.

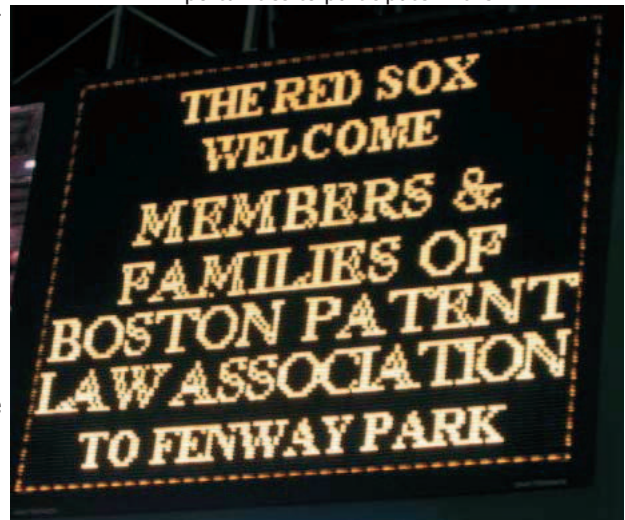
With renewed enthusiasm and a new co-chair, Lisa Winsor and Monica Grewal of the Pro Bono Committee have piqued the interest of more than 26 members. Proposed new programs include a collaboration with the Division of IP and New Technologies at World Intellectual Property Organization (WIPO) in Geneva in which members can help in teaching patent drafting and IP licensing courses in developing countries. For example, a program is currently underway in India. Language skills in French and Spanish for teaching/tutoring purposes are sought but not required. Some assignments may involve travel, and expenses associated with such travel will be reimbursed by WIPO. There are also opportunities to assist with drafting of national IP policies. Very exciting and rewarding possibilities!

Ever a subject of interest to US patent practitioners is the evolution of IP policy in the Pacific Rim. Deirdre Sanders and John Anastasi of the International and Foreign Practice Committee wish to call your attention to the upcoming USPTO China

Roadshow to be held in Boston on September 27-28. Comments on the proposed amendments to China's Patent Law are solicited.

The Amicus Committee, with Erik Belt and Peter Corless at the helm, oversaw the submission of an amicus brief to the Supreme Court in the case of *MedImmune, Inc. v. Genentech, Inc., et al.* The Committee is now considering a request to contribute an amicus brief on behalf of *Ferring B.V.* and *Aventis Pharmaceuticals* in a case against *Barr Labs* involving the standard for finding inequitable conduct in patent prosecution. Those who are interested should contact Erik or Peter.

Our annual luncheon meeting will be held at the Boston Harbor Hotel on December 6. I encourage you to update your contact information on the website and review the list of committees for opportunities to participate in the BPLA. ♦



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USPTO Proposes Changes to Continuing Application Practice and Examination Reforms

By: Steven M. Jensen, Esq., Edwards, Angell, Palmer & Dodge LLP

On January 3, 2006, the U.S. Patent and Trademark Office (USPTO) published two proposed rule making packages that would affect continuing application practice and examination, respectively. The period providing public comments has closed, but the USPTO has not yet taken any action to implement the proposed rules.

The first rule making package addresses continuing applications, including continuation (CON) applications, continuation-in-part (CIP) applications, divisional applications, and Requests for Continued Examination (RCE). The proposed rules would allow only a first CON, CIP, or RCE application to be filed as of right; for any subsequent continuing application, the applicant would be required to make "a showing as to why the amendment, argument, or evidence presented could not have been previously submitted."

This proposal would mark a significant change to continuing application practice, and would likely increase the number of appeals filed, as an alternative to continuing the examination process. For example, after a patent application is filed, assuming the applicant then files an RCE, the applicant would not automatically be entitled to file a continuation application, but instead would need to prepare a petition with the required "showing" justifying the filing of the continuation application.

The proposed changes to continuing application practice would also redefine divisional applications as those applications filed in response to a restriction or unity of invention requirement. Under the proposed rules,

divisional applications would not be subject to the above limitations on continuing applications.

Additional proposals address conflicting claims in multiple applications, which are often subject to double patenting rejections. Under the proposed rules, applicants would be required to identify applications with filing dates within two months of each other, and which name at least one common inventor. A rebuttable presumption of double patenting would exist where two applications have the same filing date and a "substantially overlapping disclosure."

The USPTO has proposed the above rules changes in order to address a substantial backlog of unexamined applications, and to curb "abuse" by applicants. However, at least one organization of patent attorneys has opposed these changes, and provided alternatives to address the substantial number of unexamined applications. The American Intellectual Property Law Association (AIPLA) has recommended hiring additional patent examiners as a better approach to the problem. The AIPLA's comments question the statutory authority of the USPTO to implement the proposed rules changes, and suggest that a likely increase in appeals and the filing of more divisional applications will negate any reduction in continuing applications, and at the same time increase costs for applicants.

Examination Proposal Would Adopt Representative Claims Practice:

In the second rule making package, the USPTO proposed significant changes to the examination process. Presently, each claim

of a patent application is examined initially, and also addressed in subsequent examinations. The USPTO has proposed adopting a "representative claims" practice, whereby the examined claims would be limited to ten representative claims, including all independent claims and dependent claims designated by the applicant. If additional claims are presented, the applicant would be required to file an "examination support document" justifying the examination burden. The examination support document would require the applicant to certify that a pre-examination search was conducted, and identify the most relevant references obtained from that search.

The AIPLA also has criticized the USPTO's proposed examination reforms, noting that the proposed changes would introduce new complexities to the examination process, and increase the administrative burden on examiners. The AIPLA also criticized the "representative claims" proposal as a piecemeal approach to examination. To discourage applications with excessive claims, according to the AIPLA, the USPTO should limit the number of claims to six independent claims and 30 total claims, and require very high per-claim costs for additional claims.

The two rule making packages proposed by the USPTO would dramatically affect patent examination practice and patent strategy, but would not assist applicants or reduce the backlog of unexamined applications. It is unlikely that the proposals will be adopted in their present form, but the rule-making process requires close monitoring. ◊



Attendees at Summer Baseball Outing, Fenway Park

Left: Paul Alloway, Genzyme; Dorothy Wu, Boston College Law School; Sandy Brockman-Lee, Proskauer Rose; Stephen Cole, Franklin Pierce Law School; Right: Pamela Ariniello of Dana Farber Cancer Institute, and Pat Ariniello

IS A FASTER PATENT A BETTER PATENT?

By, *Christine C. O'Day, Esq., Edwards, Angell, Palmer & Dodge LLP*

USPTO Proposes Accelerated Examination Procedure

The U.S. Patent and Trademark Office (USPTO) recently announced that it would offer an accelerated examination program to interested patent applicants. In its press release on June 26, 2006, the USPTO indicated that the program is intended to provide applicants with "quality patents in less time."

In exchange for expedited examination though, applicants will be required to provide the Examiner with the closest prior art and a description of its relevance. Other restrictions also apply but nonetheless the program is interesting - particularly for certain applicants and/or technology areas.

Final decision within 12 months

According to the USPTO's proposal, applicants would receive a final decision by the Examiner within twelve months as to whether or not their application for a patent will be granted or denied. Currently, while the USPTO's goal is to render such a decision within two years of the application's filing date, that timeframe is not something innovators or practitioners can typically count on.

At a glance, the accelerated examination procedure bears some resemblance to the present "Petition to Make Special". That petition can be filed at any time together with a statement that a search of the prior art was made. Like the accelerated examination procedure, an Information Disclosure Statement (IDS) also must accompany the petition, as well as information about the search and the relevance of the references being cited.

The Petition to Make Special is different from the proposed accelerated examination procedure though in that the former relates more to particular subject matters, e.g., inventions relating to biotechnology or medicine, where an applicant's health or age would require expedited examination, or where actual infringement of claims is occurring (claims must be "unquestionably" infringed).

Other Notable Features

The accelerated examination procedure also would limit applicants to a maximum of 20 allowed claims. The permitted time periods for filing responses to office actions also would be reduced during prosecution.

The Catch

In order for applicants to take advantage of the accelerated examination process, there are necessarily a few trade-offs. In particular, applicants will be required to conduct a search of the prior art and submit all prior art to the USPTO that is closest to their invention. Additionally, applicants must provide an explanation of the relevance of that prior art.

In contrast to that requirement, as part of the regular examination procedure, applicants are not required to conduct a search of the prior art, nor are they typically required to provide an explanation of its relevance. Rather, applicants are obligated to bring any material art to the attention of the USPTO that they are or become aware of during prosecution of the application.

Another requirement of the proposed accelerated examination procedure is that applicants must offer information on the utility of their invention and show how the written description supports the invention claimed.

The USPTO sees these limitations and requirements as a way to cause applicants to file better applications with claims that are commensurate in scope with the actual invention.

Some initial concerns

One concern in applicants offering all of this additional information is estoppel. For example, in characterizing the references cited or in offering other statements onto the record, that information will become part of the prosecution history. As such, it could be used against the applicant at a later time. Estoppel can adversely impact applicants in their ability to enforce the ultimate patent and serve to limit the patent's scope.

Another concern is that the USPTO Examiner may tend not to search beyond the art identified by applicants due to the significant time constraints. The danger there would be the failure of the Examiner to identify and consider other material prior art. It is critical to have the best known prior art considered by the Examiner since any patent issuing on this application would be legally presumed valid over such prior art.

More suited to particular applicants and/or technology areas

The fast patent may provide the needed

incentive to attract investors. Moreover, if the innovator's ability to quickly market patented technology is critical to the business, perhaps a narrow patent in one year is better than a broader one in two or three years. The accelerated examination procedure also may be better suited to those technologies having a shorter life span where there is much more value in the initial portion of the patent's term.

Opportunity for public comment

The USPTO proposal is open to public comment for a sixty-day period. Once finalized, the accelerated examination procedure could be available as early as the Fall 2006. ♦

Seminar On Trademarks and Unfair Competition Committee To Host Trademark Year in Review

The Trademarks and Unfair Competition Committee, co-chaired by Cynthia Johnson Walden and John L. Welch, will host its annual *Trademark Year in Review* seminar on Thursday morning, October 26, 2006 at the Langham Hotel in Boston. Breakfast and registration will begin at 7:30 A.M., and the program will run from 8:00 A.M. until 10:45 A.M. Former TTAB Judge Beth Chapman, presently Special Counsel to Oblon, Spivak, McClelland, Maier & Neustadt, P.C., will review the year's important TTAB developments, both decisional and procedural. Julia Huston of Bromberg & Sunstein LLP will discuss new federal and state legislation and will provide her comments on the proposed TTAB Rule changes. John DuPré of Hamilton, Brook, Smith & Reynolds, P.C. will review noteworthy 2006 federal trademark cases outside the First Circuit. Larry Robins of Finnegan, Henderson, Farabow, Garrett & Dunner, LLP will survey recent trademark decisions from the First Circuit, including its district courts. Those interested in attending should contact Amy L. Brosius at Fish & Richardson, P.C. (Tel. 617-956-5928 or e-mail brosius@fr.com). ♦

Improper Claiming of Small Entity Status Can Cost You Your Patent - Illinois Court Holds Patents Invalid Pursuant to A Finding of Inequitable Conduct Based on Improper Claim to Small Entity Status
By, Scott Pierce, Esq., Hamilton, Brook, Smith & Reynolds P.C.

United States patent law permits individuals, non-profit corporations and small businesses to pay certain fees at a discounted rate. Qualification for discounted fees, however, is strictly limited to "small entities," as that term is defined by rules of practice promulgated by the United States Patent and Trademark Office as Title 37 of the Code of Federal Regulations (37 C.F.R.).

Generally speaking, a "small entity" means any "person," "small business concern" or "non-profit organization," as those terms are defined in the rules. Among the requirements within the definition of each of these terms is that, at the time small entity status is claimed, there must be no obligation to assign, grant, convey, or license any rights to the invention to any entity (e.g., person, concern or organization) that would not, in turn, qualify for small entity status.

Determining whether the qualifications for any of the defined terms can be met is, at best, difficult. For example, the definition for "small business concern" makes reference to a separate set of rules (i.e., 13 C.F.R. §§ 121.801 - 121.805) and presents one of the rare instances where the reader having questions is referred to another entity, in this case the Small Business Administration.

In *Nilssen v. Osram Sylvania* (N.D. Ill. 2006) (Case No. 01 C 3585) the plaintiff, Nilssen, sued Osram Sylvania for infringement of several patents, the maintenance fees for many of which had been paid by Nilssen on the basis of his purported status as a "small entity." The court found that, at the time Nilssen claimed small entity status, he had previously entered into an agreement with Phillips Electronics North America Corp. (Phillips) that obligated Nilssen to license several of the patents to Phillips. The court also found that Phillips did not qualify as a small entity at the time of agreement and "[b]ecause Nilssen had an obligation to license to Phillips, all the patents subject to the [agreement] were not entitled to a small entity status and required payment of large entity fees." Further, the court found unavailing reliance by Nilssen on licensing of patents

to an intermediate organization, the Geo Foundation, which was established as a non-profit charitable organization. Specifically, the court stated that, "Nilssen was required to pay large entity fees for all patents licensed to the Geo Foundation because the Geo Foundation itself licensed the patents to large entities."

The Patent Office specifically provides for correction of errors in making small entity payments if establishment of small entity status was made in good faith and the consequent fees were paid in good faith. However, and as also noted by the court, "while the PTO is not required to make an inquiry into whether the patentee has established good faith as a condition of late payment, if a patentee seeks to correct an incorrect payment of fees as a small entity . . . [made] without good faith, the patentee may be found to have engaged in inequitable conduct." Here, the court found inequitable conduct by Nilssen in establishing small entity status, and determined that all of his defenses in this regard to be not credible or without merit. Of particular note, the court found to be without merit "Nilssen's argument that he would not have intentionally paid small entity fees because the amount of money he was saving was too small relative to what he might lose if his patents were declared unenforceable." In response to Nilssen's argument, the court stated, in a footnote, that "people are dishonest and break the law even when small amounts of money are at stake" (referencing *DaimlerChrysler AG v. Feuling Advanced Techs., Inc.*, 276 F. Supp. 1054, 1062 (S.D. Cal. 2003) ("Why [patentee] and his agents would put the enforceability of patents licensed for millions of dollars at risk to save a few thousand dollars in PTO fees is beyond reason. Yet, the evidence overwhelmingly supports the inference that they did so, and common experience confirms that the world has no shortage of individuals who commit irrational and self-destructive acts.")). With respect to payment of small fees on the basis of small entity status, the court concluded that "Nilssen's declara-

tions of small entity status and small entity payments rendered Nilssen's repeated misconduct so culpable as to render the patents at issue unenforceable."

Continued qualification for small entity status must be reviewed prior to payment of each maintenance fee. Further, establishment of small entity status to qualify for reduced filing fees must be reviewed prior to payment of an issue fee. Applicants are strongly advised that they establish small entity status for the purpose of paying reduced fees at the United States Patent Office at their peril. As suggested by Nilssen in his defense, and as noted by the court by implication, the small amount of money to be saved in proportion to the significant investment associated with development of a patent estate rarely justifies the risk involved in establishing small entity status before the United States Patent and Trademark Office. ♦

UPCOMING EVENTS

Friday, October 20, 2006

Strategies for Handling Markman Hearings: Claim Drafting to Hearings, Judicial and Litigator Perspectives (co-sponsored with Suffolk University Law School), 9:00 am to 4:00 pm

Friday, October 26, 2006

Seminar *Trademark Year In Review*, Langham Hotel, Boston - Registration 7:30 am; Program 8-10:45 am

Wednesday & Thursday, November 29-30, 2006

Advanced PCT Seminar, Holiday Inn, Cambridge St, Boston

Jobs Available, cont

SR CORPORATE COUNSEL, IP

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Organic Chemistry: Minimum of 1-3 years experience as an IP Attorney. Advanced degree in organic chemistry required.

Litigation: Minimum of 3-5 years experience as a IP Litigator. Technical degree from a quality college or university. Track record of effective advocacy for clients. Experience as a leader on litigation team for complex patent cases.

All positions require: License to practice law in Massachusetts or the willingness and ability to be so licensed. License to practice before the USPTO. Law degree from accredited law school. High academic achievement in technical and law degree. Demonstrated ability to work directly with clients and develop and execute service strategies. Strong writing and verbal communication skills.

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BPLA Committees

ACTIVITIES & PUBLIC RELATIONS

activities@bpla.org

Gregory Sieczkiewicz (617) 526-9734

AIPLA MOOT COURT

mootcourt@bpla.org

Thomas M. Johnston (617) 573-5805

Amy Brosius (617) 542-5070

AMICUS

amicus@bpla.org

Erik Paul Belt (617) 443-9292

Peter F. Corless (617) 439-4444

ANTITRUST LAW

antitrust@bpla.org

Robert J. Spadafora, Jr. (781) 398-2548

Ernie Linek (617) 720-9600

BIOTECHNOLOGY

biotechnology@bpla.org

Doreen M. Hogle (978) 341-0036

Leslie MacGregor (617) 429-7809

CHEMICAL PATENT PRACTICE

chemical@bpla.org

Jeffrey D. Hsi (617) 439-4444

Lisa A. Dixon (617) 444-6396

COMPUTER LAW

computer@bpla.org

Edward W. Porter (617) 494-1722

John J. Stickevers (617) 443-9292

CONTESTED MATTERS

contestedmatters@bpla.org

Susan Glovsky (978) 341-0036

Michael McGurk (617) 452-1600

Donna Meuth (617) 526-5000

COPYRIGHT LAW

copyright@bpla.org

Charles L. Gagnebin, III (617) 542-2290

CORPORATE PRACTICE

corporate@bpla.org

Walter F. Dawson (978) 452-1971

Faith F. Driscoll (781) 326-6645J

James G. Cullem (978) 867-2311

Ethics and Grievances

ethics@bpla.org

Timothy A. French (617) 521-7015

INTERNATIONAL & FOREIGN PRACTICE

international@bpla.org

Deirdre E. Sanders (978) 341-0036

John N. Anastasi (617) 395-7000

LICENSING

licensing@bpla.org

William G. Gosz (781) 863-1116

Peter C. Lando (617) 395-7000

LITIGATION

litigation@bpla.org

Ronald E. Cahill (617) 439-2782

Matthew Lowrie (617)395-7000

PATENT LAW

patents@bpla.org

Kathleen B. Carr (617) 951-3326

John T. Prince (617) 871-3346

PATENT OFFICE PRACTICE

patentofficepractice@bpla.org

J. Grant Houston (781) 863-9991

David G. Conlin (617) 439-4444

PRO BONO

probono@bpla.org

Lisa E. Winsor (617) 395-700

Monica Grewal (617) 526-6000

TRADE SECRETS

tradesecrets@bpla.org

Stephen Y. Chow (617) 854-4000

TRADEMARKS & UNFAIR COMPETITION

trademarks@bpla.org

Cynthia J. Walden (617) 542-5070

John L. Welch (617) 832-1000

WEBSITE COMMITTEE

website@bpla.org

Joseph Maraia (617) 526-9885

Neil Ferraro (617) 626-8000

YOUNG LAWYERS & LAW STUDENTS

younglawyers@bpla.org

Michelle Bielunis (617)439-2481

Doris Fournier (617)542-6000

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Editor: Leslie Meyer-Leon, Esq.

Contributors:

**Dr. Ingrid Beattie
Steve Jensen, Esq.
Christine O'Day, Esq
Scott Pierce, Esq
John Welch, Esq.**

Photos by

**Jennifer Karnakis, Esq.
Greg Sieczkiewicz, Esq.**

Created By: Katherine A. Meyer

Letters to the editor, articles and job postings are encouraged. EMail all correspondence to: BPLA Newsletter c/o vice-president@bpla.org

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**Boston Patent Law Association
8 Faneuil Hall, Boston, MA 02109
Telephone: (617) 973-5021
www.bpla.org**

Interested in playing a more active role in a committee?

Please contact the committee chair if you are interested in joining, switching, or taking a more active participatory role in, a committee.

Boston Patent Law Association Newsletter

2005-2006

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President Ingrid A. Beattie, Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., One Financial Center, Boston, MA. 02111-2657, ph 617-542-6000, fax 617-542-2241, iabeattie@mintz.com

President-Elect Lee Carl Bromberg, Bromberg & Sunstein LLP, 125 Summer Street, Boston, MA, 02110-1618, ph 617-443-9292, fax 617-443-0004, lbromberg@bromsun.com

Vice President Leslie Meyer-Leon, IP Legal Strategies Group, P.O. Box 1210, Centerville, MA, 02632-1210, ph 508-790-9299, fax 617-790-1955, LMeyer-Leon@abanet.org

Treasurer Mark B. Solomon, Hamilton, Brook, Smith & Reynolds, PC, P.O. Box 9133, Concord, MA, 01742-9133 ph 978-341-0036, fax 978-341-0136, mark.solomon@hbsr.com

Secretary Lisa Adams, Nutter, McClennen & Fish LLP, World Trade Center West, 155 Seaport Blvd. Boston, MA. 02210-2604, ph 617-439-2550, fax 617-310-9550 ladams@nutter.com

Member Doreen M. Hogle, Hamilton, Brook, Smith & Reynolds, P.C., 530 Virginia Rd., Concord, MA. 01742-9133 ph 978-341-0036, fax 978-341-0136, doreen.hogle@hbsr.com

Member Neil P. Ferraro, Wolf, Greenfield & Sacks, P.C., 600 Atlantic Avenue, Boston, MA, 02210-2206, ph 617-646-8000, fax 617-646-8646, nferraro@wolfgreenfield.com

Member J. Grant Houston, Houston Eliseeva, LLP, 4 Militia Drive, Suite 4, Lexington, MA, 02421, ph 781-863-9991, fax 781-863-9931, grant.houston@ghme.com

Member Stephana E. Patton, Edwards Angell Palmer & Dodge LLP, Boston, MA, 02210 ph.617-517-5510, fax 888-325-9092, spatton@eapdlaw.com

Boston Patent Law Association
8 Faneuil Hall Marketplace
Boston, MA 02109