

INTELLECTUAL PROPERTY AND TECHNOLOGY NEWS

Perspectives • Analysis • Visionary Ideas



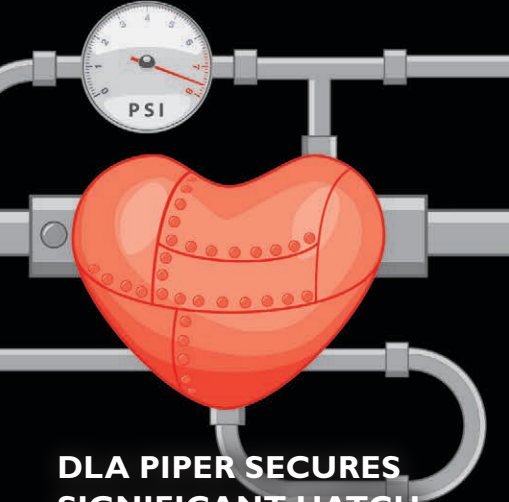
CELEBRITY ENDORSEMENTS ON SOCIAL MEDIA:

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SUPREME COURT CORNER



DLA PIPER SECURES SIGNIFICANT HATCH-WAXMAN VICTORY FOR ABBVIE

The US Court of Appeals for the Federal Circuit recently affirmed, on all issues, DLA Piper's successful jury verdict for client AbbVie in *Sanofi-Aventis v. Glenmark*, regarding the high blood pressure drug, Tarka.

This will leave intact a US\$16 million jury verdict, and DLA Piper expects AbbVie will receive additional damages in a post-verdict accounting.

An injunction against the generic company will remain in effect until next year, when the patent expires. This case is one of the few cases, if not the only case, in which a court awarded damages to a brand-name pharmaceutical company in a case involving the Hatch-Waxman Act.

DLA Piper's trial team included:



John Allcock
Partner, San Diego



Stuart E. Pollack
Partner, New York



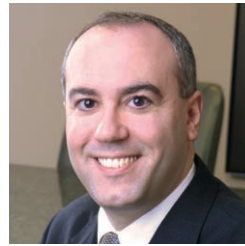
Stanley Panikowski
Partner, San Diego



Erica Pascal
Partner, San Diego

Please note that past results are not a guarantee of future success.

EDITOR'S COLUMN



Thomas Zutic
Partner, Intellectual Property and Technology

Since our last issue, there have been a number of exciting developments within DLA Piper's Intellectual Property and Technology practice. In March, *Managing Intellectual Property* named DLA Piper the Global Intellectual Property Firm of the Year for 2014. We are honored that our practice was celebrated as one of the largest and most effective in the world.

Last month, I attended the annual International Trademark Association meeting in Hong Kong along with more than 30 of my IPT partners from around the world. The global INTA meeting was attended by over 8,000 trademark practitioners and serves as a wonderful forum to discuss innovative trademark issues affecting brand owners at all levels. Alongside in-house lawyers from Visa and FIFA, I had the opportunity to take part in a panel on "Building a Global Brand Protection Strategy." While we will provide more detail on developments at INTA in our next edition, a hot topic was the role social media plays in the world of IP. Indeed, in this issue of *IPT News*, our cover article focuses on one aspect of this very issue: the interplay between rights of publicity and social media. Brand owners seeking to exploit social media in their marketing must vigilantly monitor the use of any content involving third parties. The boundaries of permissible use and rights are shifting. We hope you find this article helpful and informative.

Keeping with the theme of rights in one's persona online, this issue also discusses a landmark ruling by the European Court of Justice that increases the rights of private individuals to remove themselves from search engine results. As always, in our popular *Supreme Court Corner* we highlight noteworthy IP-related rulings and pending cases in the United States Supreme Court and analyze what these decisions mean for your business. I hope you find this issue of *IPT News* useful and thought-provoking. We welcome your feedback and suggestions.

Until next time,

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LAW360 NAMES TWO PATENT LITIGATION PARTNERS RISING STARS

Law360 has named two DLA Piper partners among its Rising Stars for 2014. *Law360* notes that this year, the honorees were selected from more than 1,000 US nominees to arrive at “our list of the 163 attorneys under 40 whose legal accomplishments belie their age.”



Erin Gibson
Partner, San Diego

Erin Gibson was one of only five lawyers named to *Law360's* International Trade list for her patent litigation experience in the ITC. The publication noted her recent work for Motorola Mobility against TiVo and her enforcement work on behalf of an Arizona-based circuit component company.



Matt Satchwell
Partner, Chicago

Matt Satchwell was one of only ten lawyers named to *Law360's* Intellectual Property list. The publication cited his technical prowess and patent litigation success on behalf of Japanese companies such as DENSO, Toyota Motor Corp. and Panasonic Corp., as well as General Motors.

A LEADING PATENT LITIGATION PRACTICE

DLA Piper is one of the most active law firms in patent disputes, according to the “2013 Patent Litigation Year in Review” published by analytics firm Lex Machina.

ALL ABOUT THE CLIENTS

Although I am often tempted, I do not usually acknowledge achievements of people in our group, nor of the group itself, in this column. This time will be an exception.



John Allcock
Partner
Global Co-Chair and
US Chair, Intellectual
Property and Technology

At the time DLA Piper was formed back in 2005, we were not ranked in the top 25 in the US in patent litigation, if measured by number of cases. We had a strong group, handling important cases for important clients, but our geographic reach in the US was limited. We had no IP lawyers in Japan, China, Germany and other parts of Europe. Our presence in other IP jurisdictions around the world was similarly sparse.

Things have advanced and the world is noticing. In this edition, we report on our rankings by Lex Machina in US patent litigation, where we rank second among all US national law firms for total patent cases in 2009 - 2013, and number three among all US national law firms for open patent cases in 2013. Now, of course, this does not tell the whole story. In addition to numbers of cases, we are proud of the clients we represent, the complexity of the cases we manage and the results we have achieved. We are happy to see that greater numbers of clients from virtually all sectors have come to us to handle their important patent cases.

We also note in this edition that *Managing IP* magazine recently honored us with its Global IP Firm of the Year award, praising us for our multidisciplinary experience and global approach.

We sure have come a long way from the relatively sparse capabilities we had when we started this venture. And we have done so in many ways, including by developing our younger folks, two of whom were recently recognized as Rising Stars by *Law360*.

But finally, while we are happy about these achievements, we are not doing it for ourselves. It's all about the clients. You only grow and achieve by putting in the effort, placing our client's interests first and gaining the best results you can for them. Every day.

john.allcock@dlapiper.com



LANDMARK PRIVACY RULING IN EUROPE ON THE RIGHT TO BE FORGOTTEN

By Patrick Van Eecke, Anthony Cornette and Jim Halpert

In a landmark ruling in May, the European Court of Justice ruled that search engines need to remove the link between search results and a web page if it contains information an individual deems should be “forgotten.”

THE FACTS

In 1998, a major Spanish newspaper published two short announcements about a real estate auction that occurred due to a Spanish citizen's social security debts. In 2009, this person contacted the newspaper, complaining the announcements still appeared in Google searches of his name. Arguing the search results damaged his reputation and the attachment proceedings had been resolved long before, he asked the newspaper to block the pages from being indexed by search engines. The newspaper declined.

In 2010, the citizen contacted Google and filed a complaint with the Spanish data protection authority, the AEPD, which took the view that "it has the power to require the withdrawal of data and the prohibition of access to certain data by the operators of search engines when it considers that the locating and dissemination of the data are liable to compromise the fundamental right to data protection and the dignity of persons in the broad sense, and this would also encompass the mere wish of the person concerned that such data not be known to third parties."

Google Spain and Google Inc. appealed the AEPD's decision to the Audiencia Nacional, Spain's national high court, which then submitted several questions to the European Court of Justice regarding the application of the European Data Protection Directive.

THE ECJ DECISION

The main points of the ECJ ruling in *Google Inc. v Agencia Española de Protección de Datos* follow:

Controller: The ECJ ruled that Google is not merely a processor but also a controller of personal data on third-party web pages because Google decides on the purposes and means of the indexing activity.

Indexing is processing: The ECJ ruled that indexing information by a search engine is processing of personal data in the sense of the European Data Protection Directive.

National data protection law is applicable: The ECJ ruled Spanish data protection law applies, even if indexing happens in the US. Google Spain is established in Spain and is a subsidiary of Google Inc.; thus the promotion and selling, in Spain, of advertising space offered by the search engine makes Spanish data protection law applicable.

Data subjects may request removal of links from search engines: Google is obliged to remove links to web pages containing personal data, the ECJ ruled, even if publication on the web pages is lawful, because potential interference in a person's rights "cannot be justified by merely the economic interest which the operator of such an engine has in that processing." Removal may be necessary when search results "are liable to constitute a more significant interference with the data subject's fundamental right to privacy than the publication on the web page."

Fair balance: A fair balance should be found between the legitimate interests of Internet users seeking access to information and the privacy rights of citizens. The ECJ stated this balance depends "in specific cases, on the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life."

Right to be forgotten: The ruling endorses a right to be forgotten by the ECJ under the current Data Protection Directive. A citizen may require Google to remove him or herself from search results, making use of his or her "right to be forgotten" if the personal data have become inadequate, no longer relevant or excessive in relation to the purposes for which they were processed and in light of elapsed time.

BROAD IMPLICATIONS: EU AND US

This ruling increases the rights of private individuals to remove themselves from search results, making search results less reliable. The ruling could impact day-to-day operations of Internet companies and could have broad implications for any service using third-party data sources containing personal data.

In the upcoming new Data Protection Regulation, the right to erasure is defined even more broadly. The present case will be of interest to Internet companies and publishers for balancing privacy rights of citizens against the right to access information, to conduct a business and the freedom of expression. Although such information would still be available on the original websites, it will become more difficult to find if removed from search results.

It is now up to the Spanish National High Court to decide whether the earlier decision of the Spanish Data Protection Authority should be annulled. The High Court will probably soon confirm the decision of the Data Protection Authority, obliging Google to "take the necessary measures to withdraw the data from their index and to render access to the data impossible in the future."

This ECJ decision will have an impact throughout the European Union because it is binding on any other EU national court or tribunal before which a similar issue may be raised.

Also, the ECJ's conclusion is directly contrary to US law, whereby search engines normally enjoy immunity, under 47 U.S.C. § 230, for linking to content provided by others. The First Amendment strongly protects against lawsuits seeking to remove non-defamatory postings of third parties or other speech about those postings.

US providers of Internet search functionality with some presence in the EU should be mindful of requests from Europe to remove links to websites purportedly infringing data protection rights of EU residents.

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CELEBRITY ENDORSEMENTS ON SOCIAL MEDIA:

7 TIPS FOR NAVIGATING THE RIGHT OF PUBLICITY

By David Kramer and James Stewart



Social media makes building a brand easy: the tools are laid out in front of you, ready to launch your company to worldwide fame with a click of the mouse. Craft a few irreverent tweets, refresh the company Facebook page and voilà: you instantly have the power to engage consumers on a level never before possible, without the constraints of old-line paradigms.

In the real world, it's not that simple. As with any emerging medium, the always-on world of social media generates risks for brand owners every minute. While these risks are not always predictable, experience provides guidance on some issues brands may face. Among these questions: how far can you leverage the names and images of celebrities when promoting your brand online?

The allure of celebrity endorsement is clear. Celebrities have captivated the public for decades. Savvy businesses understand that this cultural fascination affects consumer choices. But, absent an explicit endorsement arrangement, leveraging the power of celebrity to shape consumer perception in a brand's favor has always required a careful balancing act, particularly because of "right of publicity" statutes passed by a number of US states.

The right of publicity, which originated during the 20th century, protects individuals against unauthorized commercial exploitation of their image in commerce. This differs from the traditional right of privacy in that it protects commercial interests rather than personal interests. While this right theoretically protects all persons, in practice only celebrities have accrued sufficient commercial value in their identity to support material right of publicity claims.

Early right of publicity cases focused on celebrity names and likenesses – elements that could easily be reproduced in print. As technology and popular culture have advanced, courts have expanded the scope of protectable rights. Today, the right of publicity is a personal property right which prevents unauthorized use of the full celebrity persona: names, likenesses, voices or other identifying features.

This area of the law is constantly evolving, while the market for celebrity endorsements is growing. This means the financial stakes are high, and even one misstep can be costly and embarrassing. Companies wishing to use celebrity names and images online need to get in front of the known risks. As you look at your social media presence, keep these seven points in mind:

1. You can (almost) never get something for nothing. Social media may present you with opportunities that appear to be amazing values at little or no cost. Be wary. Although agility is part of the beauty of social media, be sure you have strict procedures in place that require time for ample legal review.

2. Tread carefully with unauthorized celebrity photographs. A celebrity is photographed using your product. Is it a "free" endorsement? Using such photos without approval can be problematic. It may be permissible to link to the original source, but take great care not to create the impression an endorsement has occurred. For example, directly reposting such material outside its original context could give rise to a right of publicity claim; unauthorized republication of the image could also lead to copyright infringement liability.

3. Celebrities can be contentious. Celebrities' livelihoods are inextricably tied to their personal brands. The value of top-tier celebrities can be substantial. When celebrities perceive their personal brands are being threatened or exploited, the response can be harsh. Be prepared for the worst if you elect to tread too close to the line.

4. Capitalize on celebrity outreach to your brand. Monitor social networks for references to your brand and flag any celebrity interactions. These unsolicited endorsements can be exciting for the brand and its consumers. But while a response or retweet is likely appropriate, take care not to use the celebrity's mention of your brand in a way that could be considered overly exploitative.

5. Carefully consider requests from celebrities to remove content. If a celebrity, or member of the celebrity's team, requests removal of social media content that mentions the celebrity, consider doing so even if you feel your use is permissible. Sometimes expeditious removal can be the best way to avoid an ugly dispute; it also shows your good faith, which may pay great dividends later – perhaps leading to an authorized endorsement.

6. Your brand isn't the only one monitoring social media. Many celebrities have staff whose job is to monitor Internet coverage of the celebrity's brand. No matter how modest you perceive your unauthorized use of the celebrity persona to be, you should assume it will be seen by the celebrity, potentially exposing your brand to liability.

7. When in doubt, get permission. While this point may run counter to one of the core elements of social media – timeliness – there is simply no other way to truly eliminate risk. That being said, consider using social media to expedite the approval process. Sometimes a private message to a celebrity's social media account is the fastest way to get his or her attention.

GLOBAL RESOURCES TO HELP MANAGE YOUR GLOBAL BUSINESS

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www.dlapiper.com/prize-promotions-across-the-world-handbook-03-04-2014

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www.dlapiperoutsourcing.com/tools/sourcing-reference-guide.html

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US CONGRESS MAY ACT AGAIN ON PATENT REFORM

By Andrew Stein

The Leahy-Smith America Invents Act (AIA), enacted in 2011 after three different US Congresses considered various iterations of the legislation, was the most sweeping reform of our patent system since 1952.

But since its enactment, calls have arisen in certain quarters for even more reform. The AIA, some commentators say, did not go far enough to combat patent trolls. This is true, they say, even though the AIA authorized the US Patent and Trademark Office to create the new *inter partes* and “covered business method patent” post-grant review proceedings that the former Chief Judge of the Federal Circuit has described as essentially having no purpose other than to eliminate patent rights.

Those who want more reform may get it. In December 2013, with overwhelmingly bi-partisan support, the House of Representatives passed HR 3309, the so-called Innovation Act. Compared to other substantive legislation like the AIA, the Innovation Act raced through the House in less than seven months, having been first introduced by Representative (and Chairman of the House Judiciary Committee) Bob Goodlatte (R-VA) as a “discussion draft” in May 2013.



TROLLS TARGETING THE LITTLE GUY

Recent interest in patent reform can be traced to the behavior of a few “bad egg” patent plaintiffs made famous by the mainstream press for targeting the “little guy.” For example, MPHJ Technology has, so far, sent more than 16,000 letters demanding licensing payments to mom-and-pop users of systems that scan documents to e-mail, rather than to the manufacturers of those systems. Similarly, Innovatio IP Ventures demanded payment for use of Wi-Fi routers in the more than 13,000 letters it sent to coffee shops and small-chain hotels and motels, rather than to the manufacturers of the routers those businesses were using.

As passed by the House, the Innovation Act attempts major reform on patent litigation in four main ways: 1) it heightens the pleading requirements for patent infringement cases;

2) it institutes “loser pays” fee-shifting; 3) it limits discovery before a claim construction ruling is made; and 4) it allows a suit against a customer to be stayed in favor of one against a manufacturer.

Only after the House passed the Innovation Act did the US Senate begin to seriously consider similar reforms. However, those efforts have now completely stalled, as Senator Patrick Leahy (D-VT), co-author of the AIA, has removed the leading Senate patent reform bill, S. 1720, from the Judiciary Committee’s agenda. Absent further Senate action, this most recent round of patent reform may be at its end.

Andrew N. Stein, an associate based in Washington, DC, focuses a significant portion of his practice on defending operating companies against patent troll litigation in federal district courts. Reach him at andrew.stein@dlapiper.com.



SUPREME COURT CORNER



RECENT DECISIONS



CASES TO WATCH



Octane Fitness, LLC v. Icon Health & Fitness, Inc.
Patent: Decided: April 29, 2014

Holding: A patent case is “exceptional” under 35 U.S.C. § 285 when it “stands out from others with respect to the substantive strength of a party’s litigating position or the unreasonable manner in which the case was litigated.”

This decision overturns the *Brooks Furniture Mfg. v. Dutilier Int’l Inc.* standard, finding instead that awarding fees is a matter of discretion and should be evaluated case by case. The court noted “exceptional” is not defined in § 285 and found exceptional means “uncommon,” “rare” or “not ordinary,” rejecting the prior two-prong standard as “overly rigid.” The Court held a party could satisfy § 285’s “exceptional” requirement by showing an infringement claim is “simply one that stands out from others with respect to the substantive strength of a party’s litigating position (both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated.”

This opinion is being widely read as lowering the standard for attorney fee awards. However, in the first opinion applying *Octane – Bianco v. Globus Medical, Inc.* – the Eastern District of Texas did not award fees because the defendant did not meet its burden of proof. Interestingly, Federal Circuit Judge William C. Bryson was sitting by designation and authored the opinion.

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Alice Corp. Pty. Ltd. v. CLS Bank Int'l

Patent: Decided: June 19, 2014

Holding: The patent claims, which use a generic computer for intermediated settlement, are unpatentable under § 101 because they are drawn to an abstract idea and fail to claim an “inventive concept.”

While “abstract ideas” are generally unpatentable, a unanimous Supreme Court (9-0), following *Mayo Collaborative Svcs.* and *Bilski*, held certain applications of these ideas may be patent eligible. To determine patentability under § 101, the court must analyze, first, whether the claims are directed to an abstract idea and, second, whether the claims include an “inventive concept”—“i.e., an element or combination of elements that is ‘sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the [ineligible concept] itself.’” (quoting *Mayo*)

Petitioner Alice Corp. is the assignee of several patents that claim methods, systems and computer-readable media for using a generic computer to mitigate settlement risk. In finding the claims at issue unpatentable, the Court held that they are drawn to an abstract idea, mitigating settlement risk, though the Court did not “delimit the precise contours” of “abstract ideas.” Second, the Court held that merely tying a claim to a generic computer does not “transform that abstract idea into a patent-eligible invention.” Petitioner’s method claims are thus unpatentable because they simply implement the abstract idea through a generic computer. Likewise, Petitioner’s computer system and computer-readable medium claims are unpatentable—none of the recited hardware claims a meaningful limitation beyond the generic use of a computer.

While at first blush this decision seems to be a victory for patent challengers, software patentees may also be encouraged by it. On one hand, this decision may trigger an increase in § 101 motions, and lower courts may rule more computer-related patents invalid. On the other, the Court’s narrow holding also affirms software inventions with an “inventive concept” are patentable.



Nautilus, Inc. v. Biosig Instruments, Inc.*

Patent: Decided: June 2, 2014

Holding: The Court, in a unanimous (9-0) opinion authored by Justice Ginsburg, held that the Federal Circuit’s indefiniteness standard bred “lower court confusion” because it “lack[ed] the precision §112, ¶2” demands.



Limelight Networks, Inc. v. Akamai Techs., Inc.*

Patent: Decided: June 2, 2014

Holding: The Supreme Court, in a unanimous (9-0) decision authored by Justice Samuel Alito, held that induced infringement requires proof of an underlying direct infringement. Assuming without deciding that the Federal Circuit’s *Muniauction* case is correct, the Court found that a method claim is directly infringed when one either completes each step or directs or controls the performance of each step.



Highmark Inc. v. Allcare Health Management System, Inc.

Patent: Decided: April 29, 2014

Holding: A district court’s decision to award fees in a patent case under 35 U.S.C. § 285 is reviewed on appeal for abuse of discretion.

Highmark overturns the *Brooks Furniture* standard of *de novo* review because a district court is “better positioned” to decide whether a case is exceptional due to its experience with the case over a “prolonged period of time.”

The district court had awarded Highmark \$5 million in attorneys’ fees, finding Allcare had engaged in a pattern of vexatious, frivolous litigation conduct. The Federal Circuit had reviewed the award without deference, pursuant to *Brooks Furniture*.



Petrella v. Metro-Goldwyn-Mayer, Inc.

Copyright: Decided: May 19, 2014

Holding: The equitable defense of laches cannot bar damages, a legal remedy, in copyright cases.

Paula Petrella, owner of the copyright to the screenplay for the 1980 movie *Raging Bull*, waited until 2009 to bring her copyright infringement suit, seeking damages only for the three-year statutory period. The majority opinion (6-3), delivered by Justice Ruth Bader Ginsburg, ruled that laches, an equitable remedy, cannot bar legal relief when, as here, Congress has enacted a statute of limitations; but laches can be invoked to bar an equitable remedy, *e.g.* injunction. Under the Copyright Act, authors have a long copyright term and a right to sue for infringement occurring no more than three years prior to suit, which, according to the Court, leaves “little place” for a doctrine that would further limit the timeliness of a copyright owner’s suit.”

Petrella suggests copyright owners, in considering when to file an infringement suit, should consider the nature of the remedy (*i.e.* legal or equitable). To protect against a delay in suit, a party suspecting it may infringe another’s copyright should consider early declaratory judgment on non-infringement and document its non-infringement case to preserve key testimony and documents.



American Broadcasting Companies v. Aereo

Copyright: Argued: April 22, 2014

Issue: Does a company “publicly perform” a copyrighted television program when it retransmits a broadcast of that program to paid subscribers over the Internet?

Aereo provides its subscribers antennae permitting them to watch and record over-the-air broadcast TV programs. The petitioners argue Aereo’s transmissions are public performances under the Copyright Act and could harm the broadcast industry. The justices asked whether the “public performance” line could be drawn to include Aereo while excluding other unrepresented industries, such as cloud-based content providers.

*Look for more on these cases in Supreme Court Corner in *IPT News*, Q3 2014.

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