Lang Michener LLP
Lawyers – Patent & Trade Mark Agents



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**Recent amendments to the *Patent Rules* aim to clarify the definition of a "small entity" and provide some relief where this status is erroneously claimed. Keith Bird discusses the lingering uncertainties on the horizon for patent owners.**

## The Hidden, Contentious Issues of Copyright Co-Ownership

Ryan J. Black

One typically assumes a copyright owner to be a single person or entity – from the solitary novelist penning her latest work to the movie studio releasing a blockbuster hit. But consider the screenwriting duo who collaborate on a script, the band members who co-write a song, or the entrepreneurial programmers who jointly develop the next killer application. Should one screenwriter be able to write a sequel without the other? Can one band member license a song for use in a television commercial? What happens when one programmer wants to sell the application to a software giant? Careful consideration should be paid to the concept, and the pitfalls, of co-ownership of copyright.

The *Copyright Act* (Canada) states that, unless an exception is met, the author of a work will be the first owner of copyright in that work. So, if the work is a "work of joint authorship" as defined in the Act, and no other deeming provisions apply, the authors are the co-owners of the copyright. A work is one of joint authorship, generally, when it is produced through the collaboration of two or more people, except for situations where each person makes distinct contributions to the work (e.g., an artist who contributes distinct illustrations to a book), or where the contributions of others are mere ideas or inspirations (on the basis that each contribution must be capable of copyright). Since even a small contribution may be capable of copyright and could create joint authorship, great care must be taken by authors in allowing another person to collaborate in works.

Co-ownership in copyright can also arise in other situations. Copyright may be sold or assigned by one author to two or more people. Alternatively, the *Copyright Act*'s default ownership rules can deem joint authorship – the Act deems employers to own works created in the course of employment, and commissioned paintings or photographs to be owned by the person who commissioned them. While it may be difficult to imagine one person creating a single work for two employers, it is easier to foresee an artist creating a painting commissioned by two people.

What does it mean to be a co-owner, and, specifically, what right does each co-owner have to exploit (or prevent the exploitation of) the copyright? The answer to this question depends largely on the legal form of co-ownership, which may be decided by agreement or interpreted by the courts.

Looking first to other jurisdictions, co-ownership of copyright (absent an agreement) in the UK has been interpreted to mean "joint tenancy," where each owner holds an undivided interest in the whole copyright. This means that one owner who attempts to exploit the copyright without the permission of others may be liable for infringement, and no single owner or group could license, assign or sell the copyright without the consent of the rest. By contrast, courts and legislation in the U.S. have interpreted co-ownership to be "tenancy in common," where each owner holds a proportional interest in the copyright. Each owner, therefore, is not liable for infringement for non-exclusively licensing the work or selling his or her proportional interest in the copyright without the permission of the others. U.S. copyright law also requires each owner to account to the others for profits earned from licensing.

In Canada, unfortunately, there is little guidance in legislation or case law for the default interpretation of copyright co-ownership. The *Copyright Act* does not contain any provisions dealing with co-ownership situations; instead it simply contains the implicit provision that (absent a deeming rule) joint authors will be co-owners of a work. For example, s. 13(4) of the Act states that owners may assign the whole or partial copyright to their works in writing, but does not specify what level of consensus is required for co-owned works to be assigned or whether it can be done by each co-owner individually. Furthermore, while it has been argued that some early 20th-century case law supports the UK position on copyright joint tenancy (as do other Commonwealth decisions), there is a noticeable lack of Canadian cases directly on point, especially as between the competing interests of the co-owners themselves.

In fact, each Canadian province may have its own jurisprudence that determines whether property such as copyright is presumed to be held in joint tenancy or as tenants in common. Even with such presumption, the facts in each case could rebut it, as could an agreement among the co-owners. For example, a court may view co-ownership of copyright in a confidential document (where, presumably, the creators intended to restrict disclosure) differently than that in a published academic work (where, presumably, the creators intended to disseminate knowledge widely).

Before attempting to exploit copyright, and preferably even before a copyrightable work is created, joint authors and co-owners should agree in writing on their respective rights and obligations. Should one be entitled to "veto" a proposed licence? May co-owners license independently, or will licensing decisions be made on a majority basis? Should there be a differentiation between exclusive and non-exclusive licensing? If one co-owner licenses the work, are royalties owed to the others, or do the co-authors intend to go their separate ways with the work? May co-owners sell their "portion" of the copyright and, if so, what rights do the others have? Are co-owners entitled to develop derivative works such as sequels, adaptations or later versions? What happens when a co-owner dies?

*Before attempting to exploit copyright, and preferably even before a copyrightable work is created, joint authors and co-owners should agree in writing on their respective rights and obligations. If one co-owner licenses the work, are royalties owed to the others, or do the co-authors intend to go their separate ways with the work?*

Co-owners of copyright must consider these questions at the outset. Through the rose-coloured glasses of their creative endeavours, they may not see that co-ownership is rife with contentious issues.

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## Federal Court of Appeal Reviews Significant Issues in Trade Mark Law

**Dale E. Schlosser**

Below is a summary of the most recent installment of *Remo Imports Ltd* v. *Jaguar Cars Limited and Ford Motor Company of Canada* (2007 F.C.A. 258). This concerns a trade mark dispute involving the trade mark JAGUAR decided by the Federal Court of Appeal which addresses many areas of trade mark law. The dispute primarily involves the use of JAGUAR with tote bags, handbags, school bags and the luggage.

The Court of Appeal noted that the Amended Notice of Appeal was 49 pages and that some of the alleged errors of law argued by the Appellant (Remo) were not addressed in its Memorandum of Fact and Law or the Amended Notice of Appeal. The decision by the Court comments that the Court had expressed concern that it had become an appeal by ambush. As a general rule, the Court of Appeal will not hear grounds of appeal that were not raised in the Notice of Appeal or the Memorandum of Fact and Law. Not a good start for Remo.

Justice Létourneau for the Court of Appeal noted that there was an extensive record of six thousand exhibits, hundreds of binders and dozens of samples and, in particular, stated:

> I should add that, as an American appellate judge once said, judges are not ferrets: cited in *Dow AgroSciences Canada Inc.* v. *Philom Bios Inc.*, 2007 ABCA 122, at paragraph 53. It cannot be expected that appeal judges will embark on a search of the record to find pieces of evidence which could support or particularize broad allegations made by a party to the appeal.

Remo, which had a registration for JAGUAR, launched an action for infringement against Jaguar Cars. Remo registered its trade mark in 1981 for tote bags and luggage and amended it in 1984 for handbags and school bags. Jaguar Cars counterclaimed also alleging confusion. The trial judge found in favour of the respondents. In its declaration (Statement of Claim), Remo had stated that Jaguar's use of wares such as wallet cases and other wares were confusing with Remo's wares used with the trade mark JAGUAR and that Jaguar Cars' wares are in the same general category of wares as those of Remo.

*The Court of Appeal questioned how Remo could have engaged in passing off when it did not know of the existence of the trade marks of Jaguar Cars.*

As of 1991 and the time of trial, Remo admitted that there was actual confusion between its wares and those of Jaguar of a slightly different category of luggage wares. Accordingly, the Court of Appeal commented that it is hard to imagine how and why the trial judge could not conclude there would be at least a likelihood of confusion between similar wares or wares of the same category, namely Remo's baggage, tote bags, school bags and handbags and Jaguar Cars' luggage, baggage and bags. The Court of Appeal commented that the trial judge was entitled to draw that conclusion after having found that Jaguar Cars' trade marks were famous and extended to the impugned wares.

Justice Létourneau pointed out that having lost at trial, Remo was now contending that there is no confusion between its wares consisting of baggage, tote bags, handbags and school bags and all of the luggage wares of Jaguar Cars, i.e. it had changed its argument significantly from what it claimed before the trial judge.

One ground raised by Jaguar Cars in attacking Remo's trade mark registration was that the registration was invalid on the basis of depreciation and deception to the public with reference to Section 22(1) of the *Trade-Marks Act,* which provides a remedy, i.e. no person shall use a registered trade mark of another in a manner that is likely to have the effect of depreciating the value of the goodwill attaching thereto. Section 18(1) of the *Trade Marks Act* states that a registration is invalid if the trade mark was not registrable at the date of registration; the trade mark is not distinctive; or the trade mark has been abandoned. Depreciation and deception of the public are not recognized grounds under Section 18 of the *Trade Marks Act* for invalidity. The Court of Appeal noted that non-statutory grounds of invalidity have been recognized, such as misappropriation of a trade mark in violation of a fiduciary duty and fraudulent or material misrepresentations for the purposes of registration.

Although the trial judge expressed some surprise, he accepted the testimony of the sole shareholder of Remo who had lived in Beirut, Paris and Montreal for years and travelled in Canada, Holland, Belgium, Northern Italy and Asia (Hong Kong and Korea) but never saw or heard of Jaguar Cars' trade mark JAGUAR for cars and luggage before Remo's application was filed for the trade mark JAGUAR covering tote bags and baggage. The Court of Appeal found that, on the basis of the evidence, the trial judge could not conclude that the trade mark was invalid because it was calculated to deceive and mislead the public. The Court of Appeal also found that the remedy within Section 22(1) is not a ground of invalidity of the registration.

Section 17(2) provides that no registration shall be expunged or held invalid on the ground of previous use unless it is established that the person who adopted the registered trade mark in Canada did so with knowledge of that previous use. It is also necessary for the previous user to bring such expungement proceeding. Section 17(2) denies the right to an expungement where the proceedings are commenced after the expiration of five years from the date of the registration of the trade mark and the five-year limitation period applies unless it is established that the person who adopted the registered trade mark knew of the previous use. Since the parties were not aware of each other at the onset of the proceedings, the Court of Appeal held that the trial judge erred in ordering expungement of the registration on the basis of prior use. In this case, the five-year limitation period had expired.

Since both parties were unaware at the time and until 1991 of the existence of each other, the Court of Appeal questioned how Remo could have engaged in passing off (a willful or negligent misrepresentation creating confusion in the public) when it did not know of the existence of the trade marks of Jaguar Cars. However, Remo did not appeal against the judge's conclusion with respect to a finding of passing off.

Remo had a valid registration until found invalid and expunged by the trial judge in 2006, therefore, Jaguar Cars was entitled to damages or profits for infringement but only as of the date of the judgment by the trial judge, i.e. January 16, 2006.

Given the animosity between the parties, it is unlikely that this is the last time the Federal Court or Federal Court of Appeal will be asked to resolve issues between the parties.

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## Louis Vuitton Bags K2 – The Rising Cost of Counterfeiting

**Matthew Thurlow**

The recent decision of the Federal Court in *Louis Vuitton Malletier S.A. et al.* v. *Lin Pi-Chu Yang et al.* (2007 FC 1179) awarded extensive damages against counterfeiters that had exhibited a pattern of such behavior. The decision, released on November 14, 2007, reinforces the position taken by the court in *Microsoft Corporation* v. *Cerelli et al.* [2006] FC 1509.

The plaintiff, Louis Vuitton, is the well-known maker of fashion accessories. The defendants, Lin Pi-Chu Yang and Tim Yang Wei-Kai (both also known under aliases) have, since at least 2001, controlled and operated a retail store named K2 Fashions, located in Richmond, British Columbia.

Louis Vuitton had been pursuing the defendants since 2001, in relation to alleged trade-mark and copyright infringement through the sale of counterfeit Louis Vuitton goods at K2 Fashions. Two previous judgments had been entered against the defendants, though the awards given therein have not been paid. Subsequent to those judgments, Louis Vuitton has orchestrated the seizure of numerous counterfeit copies from the defendants, and have repeatedly advised the defendants to cease their infringing activities. These attempts by the plaintiffs to curb the infringing activities of the defendants have been largely unsuccessful.

The plaintiffs commenced the present action July 5, 2007, alleging trade-mark infringement and copyright infringement, by K2 Fashions' sale of counterfeit Louis Vuitton goods. The defendants failed to defend the action, and Louis Vuitton brought a motion for default judgment. The Court granted default judgment, easily finding that both trade-mark and copyright infringement had occurred.

Louis Vuitton elected an award of statutory damages in relation to infringement of its copyrighted works. Such damages range between $500 and $20,000 per infringed work. There were two infringed works in this case. Looking to the analysis performed in the *Microsoft* case, the Court found that the full $40,000 was appropriate, given that the defendants had acted in bad faith and had persistently engaged in infringing activities despite being advised numerous times to stop such activities. Justice Snider also found a high award to be "necessary to deter future infringement and, secondarily, to deter open disrespect for Canada's copyright protection laws."

Apart from the number of infringed works, a "nominal" award of $6,000 per instance of infringement is often given to each plaintiff in actions for trade-mark infringement – i.e., as an approximation of damages, where neither damages nor profit can be accurately quantified (as is commonly the situation when defendants do not defend or participate in the action). In this case, the Court found such a "nominal" award to be appropriate – with an adjustment to $7,250 per infringing instance to account for inflation – and awarded a further $87,000 to the plaintiffs (i.e., six instances each at $7,250 per plaintiff).

Using the test set out by the Supreme Court of Canada in *Whiten* v. *Pilot Insurance Co.* [2002] 1 S.C.R. 595, additional punitive and exemplary damages of $100,000 were awarded, noting such an award to be consistent with that given in the *Microsoft* case. Here, the Court found such an award was justified in view of the egregious conduct of the defendants, and the disproportionally low award of damages for trade-mark infringement when compared to the profits that were probably made (and which profits could not be determined due to the non-participation of the defendants in the action).

The plaintiffs were also awarded $36,699.14 in costs, bringing the total award of damages and costs to $263,699.14.

The similarity of scale for the statutory and punitive damage awards in this case in comparison with those in *Microsoft* serves to reinforce the message that holders of intellectual property rights are now in a strong position to seek extensive damages against counterfeiters. This decision is also a further warning to counterfeiters of the high risk of taking a flippant attitude to court proceedings and other attempts to curtail their infringing activities.

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## Canada-U.S. Patent Prosecution Highway Now Open

**Orin Del Vecchio**

January 28, 2008 marked the beginning of a Patent Prosecution Highway ("PPH") one-year pilot project between Canada and the United States. The PPH is a joint initiative between the Canadian Intellectual Property Office ("CIPO") and the United States Patent and Trademark Office ("USPTO") to expedite the examination of patent applications, while also reducing the workload on patent examiners.

That same day, the first-ever PPH (between the U.S. and Japan) became permanent, after a successful pilot project that had been initiated in July 2006. Similar pilot projects are currently underway, including ones between the U.S. and the UK, the U.S. and South Korea, South Korea and Japan, and Japan and the UK.

### Requirements

The concept behind the PPH is that an allowed patent application in a first country may expedite prosecution and allowance of a corresponding patent application (based on a priority claim) in the other country. The PPH can be initiated after the first country finds at least one claim to be patentable (allowed). Upon filing a successful PPH request in the second country, the corresponding application will be placed on a separate PPH examination list, with the aim of expediting its allowance.

Eligibility for the PPH depends on where the application was first filed. In Canada, the PPH may be accessed where (a) a Canadian application claims priority, or (b) there is a Canadian National Entry of a PCT application which claims priority, from an allowed U.S. application. Canadian divisional applications that meet these criteria are also eligible for the PPH.

In the U.S., the PPH may be accessed where (a) a U.S. application claims priority, or (b) there is a U.S. National Entry of a PCT application which claims priority, from an allowed Canadian application. An alternate route onto the PPH, available only in the U.S., exists for (c) a U.S. National Entry of an originating PCT application, where a Canadian National Entry (stemming from the same PCT application) has been allowed. U.S. divisional and continuation applications that meet these criteria are also eligible for the PPH.

In both countries, only published applications are eligible for the PPH, and only if examination has been requested but not commenced. For Canadian applications, it will generally be possible to delay filing a request for examination until the same time as filing a PPH request.

Along with a PPH request, an applicant must also file a table showing a direct correspondence between the yet-to-beexamined claims and the allowed claims in the first-filed application. If necessary, an amendment may be contemporaneously submitted to place the claims in such condition. If the patent office finds that the claim sets do not correspond with one another, the PPH request will be irrevocably denied. Accordingly, prior to filing the PPH request, care must be taken to make any necessary amendments.

Presently, there is no additional fee charged in Canada for submitting a PPH request (i.e., beyond the standard examination fee), although this is subject to change. In the U.S., there is a petition fee of US$130 for filing a PPH request.

### Strategic Considerations

The Canada-U.S. PPH may create some significant benefits for patent applicants. By first filing a Canadian patent application along with a request for accelerated examination, an applicant might receive a first office action, and possibly even allowance, within a year of such filing.

In the United States, a corresponding U.S. application could gain entry onto the PPH as soon as the Canadian parent application is allowed. In this manner, it should be possible for applicants to avoid the complex (and expensive) accelerated examination requirements of the USPTO, so as to obtain an allowed and granted U.S. patent in an expedited fashion. (Alternately, overly negative examination results, received from CIPO within the first year, may suggest that no corresponding applications should be filed so as to save the associated costs.)

If patent protection beyond Canada and the U.S. is desired, the foregoing strategy could also be employed by filing an originating PCT application.

### Conclusion

Notably, the PPH is now open for both new and *existing* (i.e., previously filed) applications that meet the necessary criteria. As such, a review of all contemplated and pending patent applications should be undertaken to determine if any are appropriate for expedited prosecution and allowance using the PPH.

The Canada-U.S. PPH creates new possibilities, and new decisions, for patent applicants. Choosing the right jurisdiction of first-filing for a patent application is now more crucial than ever – i.e., in view of the potential repercussions on PPH eligibility.

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## "Small Entity" Status – Improved but Perhaps not Perfected

**Keith Bird**

The Canadian patent regime, like many others, provides a 50% reduction in government fees to eligible sole inventors, small companies and universities. Those who qualify for the fee reduction are called "small entities," a term defined in the *Patent Rules*. Small entity status was considered in *Barton No-Till and Flexi-Coil* v. *Dutch Industries* (2003), 24 C.P.R. (4th) 157 (F.C.A.), reversing in part, 14 C.P.R. (4th) 499 (F.C.T.D.), in which it was decided that the entity status of an applicant was determined, once and for all, when the applicant first "engaged" the patent regime.

The definition of small entity that was in effect when *Dutch Industries* was decided was:

> "**small entity**" in respect of an invention, means an entity that employs 50 or fewer employees or that is a university, but does not include an entity that
>
> (a) has transferred or licensed, or is under a contractual or other legal obligation to transfer or license, any right in the invention to an entity, other than a university, that employs more than 50 employees, or
>
> (b) has transferred or licensed, or is under a contractual or other legal obligation to transfer or license, any right in the invention to an entity that employs 50 or fewer employees or that is a university, and has knowledge of any subsequent transfer or license of, or of any subsisting contractual or other legal obligation to transfer or license, any right in the invention to an entity, other than a university, that employs more than 50 employees. [*Patent Rules,* S.O.R./96-423, s.2]

The draconian consequences of failing to correctly determine and claim small entity status for a client were made apparent in *Johnson & Johnson Inc. et al.* v. *Boston Scientific Ltd.* 2004 F.C. 1672 (F.C.), in which the Court found that the applicant was not a "small entity" when its applications were filed. Consequently, its applications had been abandoned 12 months after they were filed, due to the payment of insufficient filing fees, and had not been reinstated within the 12 months thereafter. As a result, those applications were irrevocably abandoned and the patents issuing from them were invalid. A similar finding was made in *Johnson & Johnson et al.* v. *Arterial Vascular Engineering Canada, Inc. et al.* 2004 F.C. 1673 (F.C.).

The Government of Canada has responded to these cases by enacting amendments to the Patent Rules to clarify the definition of a small entity and to provide relief in circumstances where small entity status has been erroneously claimed. The present definition of small entity, which came into force June 2, 2007, is set out in s.3.01 of the *Patent Rules*:

> **"small entity,"** in respect of an invention, means an entity that employs 50 or fewer employees or that is a university, but does not include an entity that
>
> (a) is controlled directly or indirectly by an entity, other than a university, that employs more than 50 employees; or
>
> (b) has transferred or licensed or has an obligation, other than a contingent obligation, to transfer or license any right in the invention to an entity, other than a university, that employs more than 50 employees.

While this definition of small entity is certainly clearer than the definition it replaced, neither the terms "directly or indirectly controlled" nor "contingent obligation" are defined in the *Patent Act* or *Patent Rules* and we will have to await the appropriate case before the courts have an opportunity to interpret these terms. For example, it is not clear if a Canadian subsidiary having only five employees but owned by a U.S. parent having several hundred employees would qualify as a small entity. Similarly, while "contingent obligation" would appear to refer to a security agreement, the exact terms of such agreements may determine if they are contingent or not.

As indicated above, the *Patent Rules* now have a provision for making corrective payments when insufficient fees were paid on the basis of an erroneous claim of small entity status. S.26 states:

> 26(3) Except in respect of Part V, if the appropriate fee under subsection 3(3), (5), (7), (8) or (9) in respect of a proceeding or service is either a small entity fee or a standard fee, and if, after the coming into force of this subsection, a person pays the small entity fee but the applicant or patentee later becomes aware that the standard fee should have been paid, the Commissioner is authorized to extend the time fixed by these Rules for payment of the appropriate fee if the Commissioner is satisfied that the circumstances justify the extension.
>
> (4) An extension may be authorized under subsection (3) only if the following conditions are satisfied:
>
> (a) the applicant or patentee files a statement that, to the best of their knowledge, the small entity fee was paid in good faith and the subject application for the extension is being filed without undue delay after the applicant or patentee became aware that the standard fee should have been paid;
>
> (b) the applicant or patentee pays the difference between the amount of the small entity fee that was paid and the standard fee as set out in Schedule II to the *Patent Rules* as they read at the time the small entity fee was paid; and
>
> (c) the applicant or patentee pays the fee set out in item 22 of Schedule II in respect of each fee that is the subject of an application for such an extension.

It should be noted that acceptance of corrective payments is at the Commissioner's discretion. Furthermore, the applicant or patentee must file a statement that the incorrect payment was made in good faith, and that the corrective payment was made without undue delay after the error was discovered. Clearly, such a statement would be closely scrutinized in the event of subsequent litigation involving a patent issuing from an application during the prosecution of which such a statement was filed.

Given the potential loss of patent rights that may occur if insufficient fees are paid, and subsequent corrective payments are either not accepted or subsequently challenged as being improper, Lang Michener LLP continues to recommend to its clients that large entity fees be paid unless there is absolutely no doubt that an entity satisfies the definition of small entity when the Canadian patent regime is engaged.

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# Announcements and News

## Announcements

### Tim Squire New Chair of Intellectual Property Group

**Tim Squire** is the new Chair of the Intellectual Property Group. Tim has been a partner with the firm since 2004 and has a history of being involved with firm activities including being a member of the firm's Marketing and Student Committees. Tim is taking the reins from **Don MacOdrum**. We thank Don for the outstanding work he has done in this position.

### Tim Squire Appointed Chair of the Biomedical Device Subsector of the Licensing Executives Society

Lang Michener is pleased to announce that **Tim Squire** has been appointed as chair of the Biomedical Device Subsector of the Licencing Executives Society, commencing January 2008.

### Intellectual Property Group Member Update

We are pleased to announce that **Rosamaria Longo**, Associate, and **Alvira Macanovic**, Scientific Consultant, have joined the firm in the Intellectual Property Group in Toronto.

We are also pleased to announce that **James M. Bond** of Vancouver was admitted into the partnership on January 1, 2008.

## News

### Donald MacOdrum Recognized As an Expert in His Field in Three Leading Directories

Lang Michener is pleased to announce that **Donald MacOdrum** was recognized by his peers as an expert in his field in *The 2008 Lexpert/American Lawyer Guide to the Leading 500 Lawyers in Canada*, *The Best Lawyers in Canada 2008*, and *The International Who's Who of Business Lawyers 2008*.

### Three Lang Michener Lawyers Appointed to International Trademark Association (INTA) Committees

Lang Michener is pleased to announce that **Dale Schlosser**, **Peter Giddens** and **Alison Hayman** have each been appointed to much-sought-after two-year committee terms with various International Trademark Association ("INTA") committees. Dale Schlosser has been appointed to the Monetary Remedies Subcommittee of the Enforcement Committee. Alison Hayman has been appointed to the Fair Use & Other Boundaries Subcommittee of the Emerging Issues Committee, and Peter Giddens, who was also the recipient of the INTA 2005 Service Award for the Advancement of Trademark Law, has been appointed to the Online Trademark Use Subcommittee of the Internet Committee. The appointments commenced in January 2008.

IntellectualPropertyBrief

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