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Currents

ISSUES AND TRENDS IN INTELLECTUAL PROPERTY AND E-COMMERCE LAW

Business Methods Dodge Bullet in *Bilski*

By Roger Gilcrest

It was thought that the decision of the Supreme Court in *Bilski v. Kappos* would finally bring some clarity, if not finality, to the issue of whether business methods are "processes" that can be patented. However, the decision failed to create a singular, workable standard, and thus continues to leave the door of the U.S. Patent Office open to patents on methods of doing business.

QUICK LOOK INSIDE

FALL 2010

- Practical Guidance for Cloud Computing
- Employer Policies Need to Address Employee Internet Usage
- Employers Must Exercise Caution When Monitoring Employee E-mails
- Proposed Multi-Track Patent Examination Process

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The invention in the *Bilski* case involved a method that would allow commodities buyers and sellers in the energy market to hedge against the risk of price changes. The claims were to a method that involved a series of steps to hedge risk; in essence, purely business method.

The *Bilski* decision is the most recent round of court decisions that have wrestled with the question: "When may a 'process' be a patentable process?"

The patent laws require those things that can be patented to fall into one of four (apparently) simple categories: (1) a composition of matter (think penicillin, Silly Putty or Viagra); (2) a manufacture (sometimes referred to as an article of manufacture - think Velcro, double-sided tape or a tamper-proof bottle); (3) a machine (e.g., a vending machine, cell phone or satellite); or (4) a process (broadly any "process, art, or method, including a new use of a known process, machine, manufacture, composition of matter, or material" such as a chemical synthesis or production method).

Before reaching the Supreme Court, the Court of Appeals for the Federal Circuit thought it had articulated a new test that would separate truly patent-worthy processes from troublesome business methods, such as that claimed by Bilski. The court had pronounced that, to be patentable, a process either had to involve a transformation of matter or in some way be tied to a

particular machine. This was called the "machine-or-transformation" test. In doing so, the court rejected its prior test for determining whether a claimed invention was a patentable process; i.e., whether it merely produced a "useful, concrete, and tangible result," as articulated in *State Street Bank & Trust Co. v. Signature Financial Group, Inc.*

This test sent shudders through several industries, but not just because business method patents might be lost. The software industry feared that so-called software patents (a term generally used to describe patents on data processing methods carried out through the use of computer programs) would be disqualified from patent protection, because most software-directed methods would fail the "machine-or-transformation" test. Likewise, industries dealing in such technical fields as detection and sensing technologies and medical diagnostics – whose methods would fall outside the "machine-or-transformation" rule – feared their inventive methods might be patent ineligible.

The *Bilski* decision held that, although the machine-or-transformation test is reliable in most cases, it is not the exclusive test. This means that methods failing this test – such as business methods (and other non-matter-transforming methods, such as data processing, sensing and diagnostic methods) - might still qualify for a patent. The majority opinion said only that the "machine-or-transformation" test serves only as a "useful and important clue or investigative tool" to determine whether an invention is a patent-eligible "process," a rather unsatisfactory result for those who may have expected a definitive legal test. Indeed, it gave no new judicial formulation to draw a clear line but avoided having to do so by deciding that Bilski's methods were not patentable processes, but merely an attempt to patent abstract ideas.

As to those other industries, as a result of the Supreme Court's decision in *Bilski*, the Supreme Court acted quickly in two cases related to the patent-eligibility of diagnostic testing and methods of treatment – *Mayo Collaborative Svcs., et al. v. Prometheus Laboratories* and *Classen Immunotherapies, Inc. v. Biogen Idec, et al.* In both cases, the Supreme Court immediately vacated the judgments and remanded for further consideration in light of its *Bilski* ruling.

However, the fractured opinion of the court demonstrates just how far the law has not come, and perhaps how far it must travel before new cases involving inventions not so readily dismissed as "abstract ideas" might force a deeper consideration of business methods as patentable subject matter. For now, however, the majority opinion clearly indicates that business methods are not to be disqualified from patentability based upon a bright-line test or legal disability. In fact, the ruling specifically allows the Federal Circuit to "[develop] other limiting criteria that further the Patent Act's purposes and are not inconsistent with its text." The decision thus invites the Federal Circuit perhaps to further refine the boundaries of patent eligibility, as long as it can do so without improper departure from the patent statute.

Reacting to the *Bilski* decision, on July 27, 2010, the U.S. Patent and Trademark Office released its *Interim Guidance for Determining Subject Matter Eligibility for Process Claims in View of Bilski v. Kappos*. These guidelines are intended to assist the Patent Office in determining whether a given invention is patentable subject matter and apply to all applications currently pending. Interestingly, the Patent Office is now encouraging patent examiners to issue rejections based on perceived lack of statutory subject matter only in "extreme cases" and allow patentability to be decided by reference to other principal requirements of novelty, unobviousness and claim clarity.

The patent examiners are now encouraged not merely to make patentable subject matter rejections as the only grounds of rejection, but rather to proceed with examination and provide all bases for rejecting claims in the first office action. Calling for a "compact" examination, each claim initially should be reviewed for compliance with every statutory requirement for patentability, even if claims are deemed deficient with respect to the patent eligibility requirement of 35 U.S.C. 101. Examiners are encouraged to make all non-cumulative rejections in the first office action. The Patent Office notes that the Supreme Court decision in *Bilski* intended to "underscore that the text of Section 101 is expansive... [and] that business methods are not 'categorically outside of Section 101's scope'."

Editor's Notes

The Supreme Court's doors remain open to business method patent claims. While the stakes were high, the *Bilski* court deferred for another day the precise standard for determining which business methods constitute patentable subject matter. In the meanwhile, attorneys will continue to interpret shades of gray to advise clients.

Currents is published three times a year as a service to inform business owners and professionals of current legal developments in intellectual property and e-commerce law. The material in Currents should not be construed as offering legal advice. Readers should consult their own professional advisors to discuss their specific circumstances.

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The Federal Register Notice publishing the guidelines also reminds examiners that Section 101 is not the sole tool for determining patentability where a claim encompasses an abstract idea and specifically states that "Section 101 is merely a coarse filter and thus a determination of eligibility under Section 101 is only a threshold question for patentability."

In an attempt to provide additional clues to patentability, the Federal Register Notice also includes a list of factors that patent examiners should consider when evaluating whether a given method is directed to an abstract idea, but specifically points out that not every factor will be relevant in every situation. No factor is said to be conclusive, and the weight accorded to each factor will vary with the facts of each case.

Of course, the notice also explains that the factors are not intended to be exclusive or exhaustive -- more fertile ground for patent applicants, patent litigants and their counsel. While patent applicants may find them somewhat instructive, the guidelines themselves are written in very general and rather abstract terms which, along with their inconclusive value, make them difficult to understand and apply in practice. The public is invited to comment on the guidelines until Sept. 27, 2010.

From the foregoing, the patentability of business methods (and other methods that may border on the abstract), though presently preserved from strict ineligibility, will certainly be a source of controversy while governing courts make further attempts at refining the boundaries of patentable subject matter. ■

Practical Guidance for Cloud Computing

By Asim Haque

Oracle CEO Larry Ellison recently compared the information technology (IT) industry to the fashion industry, and for good reason. Industry players within the IT space latch on to the latest computing fad like a fashionista would the newest Versace style on the runway. These IT fads are pushed downstream to consumers as IT professionals market these fads down the runways of IT journals and trade shows. The excitement generated by the IT industry for these fads is often merited, as many of these fads represent true milestones in computing progress.

Cloud computing is one of the industry's latest fads. In actuality, cloud computing has been offered to consumers for a few years, but it is only recently that some consensus has been reached regarding the benefits and pitfalls associated with its use. This article is intended to provide an introduction to cloud computing and describe some of its benefits and pitfalls.

What is Cloud Computing?

Cloud computing occurs when an Internet connection delivers hardware power and software functionality to users, regardless of where they are or which computer they are using. The National Institute of Standards and Technology, an agency of the U.S. Government, defines cloud computing as "a model for enabling convenient, on-demand network access to a shared pool of configurable resources (e.g. networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction."

Leaving these more technical definitions aside, cloud computing essentially occurs when a user utilizes the Internet to complete a task that would have previously required the installation of on-site software and associated hardware. "Cloud" is a metaphor for the Internet.

Benefits of Cloud Computing

Technological Advantage and Ease of Operation. The traditional model of software delivery requires the purchase/licensing of on-site software and associated hardware, and on-site computing power and disk storage space. Cloud computing, on the other hand, requires only an Internet connection and possibly a distinct set of computer specifications to access software through an Internet browser.

The cloud user simply requires less "stuff" to run a program in the cloud than the user in the traditional on-site model needs to run the same program. Also, in the

traditional model, human expertise is required in order to install, implement and maintain the on-site hardware and software. The cloud user does not require nearly that kind of personal attention and assistance to run a program in the cloud.

Financial Benefit. The obvious corollary to the technological advantage is the financial benefit that the cloud user reaps by using the cloud instead of on-site hardware and software. Users of the cloud model do not need to acquire expensive computer hardware, servers and other equipment to operate within the cloud, and typically will not require implementation training or on-site support. Also, the billing model for cloud services is a more accurately measured "pay as you go" model, as opposed to a bulk fee or set monthly fee schedule. This can provide more regular budgeting and can lead to steady savings for businesses.

Flexibility in Doing Business. Under the traditional model, a user would access software from an actual on-site computing terminal. The cloud model allows a user, possibly an employee of a business, to access the necessary program while off-site, allowing greater flexibility in doing business.

The Burdens of Cloud Computing

Loss of Control. Cloud computing users give up some control over the quality and even the type of services they receive. Cloud users are at the whim of their cloud service provider, and in the event that the cloud user desires a change in the delivery of services, the cloud service provider may reject that request if it would have a negative impact on the rest of the users in the cloud.

Shared Pool of Limited Resources. Again, the cloud user is sharing the cloud with many other users. There is always the possibility that the users of the cloud will simultaneously increase their usage requirements at one time, which could overwhelm the cloud provider's resources.

Network Dependency. Cloud computing relies heavily on network connectivity and should the cloud user have difficulty with a network connection, if the connection is slow or often self-terminates, then the cloud user will have difficulty receiving services within the cloud.

Contracting with a Cloud Computing Service Provider

Contracting with a cloud computing service provider presents some unique issues. Issues specific to the traditional model of contracting, such as number of copies of software, number of allowable terminals for use of the software, and even source code escrow, no longer have primary relevance when contracting under the cloud model.

Privacy and Data Security. Under the cloud model, issues pertaining to privacy and data security are paramount. Users of the cloud no longer store data on their own servers and must rely on the cloud provider to ensure that the users' data is secure and accessible when needed.

A cloud user should require contractual provisions that obligate a cloud provider to protect the user's data, both at the actual physical site where the servers are located and within the Internet cloud. The user ultimately should be entitled to a contractual remedy if data integrity is not maintained.

A cloud service user, in this regard, should also ensure that adequate reporting and audit requirements are set forth in the contract. Any subcontractor provision must contain language requiring the subcontractor to adhere to the privacy standards set forth in the original agreement between the cloud user and the provider.

Finally, depending on the type of data being disclosed, the cloud service user should require the service provider to provide any necessary notifications to governmental agencies if data security is breached. Again, privacy and data security are of paramount importance, as a single mishap by the cloud service provider could affect thousands of customers. The risk associated with inadequate data security and privacy should be part of the risk calculus undertaken by your business in determining if the cloud model is desirable.

Limitation of Liability and Indemnification. If the risk calculus appears too high for your business to contract with a cloud service provider, then the limitation of liability and indemnification provisions are the only vehicles available to equalize this risk. The cloud service provider should indemnify its customers against third party claims for breach of data security, privacy and standard claims like negligence. The provider should pay the damages that result from these claims, without limitation. Typically, the cloud service provider will not compensate the cloud user for the consequential damages, and these damages will usually be "carved out" of the limitation of liability provision.

Service Level Agreements. A cloud user should also insist upon a service level agreement (SLA) with the cloud service provider. The expected "uptime" for the cloud services should be high (~99.8 percent), and any deviation from this uptime guarantee should result in the possibility of termination without cause or a credit against fees to be paid by the user.

Data Access and Ownership. A cloud user should also be sure that it will at all times have access to its data in a usable form. The user should have an understanding of how it will obtain its data if some sort of catastrophic event occurs disrupting the cloud or if the cloud provider becomes insolvent

or is acquired by another company. Contracts should also contain data destruction instructions requiring the cloud service provider to destroy data after termination of the contract, or as needed with the consent of the cloud user.

Governing Law and Venue. Both the cloud user and cloud service provider will push for their respective states' laws and courts to govern any disputes related to the contract. The cloud user should push vigorously to have its home state's laws and courts govern such disputes. If the contract is silent as to governing law, then disputes will likely be governed by that state's laws where the defendant (more than likely the cloud service provider) resides. Adding more complexity to the matter, a cloud user's data may be stored offshore, or in multiple states, so again, the cloud user should endeavor to have its home state act as the legal and judicial venue for disputes under the service contract.

On Cloud Nine Yet?

This article is by no means intended to vilify cloud computing or scare the potential cloud user from utilizing the IT industry's latest computing method. While both business benefits and burdens are discussed in this article, the benefits to cloud computing, in the author's opinion, *far* outweigh the burdens. Upon reading this article, your business should be well-equipped to move beyond just window shopping cloud computing products, to enjoying the most recent software delivery method designed by the IT industry. ■

Employer Policies Need to Address Employee Internet Usage

Employer-provided Internet access has become standard for many types of jobs. With that access comes challenges for employers, from excessive personal use of that access on company time, including use of web-based personal e-mail accounts, to the posting of photographs and other information on social networking sites with which the company would rather not be associated. Many employers either lack comprehensive employee Internet-use policies, or have policies that need to be updated to address social networking and other Internet-use issues. The relationship between Internet use and employment issues is changing rapidly, as technological advances create a surge in opportunities and risks.

There is no reason to think that the pace of change, both technologically and legally, will slow down anytime soon. But that is no reason for employers to wait to adopt or revise employee computer use policies. About 72 percent of all companies are concerned that employee behavior on social media sites is putting the company at some kind of risk. The ease of electronic communication can jeopardize the security of company intellectual property and trade secrets.

Establishing policies that address current challenges will involve decisions such as whether to permit employee access to social networking sites using company systems. In 2009, 89 percent of all employers permitted employee access to Facebook on their company computers. This year, that percentage is down to 49 percent.

Updated computer use policies should address the following basic issues:

- Company information technology (IT) systems are company property, and therefore the company has the right to monitor and review employees use of those systems, including any data stored by employees on the company's systems.
- Employees have no right or reasonable expectation of privacy in their use of the company's IT systems.
- Employees are to use company IT systems primarily (or exclusively) for business purposes.
- If personal use of company IT systems is permitted on a limited basis, the company has the right to restrict and impose limits on that use to prevent excessive or improper use.
- Use of company IT systems to access personal web-based e-mail and social media sites may be prohibited.
- Use of company IT systems for harassing, threatening or illegal behavior, is prohibited.
- Employees may not use company IT systems to access inappropriate websites, such as pornographic, gambling or offensive sites.
- Employees may sign an acknowledgement form that reminds the employee of key provisions in the computer use policy and includes the employee's agreement to monitoring of use of company IT systems, waiving confidentiality and privacy rights in such use.
- Company computers may be set up to have a pop-up consent form at login.

Employee computer use policies should be developed with full input from company IT staff to incorporate their concerns and to make sure that IT systems operate consistently with the policy's restrictions and prohibitions. Though the pace of change in this area is rapid, now is the time to review and revise these policies. The legal risks will not wait. ■

Employers Must Exercise Caution When Monitoring Employee E-mails

By Erik Stock

Two recent cases have addressed the propriety of an employer accessing and retaining e-mails written or accessed by former employees using the employer's computer equipment, but which were ultimately stored on third-party servers (e.g. Hotmail, Gmail). Even though the cases do not apply Ohio law, they appear to indicate a larger trend toward limiting an employer's rights to such e-mails.

In *Pure Power Boot Camp v. Warrior Fitness Boot Camp*, the United States District Court for the Southern District of New York held that an employer could not introduce into evidence e-mails stored by a former employee in the employee's non-work e-mail accounts. Pure Power Boot Camp filed suit against former employees after the employees left Pure Power's employ to begin a competing fitness business, allegedly stealing Pure Power's trade secrets and infringing upon its trademarks, trade dress and copyrights.

Pure Power's owner, Lauren Brenner, asserted that she was able to access the Hotmail account of one of the former employees, Alexander Fell, because at some point during his employment he had accessed that account from a computer owned by Pure Power. His login and password were automatically saved on the computer such that those fields were automatically populated when Brenner accessed the Hotmail website. Brenner further stated she found Fell's Gmail login information stored in an e-mail on his Hotmail account and that she made a "lucky guess" at the password for an e-mail account Fell had set up for his newly created, allegedly competing, business (it turned out that all of Fell's passwords were identical).

Pure Power did have an e-mail policy included in its employee handbook, and Brenner cited that policy as authorizing her to access Fell's e-mail accounts. However, the court found that the policy was limited on its own terms to "company equipment" and that e-mails stored on third-party e-mail servers were outside the scope of the policy. The court took into consideration the fact that there was no evidence that any of the e-mails at issue were composed on, sent through or received on Pure Power's computer system. The act of leaving his Hotmail login accessible on Pure Power's computer system did not comprise consent for Brenner to read all of Fell's e-mails stored in his various accounts. It is interesting to note that a technical pleading error on the part of the defendants saved Pure Power from having to pay a damage award and attorneys' fees. While the court found that Brenner's actions constituted a violation of the federal Stored Communications Act (18 U.S.C. § 2701), and that the act provides for the award of damages and reasonable attorneys' fees, the defendants failed to assert a cause of action under the act.

Faced with similar facts the New Jersey Supreme Court, in *Stengart v. Loving Care Agency, Inc.*, held that e-mails sent by a former employee to her attorney using a Yahoo e-mail account were subject to the attorney-client privilege, even though there was evidence the e-mails were sent using a company-owned laptop computer.

Plaintiff Maria Stengart formerly worked as an executive director of nursing for defendant Loving Care Agency, Inc. Stengart was suing Loving Care for alleged violations of New Jersey's anti-discrimination law, and the opinion arose out of Stengart's motion to show cause why the e-mails were not returned by Loving Care after Stengart asserted the attorney-client privilege.

The e-mails came to Stengart's attention after Loving Care produced some of them in response to discovery. Loving Care obtained the e-mails in the first place by imaging the hard drive of the company-owned laptop assigned to Stengart after she filed her lawsuit, and then reading through the laptop's Internet browsing history. Much as in the Pure Power case, Loving Care asserted that its electronic communications policy made it clear that Stengart had waived any right to privacy in the e-mails when she sent them using the company-owned computer. However, Loving Care's policy allowed that "occasional personal use [of e-mail] is permitted."

Faced with these facts, the court found Stengart had a reasonable expectation of privacy in the e-mails exchanged with her attorney via the laptop issued to her by Loving Care, because she used a personal, password-protected e-mail account instead of her company e-mail address and did not save the account's password on her computer. The court further held that Stengart's expectation of privacy was reasonable, given the language of Loving Care's electronic communications policy and the attorney-client nature of the e-mails. Concluding, the court wrote that its decision does not affect the rights of employers to monitor or regulate the use of workplace computers, and that companies may adopt lawful policies "to protect the assets, reputation, and productivity of a business and to ensure compliance with legitimate corporate policies." According to the court, an employer may enforce its computer-use policy by disciplining or terminating an employee who spends too much time exchanging e-mails with an attorney, but the employer may not have the right to review messages sent via web-based personal accounts. ■

Proposed Multi-Track Patent Examination Process

By Amy Tulk

In early June, the U.S. Patent and Trademark Office (USPTO) published proposed changes to the patent application examination process under its Enhanced Timing Control Initiative. This article highlights some of the proposed changes. The goal of the initiative is to provide applicants with greater control over when their applications are examined and to enhance work sharing between intellectual property offices around the world. The initiative also aims to reduce the overall pendency of patent applications that currently stands at approximately three years. The USPTO anticipates that allowing applicants to have some control over the timing of examination will result in better alignment of examination resources and the needs of innovators.

The Current Accelerated Examination Process

Currently, the USPTO allows an applicant to request accelerated examination by filing a petition to make the application special. If the petition is granted, the application is advanced out of turn for examination. Grounds for a petition to make an application special include:

- *Prospective manufacture* – Accelerated examination is available where a prospective manufacturer has sufficient means to manufacture the invention but will not unless certain that a patent will be granted. The manufacturer must be willing to manufacture the invention in the U.S. immediately upon issuance of the patent, and the applicant must have made a careful and thorough search of the prior art.

- *Infringement* – An application will be granted accelerated examination if there is an infringing product actually on the market. This also requires that a thorough comparison of the infringing product has been made, a belief that some of the claims are unquestionably infringed and a thorough search of the prior art.

- *Environmental quality* – Accelerated examination is available for inventions that materially enhance the quality of the environment by contributing to the restoration or maintenance of the basic life-sustaining natural elements such as air, water and soil.

- *Energy* – Applications for inventions that materially contribute to the discovery or development of energy resources or contribute to more efficient utilization and conservation of energy resources may also be accelerated. Examples include developments in fossil fuel, hydrogen fuel technologies, nuclear energy and solar energy or inventions relating to the reduction of energy consumption in combustion systems, industrial equipment and household appliances.

- *Other Grounds* – Petitions to make special may also be granted for inventions in the fields of superconductive materials, recombinant DNA, HIV/AIDS, cancer, countering terrorism and biotechnology applications filed by small entities. An applicant's age and health are also grounds for petitioning for accelerated examination.

The Proposed Multi-Track Examination Process

Under the proposed changes, applicants for patent applications filed in the USPTO that are not based on a prior foreign-filed application may choose one of three different tracks of examination:

- Track I – prioritized examination
- Track II – obtain processing under the current procedure
- Track III – delay lasting up to 30 months in docketing for examination of a non-continuing application

Track I, prioritized examination, is aimed at applicants for whom a more rapid examination is necessary. The USPTO anticipates this will include applicants with a currently financed plan to commercialize or exploit their innovation or applicants with a need to have more timely examination results to seek additional funding. Although the USPTO already has a program to accelerate some applications, as explained above, the proposed changes will allow a greater number of applicants to take advantage of accelerated examination and will include applicants who do not satisfy the current requirements. An applicant will be able to make a request for prioritized examination at any time during the

prosecution of an application upon the payment of a fee, the amount of which the USPTO has not yet determined.

Track III, delayed examination, is geared toward applicants who file their application just prior to the statutory bar date but before a commercially viable plan for exploitation of the innovation has been developed or financed. The applicant-controlled examination delay, which may extend as long as 30 months, will be available for applications that do not claim the benefit of a prior-filed foreign application or prior non-provisional application. An applicant requesting this track must request examination and pay the examination fee and surcharge within 30 months of the actual filing date of the application. If an applicant fails to make such a request, the USPTO would deem the application abandoned. In order to avoid delay in any notice to the public, the USPTO will also require any application taking advantage of the delayed examination to publish as an 18-month patent application publication.

An additional important aspect of the proposed changes involves the examination process for applications filed in the USPTO that are based on a prior foreign-filed application. In the case of such an application, the USPTO will not take any action until it receives a copy of the search report and first office action from the foreign office and an appropriate reply to the foreign office action, written as if the foreign office action was made by the USPTO. Upon submission of the foreign office action and reply, an applicant could request prioritized examination or obtain examination under the current procedure.

The USPTO is welcoming written comments regarding these proposed changes that must be submitted by Aug. 20, 2010. Although not in final form, these proposed changes give a good indication of the type of reform the USPTO will implement to change its examination procedures for the benefit of patent applicants in the near future.■

WEBEXTRAS

The cases, statutes and regulations referenced in this newsletter can be accessed from the online version of this *Currents* issue accessible from the SZD homepage at szd.com. Click *Resources*, *SZD Publications*, then *Currents*. SZD newsletters are posted with live links (when applicable).

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Speeches and Publications

In June, **Alan Rothenbuecher** presented "Protecting Yourself and Your Business from the 2010 Customer ... Best Practices Utilizing Terms and Conditions" for the Association of Rubber Manufacturers (Elastomer Products Group) in Akron, Ohio.

On July 28, **Alan Rothenbuecher**, **Steve Schoeny, Rod Davisson and Deborah Pryce** presented "Collaborating with Governments in a Time of Uncertainty" in Akron, Ohio, at an event sponsored by SZD and SZD Whiteboard.

On July 30, **Earl LeVere** presented "Identifying and Protecting Intellectual Property" and **Susan Rector** presented "Resources to Take Valuable Technology to Market," as part of The Ohio State University (OSU) Discovery, Innovation & Commercialization Workshop Series for the Commercialization and Incubation of Intellectual Property at the OSU Medical Center and Fisher College of Business.

On Sept. 15, **Roger Gilcrest** will present "Patent Law and Procedures for Engineers" at the Ohio Society of Professional Engineers Annual Meeting in Columbus, Ohio.

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