

Ipls

PROCEEDINGS OF THE
I NTELLECTUAL PROPERTY LAW SECTION **N**
 OF THE STATE BAR OF MICHIGAN

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IPLS ACTIVITIES

SPRING SEMINAR

Many thanks to everyone who helped to make the Spring Seminar a success!

SUMMER WORKSHOP

The Summer Seminar is nearly here and this year's program should be outstanding. Sign up now! As in the past, the summer workshop will have sessions on Friday and Saturday mornings. To increase the number of CLE credits available, optional sessions will be provided on Friday afternoon as well. One of the Friday afternoon sessions will provide an hour of credit in ethics and professionalism.

Friday morning (July 22, 1994) will focus on recent developments in the law. Kenneth B. Germain will speak on "Recent Developments in Trademark Law," Katherine C. Spelman will speak on "Recent Developments in Copyright Law," and Charles ("Chico") L. Gholz will speak on "Recent Developments in Patent Law."

On Friday afternoon, a series of seminar break-out sessions are planned. Cary Brooks will speak on "Preparation of Patent Opinions," Luis Miguel Acosta will speak on "Patent Litigation - A Primer for Non-Litigation Attorneys," H. Lawrence Smith will speak on "Licensing Negotiations with the Japanese," and Donald Corneglio will speak on "Ethics and Attorney-Client Privilege in Intellectual Property (Particularly Patent) Litigation."

On Saturday morning, an excellent series of speakers is planned. The morning begins with a presentation by John Olsen on the "Protection of Trademarks Throughout the European Community." This will be followed by a panel discussion consisting of Bill Schuurman on practice before the USPTO and its effect on subsequent litigation, Bob Armitage on the plaintiff's activities from identifying infringement to trial, and Harry Roper on defendant's activities upon receiving a complaint.

The conference will be held this year at Shanty Creek-Schuss Mountain near Bellaire, Michigan. The resort features golf, tennis and other sports activities, as well as a private beach. Sign up by June 21 to ensure space in a block of specially priced rooms set aside for the conference. A program and registration forms appear in this issue.

STATE BAR ANNUAL MEETING

The State Bar Annual Meeting will be held this year in Detroit from September 21 to September 23, 1994. Plan to attend a meeting of the IPLS at this time.

NEWS FROM THE COUNCIL

IPLS Directory

A new edition of the IPLS Directory is planned. Members of the IPLS will be listed with their current mailing address. If your address is no longer current and you rely on the post office or a former employer to forward your IPLS materials, now is the time to make sure your address with the State Bar of Michigan is current. Send address changes to: State Bar of Michigan, 306 Townsend St., Lansing, MI 48933-2083, or use the change of address form from a recent Michigan State Bar Journal.

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IPLS Committees

The current IPLS committee structure:

<u>Committee</u>	<u>Chair</u>	<u>Council Coordinator</u>
Annual Meeting	Janet Knaus	
March Seminar	Paula Ruhr Dan Bliss	
Summer Workshop	Phil Shepherd	
Patent Law	Fred Burkhart	Janet Knaus
Trademark Law	Michael Fishman	Janet Knaus
Copyright and Trade Secret Law	Janet Knaus	Janet Knaus
Publications	Andrew Farmer	Joel Bair

Active participation on these committees is earnestly solicited. Anyone interested in participating on a particular committee is encouraged to contact the Committee Chair.

The newly-appointed Chairs of the Patent Law, Trademark Law and Copyright and Trade Secret Law Committees are working on charters and recruitment plans for their Committees. Each of these committees has also prepared a mission statement which is printed below. If you are interested in participating in any of these committees, give the Chairperson of the committee in which you are interested a call.

MISSION STATEMENT

TRADEMARK AND UNFAIR COMPETITION COMMITTEE

INTELLECTUAL PROPERTY LAW SECTION OF THE STATE BAR OF MICHIGAN

The purpose of this Committee shall be to study the laws and procedures pertaining to domestic and foreign trademark and unfair competition laws and to promote the fair and just administration of such laws; to study and report upon proposed legislation; and to promote the legal education of members of the bar and the general public on the problems of the trademark and unfair competition laws by preparing, sponsoring and publishing legal writings in the trademark and unfair competition fields.

MISSION STATEMENT

PATENT COMMITTEE

INTELLECTUAL PROPERTY LAW SECTION OF THE STATE BAR OF MICHIGAN

The purpose of this Committee shall be to study the laws and procedures pertaining to federal and foreign patent laws and to promote the fair and just administration of such laws; to study and report upon proposed legislation; and to promote the legal education of members of the bar and the general public on the problems of patent law by preparing, sponsoring and publishing legal writings in the patent field.

MISSION STATEMENT

COPYRIGHT AND TRADE SECRET COMMITTEE

The purpose of this Committee shall be to study the laws and procedures relating to federal and foreign copyright laws and state trade secret laws; to study, report and, if deemed appropriate, comment upon proposed legislation and procedural changes; and to promote the legal education of members of the bar and the general public on the issues of copyright law and trade secret law by sponsoring seminars and publishing legal writings.

Council Meetings

The council reminds the membership that its regularly scheduled meetings are generally held on the first Thursday of each month at 9:30 a.m. at the State Bar Building in Lansing. Dates and locations for upcoming meetings are listed in the IPLS Planning Calendar in each issue of Proceedings. All section members are invited to attend.

Submissions to Proceedings

Articles of interest to the membership are actively solicited. If you have recently researched a topic of general interest, consider submitting an article for publication in this newsletter. In general, articles should be limited to 1500 words or less. However, longer submissions will be published as space permits. Submissions should be sent to the editor: Andrew C. Farmer, c/o Varnum, Riddering, Schmidt & Howlett, P.O. Box 352, Grand Rapids, MI 49501-0352. Remember, one of the Section's primary goals is education, and each Section Member is encouraged to further this goal through publication in Proceedings.

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IPLS PLANNING CALENDAR**WHAT WE'VE DONE . . . WHAT WE'LL DO**

March 11, 1994 Spring Seminar, Radisson Hotel, Lansing
 May 5, 1994 PLS Council Meeting, State Bar Building, Lansing
 July 21 to 23, 1994 Annual Summer Conference, Shanty Creek
 September 21-23, 1994 Michigan State Bar Annual Meeting, Detroit

20TH ANNUAL INTELLECTUAL PROPERTY LAW WORKSHOP

July 21 - 23, 1994

Shanty Creek-Schuss Mountain - Bellaire, MI

Thursday, July 21

6 - 7:30 p.m.

Reception

Sponsored by Brooks & Kushman, P.C.

Friday, July 22

Updates in Intellectual Property Law

8:30 - 9:45 a.m.

Recent Developments in Trademark Law

- * trademark validity and infringement
- * trademark registration including intent to use
- * product simulation and trade dress
- * unfair competition

Speaker: Kenneth B. Germain
Frost & Jacobs; Cincinnati, OH

9:45 - 11 a.m.

Recent Developments in Copyright Law

- * domestic legislative activity
- * judicial activity
- * international activities
- * fair use and multi media

Speaker: Katherine C. Spelman
Steinhart and Falconer; San Francisco, CA

11 - 11:15 a.m.

Break

11:15 - 12:30 p.m.

Recent Developments in Patent Law

- * leading cases in each major substantive area including designs, licensing and assignment, double patenting, procedure in the district courts and in the Federal Circuit

Speaker: Charles L. Gholz
Oblon, Spivak, McClelland,
Maier & Neustadt, PC; Arlington, VA

12:30 - 6 p.m.

Activities On Your Own, or

2 - 3 p.m.

Concurrent Program: Patent Litigation -- A Primer for Non-Litigation Attorneys

Speaker: Luis Miguel Acosta; Birmingham
Summit Room A

Concurrent Program: Licensing Negotiations with the Japanese

Speaker: H. Lawrence Smith
Varnum, Riddering, Schmidt & Howlett;
Grand Rapids
Summit Room B

3 - 3:15 p.m.

Break

3:15 - 4:15 p.m.

Concurrent Program: Ethics and the Attorney-Client Privilege in Intellectual Property (Particularly Patent) Litigation

Speaker: Cary W. Brooks
General Motors Corporation; Detroit

6 - 7:30 p.m.

Reception

Reception co-sponsored by Howard & Howard Attorneys, PC and by the Intellectual Property Law Section of the State Bar of Michigan

Saturday, July 23

PANEL DISCUSSION: Preparation for Litigation, Tactics and Practices

8:30 - 9:15 a.m.

Protection of Trademarks throughout the EC

- * how the various new laws dramatically affect the strategies to protect trademarks in Europe

Speaker: John R. Olsen
S J Berwin & Co; London, England

9:15 - 10 a.m.

Preparing to File Suit: the Critical Questions for Plaintiff's Counsel

- * early assessment of your case
- * what are the chances of the patent being held valid and infringed?
- * has there been any conduct which would cause the patent to be unenforceable?
- * what are the chances of a finding of willful infringement?
- * what are the damages and how can they be proven?
- * what are the merits of inhouse and outside counsel?
- * have you considered all the possible defenses?
- * what are the risks of failure?
- * is early settlement a viable alternative?

Speaker: Robert A. Armitage
Vinson & Elkins; Washington, DC

10 - 10:15 a.m.

Break

10:15 - 11 a.m.

What a Defendant Should Do When a Complaint is Received?

- * assessment of the case
- * chances of success and risks of failure
- * is early settlement a viable alternative
- * *DuPont v. Phillips* as a case study

Speaker: Harry J. Roper
Roper & Quigg; Chicago, IL

11 a.m. - 11:45 a.m.

Practice Before the USPTO and Its Effect on Subsequent Litigation

- * tips on how to prepare and prosecute a patent or trademark application
- * how to facilitate subsequent litigation
- * what documents (e.g., disclosure of invention) other than the file wrapper may be generated pre- or post issuance that will affect subsequent litigation
- * how documents relating to any application would be treated, particularly after issuance of the patent or trademark

Speaker: Willem G. Schuurman
Arnold, Durkee & White; Austin, TX

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IPLS ACTIVITIES

SPRING SEMINAR

Plan to attend the Spring Seminar at the Radisson Hotel in Lansing on March 11, 1994. Registration is requested by March 4, 1994. A registration form and details on the presentations appear in the back of this issue.

SUMMER SEMINAR

Make plans early to attend the Summer Seminar at Shanty Creek on July 21 through 23, 1994. The summer workshop shall again feature a Friday morning (July 22, 1994) of Kenneth B. Germain speaking on "Recent Developments in Trademark Law," Katherine C. Spelman speaking on "Recent Developments in Copyright Law," and Charles ("Chico") L. Gholz speaking on "Recent Developments in Patent Law."

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VIEW FROM THE CHAIR

by William H. Honaker

The IPLS Council has decided to break with longstanding tradition and change the format of the 1994 Spring Seminar and the Summer Workshop. However, the change will not affect the core format that has been so successful in the past.

The Spring Seminar will begin this year at 10:30 a.m. instead of the traditional 11:30 a.m. starting time. By starting one hour earlier, it is possible to add two more "break-out sessions." The remaining format is the same successful format as has been previously used. Paula Ruhr and Dan Bliss, the Co-Chairs for this year's event, have worked hard to put together an informative and educational seminar on current topics of interest that you won't want to miss.

The Summer Workshop has also gone through some changes. The thought of the Counsel was not to change the successful format, but to add to it. The addition will be Friday afternoon speakers on various "How To Topics," such as writing patent opinions and licensing do's and don'ts. These are a regular request of summer workshop participants. Additionally, we are getting more participants from other states who have ICLE requirements. Our Summer Workshop will now be eligible for 10.5 CLE credit hours, which should make this program even more attractive than it already is. This year's Summer Workshop Chairman, Phil Shepherd, has worked very hard to put together the traditional slate of speakers and to find speakers for the extra Friday afternoon topics. (I can't tell you how happy I am that the change occurred this year and not last year.)

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The last change is in the IPLS Committees. The Counsel has unanimously agreed to eliminate the Inventor Liaison, Legislation, PTO Practice, and State Law Committees and form three new committees: Patent (Chair, Fred Burkhart); Trademark (Chair, Mike Fishman); and Copyright & Trade Secret (Chair, Janet Knaus). The newly-appointed Chairs are working on charters and recruitment plans for their Committees. If you are interested in participating, give the Chairperson

of the Committee in which you are interested a call. The new Committees should be a lot of fun, and it is anticipated that these Committees will be very active.

I think the unspoken theme for this year's Counsel has been "More education for Section Members and being open minded to all proposals for change." As a Section Member, it is a great time for you to give us your comments for or about change.

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March Seminar	Paula Ruhr Dan Bliss	
Summer Workshop	Phil Shepard	
Patent Law	Fred Burkhart	Janet Knaus
Trademark Law	Michael Fishman	Janet Knaus
Copyright and Trade Secret Law	Janet Knaus	Janet Knaus
Publications	Andrew Farmer	Joel Bair

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**1993- 1994
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IPLS PLANNING CALENDAR

WHAT WE'VE DONE . . . WHAT WE'LL DO

November 4, 1993	IPLS Council Meeting, State Bar Building, Lansing	April 7, 1994	IPLS Council Meeting, State Bar Building, Lansing
December 2, 1993	IPLS Council Meeting, Chrysler Technology Center, Auburn Hills	April 29, 1994	Deadline for submissions to Proceedings, Vol. 3
January 6, 1994	IPLS Council Meeting, State Bar Building, Lansing	May 5, 1994	IPLS Council Meeting, State Bar Building, Lansing
February 3, 1994	IPLS Council Meeting, State Bar Building, Lansing	July 7, 1994	IPLS Council Meeting, State Bar Building, Lansing
March 11, 1994	Spring Seminar, Radisson Hotel, Lansing	July 21 to 23, 1994	Annual Summer Conference, Shanty Creek
		September 21-23, 1994	Michigan State Bar Annual Meeting, Detroit

FEATURED ARTICLES

THOUGHTS ON JURY TRIAL IN A PATENT CASE

by Judge Avern Cohn

Patent disputes, validity and infringement, are commonly tried to juries these days notwithstanding a feeling that jurors seldom understand the evidence and have difficulty applying the evidence to the law as stated in the instructions. Whatever jurors' difficulties, the Seventh Amendment, as currently interpreted, requires a trial by jury when any party to the dispute makes such a demand. Therefore it behooves judges and lawyers to do all they can to make the evidence and the law understandable to jurors. My experience in four patent jury trials leads me to conclude that much more can be done than I have observed being done.

1. The first question to be answered is the nature of the trial, i.e. liability and damages at the same time or a bifurcated trial under Fed. R. Civ. P. 42(b). Jurors' comprehension is improved and the trial process simplified when validity and infringement are separately tried from willfulness and damages. Generally a 60-90 day hiatus between the two trials, if two trials are necessary, is sufficient.

2. Both the judge and the lawyers should have a complete understanding of the issues in the case before the trial begins. This understanding can be best assured if the verdict form, special questions, and instructions on the law of the case are agreed upon before the trial begins. Too often these matters are dealt with after the proofs have been completed and in the short interval of time that is generally available after the parties have rested and final argument begins. Of the three, verdict form, special questions and instructions, the special questions and instructions are the most important and most difficult to come to agreement by the parties. Special questions are an essential element of jury decision making. It is the special questions that give

jurors the pathway to decision and assures the judge that the jury understood the issues. With a set of special questions keyed to the differences between the parties a general verdict is usually unnecessary. If a general verdict is used, it should be in multiple parts, again to lead the jury through the principle issues in the case. Once the special questions and verdict form have been agreed upon, the instructions on the law of the case can then be discussed. The instructions should be tailored to the issues in dispute. This means that the jury must be given the particular rules that underlay the issues on which the parties disagree as reflected in the special questions and verdict form.

3. At the start, the preliminary instructions should include a description of the patent system, an overview of the rules regarding validity and infringement, and some explanation of what the jurors will be called on to decide. Jurors should then be told what the parties agree on and what they disagree on. Jurors should be given a glossary of patent terms as well as the technical terms they are likely to hear during the course of the case. Opening statements should describe the invention and what each parties' position is in words and phrases understandable to lay people, keeping in mind what the verdict form and special questions will look like, and what the judge has already told the jurors in the preliminary instructions.

4. Jurors should be given a notebook containing the patent and the principle exhibits. The notebook should have an index and tabs and be supplemented periodically during the trial. Only those exhibits agreed upon by the parties should be included.

5. Jurors should be allowed to take notes and ask questions. Questions should be screened by the judge.

and answered either by the judge or in follow-up questions to witnesses. Answers by the judge should be agreed upon in advance.

6. Questions should be phrased with the jurors in mind. Witness should be told in advance by counsel that their answers are directed to lay jurors and not to counsel or the judge. Too often lawyers and witnesses appear to be oblivious of the fact that it is the jurors who are the important listeners and viewers and not the judge. Interruptions and objections should be kept to a minimum. Jurors are not amused by contentious lawyers and do not look kindly at lawyers who ignore the judge's rulings.

7. Direct examination and cross-examination should not be overdone. If an effort is made to impeach a witness by a prior inconsistent statement in a discovery deposition, care should be taken not to rush the examination to assure that the jurors understand the line of inquiry.

8. All of the devices that allow for simplification of the evidence and understanding by the jurors of the evidence whether it be questions and answers, writings, drawings, pictures, etc., should be utilized.

9. If difficulty is anticipated with a line of questioning or particular exhibit the judge should be alerted in

advance to enable the judge to deal with the matter before the jurors come to the courthouse or after they leave. Long side bar conversations and excusing the jury from the courtroom should be avoided whenever possible. Particularly disconcerting to the jurors is a circumstance when a witness is called, sworn and an objection to the first substantive question sustained so that the witness must then be excused. Jurors do not like it when they do not understand what is going on.

10. Final argument should be keyed to the issues in dispute and the verdict form and special questions.

11. The instructions should contain more than general statements of the law. If the jury is being called on to construe ambiguous claim language, for example, in the context of expert testimony and the like, the alternative interpretations should be made known to them in the instructions. This perhaps can best be done by each party giving the jury a "theory of the case" to be read to the jury as part of the instructions.

12. The jury should have the text of the instructions in their hands while the judge is reading them and then take the text with them into the jury room.

13. While a shotgun approach to a case can be handled by a judge it is extremely difficult for a jury to handle and it is questionable whether a jury makes a good decision when that approach is taken.

THE NATIONAL COOPERATIVE RESEARCH AND PRODUCTION ACT OF 1993¹

by A. Timothy Czapp²

Introduction

The National Cooperative Research Act of 1984 (NCRA)³ attempted to stimulate technological advancements by modifying and clarifying antitrust laws to the benefit of joint ventures engaged solely in research and development (R & D) activities. In 1993, the National Cooperative Production Amendments (NCPA)⁴ was enacted to extend NCRA's umbrella of antitrust protections to joint ventures engaged in the production of products, processes, or services. As a result of the amendments and to reflect its broader new scope, NCRA has been renamed the National Cooperative Research and Production Act of 1993 (NCRPA).⁵

This article provides brief histories for both NCRA and NCPA and also takes a section-by-section look at requirements and protections under the new NCRPA. Some miscellaneous issues and commentary relevant to NCRPA joint ventures are also included.

The National Cooperative Research Act of 1984 (NCRA)

Reasons for NCRA

Declining competitiveness of U.S. firms in the late 1970s and early 1980s focused congressional attention

on ways to achieve the advancements increasingly necessary to keep our technological advantage in the global economy. As a result of its investigation, Congress highlighted joint R & D venture activity as critical to U.S. technological superiority.

Recommending action, proponents of cooperative R & D contended that it was increasingly too expensive for a single business entity to fund its research activities. They also noted that a shortage of technical personnel forced industrial cooperation to complete advanced or difficult projects. Other collateral benefits said to result from joint R & D venture activity included a reduction of wasteful duplicative research and a spreading of losses from unsuccessful research throughout an industry. Importantly, even though companies could potentially improve their competitiveness and bottom line by forming joint R & D ventures without NCRA, they were reluctant to do so for fear of antitrust challenges.

Provisions of NCRA

Passed in 1984, NCRA was an initiative designed to promote the R & D necessary to maintain U.S. technological superiority. To do so, the Act created an environment that promoted and facilitated joint R & D ventures and attempted to alleviate perceived antitrust risks.⁶

The Act spelled out requirements for qualifying as a "Joint R & D Venture"⁷ and clarified antitrust rules applied to such ventures. Then existing judicial standards of antitrust review were codified, requiring that Joint R & D Ventures challenged under antitrust laws be evaluated with the rule of reason.⁸ NCRA also limited antitrust damages,⁹ had attorney's fee provisions for the prevailing party,¹⁰ and provided a simple notification process for registering the Joint R & D Venture.¹¹ From a business perspective, NCRA had no legal downside.

Experience under NCRA

There were only 21 research joint ventures formed between 1976-79, just prior to the Act.¹² In contrast, there have been hundreds of Joint R & D Ventures formed in the nine years since passage of NCRA.¹³ Poor performance in the domestic microelectronics industry was one of the primary reasons behind NCRA and that industry led the charge in its use. More recently, the automotive industry has begun using the act, as well as natural resource industries such as agriculture and mining. In many cases, industrial trade associations are the champions of such ventures. Such widespread acceptance of NCRA is a testament to the success of antitrust clarity and the creation of business certainty.

In another testament to its success, NCRA has received considerable coverage in business and technical journals. A more limited treatment of Joint R & D Ventures and NCRA can be found in legal journals.¹⁴ However, in the courts, NCRA has been cited infrequently, and then only as supporting material for other legal propositions.¹⁵

The intended economic benefits to the U.S. economy resulting from NCRA ventures are difficult to assess. This is primarily because a venture's research output is used far from the marketplace. The times between NCRA enactment, awareness, venture formation, completion of R&D, and commercialization of a product can be prolonged such that products resulting from a venture are still years away. The easiest measure of NCRA's success is the increasing number of venture filings and participation under the Act. Another measure, beyond the scope of this article, would be a quantification of patents filed or issued to such ventures or their participants.

The National Cooperative Production Amendments of 1993 (NCPA)

Reasons for NCPA¹⁶

In the mid 1980s, continued slumping U.S. international competitiveness,¹⁷ erosion of domestic market share in a multitude of industries, decreasing importance of American inventions in the patent system,¹⁸ and expanding foreign consortiums¹⁹ again focused congressional attention on joint ventures. Even with the advent of NCRA in 1984, there existed a continuing *perception* that U.S. antitrust laws discouraged collaborative activity.²⁰ This was believed to be particularly true for smaller companies less likely

to be aware of current antitrust standards for joint ventures. To alleviate this misperception, it was proposed that antitrust protections available under NCRA be extended to joint ventures engaged in production of products, processes, or services. This proposal underwent years of congressional wrangling before finally being accepted.²¹ The resulting enactment, NCPA, was designed to "clarify treatment of production joint ventures under antitrust laws and to eliminate unnecessary perceptual obstacles to their formation"²² such that the economy and corporations of the U.S. benefit.

In support of NCPA implementation, joint venture proponents noted that the cost of commercializing new technology often exceeds the capital resources of any single company. Also, capital requirements were said to be further stretched by shorter product life cycles, rapid changes in products to meet customer demands, and customized products. Proponents also noted that products are reverse engineered and competitive products quickly derived, thereby lessening any market exclusivity for the innovator. Most importantly, they stressed, antitrust laws could coexist with properly structured cooperative ventures.²³ It was probably this direct reference to the successful experiences with NCRA that led to acceptance of antitrust protections for production joint ventures.

Provisions of NCPA

NCPA generally extended to production joint ventures the favorable antitrust treatments found in NCRA for Joint R & D Ventures. The existing NCRA venture terminology was refined to "Joint Venture" and its definition broadened to include production of products, processes, and services.²⁴ Certain activities that restrict trade or do not fully support the intent of the act were excluded from the definition.²⁵ NCPA also had provisions to restrict antitrust damage limitations to only those production ventures located principally in the U.S. and having U.S. participants, or foreign participants²⁶ from countries whose antitrust laws treat U.S. persons fairly.²⁷ Finally, the Act created additional notification requirements for production Joint Ventures and requires periodic status reports of the Attorney General.²⁸

The National Cooperative Research and Production Act of 1993

As noted earlier, NCRPA combines provisions of both NCRA and NCPA. For the most part, the resulting Act is very straightforward. However, there are several important provisions that require explanation or comment.

Definitions: 15 U.S.C.A. § 4301

The only definition of any real significance under NCRPA is "Joint Venture." Any venture intending to qualify for NCRPA antitrust protections can only engage in activities listed therein. Although the definition is limiting, the activities are generous enough to bring a product from its infancy to production. Included are such

things as making and performing contracts for R & D, prototyping, testing, production, and collecting research and production information, in any combination.²⁹ An NCRPA Joint Venture is also permitted to establish facilities, operate on a proprietary basis, prosecute its patents, and grant licenses thereon.³⁰

NCRPA also contains a complementary listing of activities that cannot be pursued by the Joint Venture without risking the loss of antitrust protections. The excluded activities primarily consist of agreements or conduct related to marketing of venture products (except intellectual property) and to the creation of trade restraints by or among the participants of the venture.³¹ One other distinctive activity that voids NCRPA protections for venture participants is the use of existing facilities for production, unless the use is for a new product or new production technology.³² Note, however, that some of the disallowed activities can safely be pursued when they are "reasonably required to carry out the purpose of such venture."³³

Lastly, NCRPA specifically provides for "marketing"³⁴ (for NCRA venture agreements executed prior to 6/10/93) or "licensing, conveying, and transferring"³⁵ (for NCRPA venture agreements executed on or after 6/10/93) of intellectual property. Although the Act differentiates between the treatment of intellectual property under NCRA and NCRPA, Congress intended no substantive difference between the two.³⁶ The earlier language was preserved for older NCRA agreements, whereas the new language is only a more precise formulation of the ways rights in intellectual property are conveyed.³⁷

Rule of Reasons Standard: 15 U.S.C.A. § 4302

This section, enacted in 1984, is essentially a codification of earlier trends in antitrust enforcement case law. It requires that *any* challenged Joint Venture be evaluated under the rule of reason if the venture meets the NCRPA provisions.³⁸ This is true whether the challenge is brought under federal or state antitrust laws.³⁹ This section includes Joint Ventures that do not elect to file NCRPA notifications, and would, presumably, include preexisting ventures.

Antitrust's rule of reason analysis seeks to balance procompetitive effects against the anticompetitive effects of a practice before concluding whether an antitrust violation has occurred.⁴⁰ The first step in such an analysis is determining the properly defined relevant market which, when appropriate, includes worldwide capacity.⁴¹ Once established, anticompetitive effects in the relevant marketplace resulting from the Joint Venture must be demonstrated. If anticompetitive effects are shown, they are then balanced against any procompetitive effects, such as innovation and efficiency.⁴²

Limitations on Recovery: 15 U.S.C.A. § 4303

Under the Act, treble damage awards allowed to private claimants under traditional antitrust analysis⁴³ can be disabled and replaced by actual damages. To

detreble damages, the Joint Venture must avail itself of NCRPA protections by filing required notices and then act within the scope of conduct contained in its notices. A venture can lose these valuable damage protections if it is in violation of any decrees or court orders,⁴⁴ or has extended its activities beyond the defined bounds of allowed conduct for NCRPA Joint Ventures.

Attorney's Fees: 15 U.S.C.A. § 4304

A "substantially prevailing" claimant challenging the conduct of a Joint Venture shall be awarded costs, including a reasonable attorney's fee.⁴⁵ A correlative section also allows the "substantially prevailing" defendant to recover his costs, including a reasonable attorney's fee. However, defendant's recovery of costs and fees is limited to when a claim or claimant's conduct during litigation is "frivolous, unreasonable, without foundation, or in bad faith."⁴⁶ Any prevailing party can have his awarded costs and fees offset if his own conduct is "frivolous, unreasonable, without foundation, or in bad faith."⁴⁷

This section is operative only when the Joint Venture has met notification requirements and has also acted within the bounds of allowed conduct. Absent these, fees would be awarded under standard antitrust analysis.⁴⁸

Disclosure Requirements: 15 U.S.C.A. § 4305

Any party, acting on behalf of the venture, can file a notification no later than "90 days after entering into a written agreement to form" a venture.⁴⁹ Simultaneous disclosure to the Attorney General and Federal Trade Commission (FTC) must include the identities of the parties and the nature and objectives of the venture.⁵⁰ When the venture plans include production activities, additional disclosure requirements are necessary. These include nationalities of all parties to the venture and identities and nationalities for any persons who exert control over a party, either separately or as part of a controlling group.⁵¹ The added disclosures ensure that only the congressionally intended beneficiaries receive protections under the Act.

Any party, again acting on behalf of the venture, can make amendments to correct deficiencies in the original disclosure or to update it to, for example, reflect new or changed research directions. This is necessary to prevent losing NCRPA's damage protections.⁵² Similarly, to prevent losing the same protections, a notice must be filed within 90 days of any change in membership.⁵³ Provisions for withdrawing notice if the venture negotiations fall through are also available.⁵⁴

Within 30 days of filing, a notice should appear in the Federal Register.⁵⁵ The notice will include party names and describe, in general terms, planned venture activities. The parties will get a chance to review the notice prior to publication and agree on acceptable wording with the federal agencies.⁵⁶ If no agreement can be reached for the wording of the publication, the notice can be withdrawn.⁵⁷

Publication in the Federal Register has the substantial effect of initiating NCRPA damage

limitations as of the publication date.⁵⁸ If the notice is published but after the allotted 30 days, damage protections become effective 30 days after a sufficient initial disclosure is received by the Attorney General or FTC.⁵⁹ If, for some reason, publication never occurs, damage limitations are not effective. For the above reasons, counsel should verify that the notice did indeed get published and advise the venture to not begin work until that time.

NCRPA recognizes the sensitivity of business research, development, and production information and protects it accordingly. Except for the Federal Register disclosure, all information possessed by the Attorney General and FTC related to Joint Ventures has a confidential status, including investigative information obtained with respect to potential antitrust violations.⁶⁰ Such information is also specifically exempted from disclosure under the Freedom of Information Act.⁶¹ If there is any disclosure of venture information by the Attorney General or FTC, it can only result from a judicial proceeding where the information is subject to a protective order.⁶²

Added Limitations for Production Joint Ventures: 15 U.S.C.A. § 4306

This is a new section, not present in the earlier NCRA, that requires Joint Ventures engaged in production to meet two added requirements before damage protections are available. If these requirements cannot be met, limitations on damages will not be applicable but the venture can still be judged under the rule of reason standard. Both provisions were very controversial and internationally sensitive but are included to ensure that the U.S. economy is benefitted as Congress intended.

The first requirement is that the venture's principal facilities are in the U.S. or a territory.⁶³ Ancillary facilities can be outside of the U.S.. The second requirement is that "each person who controls any party to such venture (including a party itself) is a U.S. person, or a foreign person from a country whose law accords antitrust treatment no less favorable to U.S. persons than to such country's domestic persons with respect to participation in Joint Ventures for production."⁶⁴ As used in this section, "control" is intended to be defined as "power to direct the management or policies of a person"⁶⁵ and "country whose law" is meant to include domestic law as well as international agreements.⁶⁶

Other Relevant NCRPA Issues

Since NCRPA is primarily intended to promote innovation and industrial competitiveness, an intimate involvement by intellectual property attorneys in Joint Ventures is mandated. A complete and thorough understanding of intellectual property by the participants helps ensure a successful venture experience.

In the rush to jump on the Joint Venture bandwagon, it is important to remember that ventures need not use the provisions in NCRPA. The primary reason for not

doing so is that Federal Register disclosures may provide enough insight into research or production initiatives so as to give away a competitive edge to non-venture competitors. This is particularly true where the knowledge of subject matter in the disclosure is very limited or in a rapidly evolving or unique industry. Resourceful companies, including both venture participants and skeptics, can continually survey Federal Register disclosures to glean useful information about industry initiatives and direction.

Disclosures for Formation, Reformation, and Operation

Specific NCRPA filing requirements must be met to obtain protection under the act. If the initial venture disclosures are not made in the time allotted after signing the venture agreements, damage limitation protections are not available. To initiate damage protections for the venture, the venture must be reformed by executing a new written agreement and then filing the disclosure as required.

Similarly, existing R & D ventures formed under NCRA that want to expand their operations into joint production can be reformed by executing a new written agreement.⁶⁷ The venture must then refile an appropriate new disclosure with the Attorney General and FTC as if it were the first time. As a practical matter, extending existing Joint R & D Ventures into production Joint Ventures may be a sensitive issue, particularly when the circumstances of one participant have improved vis-a-vis other participants. For example, a participant in a research venture may not want to extend the venture into joint production, particularly when it can commercialize the product faster than other venture partners. As a result, research ventures are probably more likely to be extended only when participants possess similar production or marketing capabilities.

Once a Joint Venture is ongoing and has filed its initial disclosure, any new or changed research or production activities should be evaluated by the venture for additional NCRPA damage protections. The venture can elect to disclose such activities and receive damage protections as of the date of publication in the Federal Register.⁶⁸ Alternatively, the venture may assume the risk of non-disclosure by keeping new activities secret. If the venture subsequently decides to disclose the information, any acts prior to publication are unprotected.⁶⁹

Intellectual Property Rights

It is important for counsel to assess the nature and value of each participant's intellectual property rights before entering into the venture, what rights will be provided to the venture, and what rights will be returned from the venture. Provisions for these should be contained in the venture agreement. Also, because ventures can prosecute their own patent applications, agreements should fully describe the prosecution of patent applications and maintenance of issued patents. Similar provisions should also be established for licensing any venture technologies.

Employee Covenants

Applicable pre-existing agreements between employees and the parties or venture should be reviewed and updated or executed if non-existent. Some covenants to consider include those related to non-disclosure, non-competition, and invention assignment.

NCRPA Compliance

Care should be used to ensure that the venture meets and operates within the definitional requirements of an NCRPA Joint Venture. One technique to accomplish this is to draft the allowed and prohibited activities into the agreement. That same list of activities should also be communicated and explained to participant's employees involved with the venture.⁷⁰

It is also important that a party control the flow of information into and out of a Joint Venture, particularly at a working level for ventures engaged in joint production. A transfer of marketing or cost information, however innocuous, could potentially eliminate NCRPA damage protections.

Conclusion

Since it has been a nine year process to evolve from NCRA to NCRPA, it is not expected that any major additional antitrust protections for Joint Ventures will come any time soon.⁷¹ Any changes would likely result from industrial acceptance of and performance under NCRPA. A continued decline in national or international competitiveness would probably increase the chances for amendment.

In the coming years, industrial and business practices will evolve to more efficient methods allowed under NCRPA. The recent boom in Joint R&D Ventures will surely continue, and be slowly joined by production ventures. Services, now a permissible venture product, will result in a new class of ventures aimed at improved efficiencies.⁷² Joint Ventures will also offer an excellent opportunity to speed the commercialization of government laboratory and defense technologies. In summary, U.S. based Joint Ventures will become more prevalent as companies try to keep up with the global economy by taking full advantage of opportunities offered by NCRPA.

ENDNOTES

1. Copyright 1994 by Adelbert T. Czapp.
2. Member of the State Bar of Michigan and authorized to practice before the U.S. Patent and Trademark Office. The author acknowledges Mark P. Calcaterra, an Intellectual Property Law Section (IPLS) Council Member, for his valuable comments and editorial assistance. Opinions expressed herein are those of the author.
3. National Cooperative Research Act of 1984, Pub. L. No. 98-462, 98 Stat. 1815 (codified at 15 U.S.C. §§ 4301-4305 (1988)).
4. National Cooperative Production Amendments of 1993, Pub. L. No. 103-42, 107 Stat. 117 (1993).
5. 15 U.S.C.A. §§ 4301-4306 (West Supp. 1993 and Supp. Sept. 1993).

6. The antitrust risks were only perceived. The Justice Department had never challenged a pure R & D joint venture without ancillary restraints, though there was still a risk of private litigation. S. REP. NO. 427, 98th Cong., 2nd Sess. 3 (1984), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3105, 3107.
7. 15 U.S.C. § 4301(a) (6), (b).
8. 15 U.S.C. § 4302.
9. 15 U.S.C. § 4303.
10. 15 U.S.C. § 4304.
11. 15 U.S.C. § 4305.
12. H.R. REP. NO. 94, 103rd Cong., 1st Sess. 11 (1993).
13. A total of more than 300 joint ventures have been formed. *Id.*
14. *See, e.g.,* Holmes, *Research Joint Ventures and the Antitrust Laws - Recent Statutory and Administrative Changes*, 66 CHI. B. REC., No. 5, 252, (Mar.-Apr. 1985); Compton, *Cooperation, Collaboration, and Coalition: A Perspective on the Types and Purposes of Technology Joint Ventures*, 61 ANTITRUST L. J. 861 (1993); Morron, *The Administration's Legislation: The National Cooperative Research Act of 1984, The National Productivity and Innovation Act of 1983*, 18 J. MARSHALL L. REV. 607 (1985); Baker, *Restating Law and Refining Remedies: The Trading Company Act, The Joint Research Act, and the Local Government Antitrust Act*, 55 ANTITRUST L. J. 4993 (1986). *Cf.,* Zwart, *Innovate, Integrate, and Cooperate: Antitrust Changes and Challenges in the United States and the European Economic Community*, 1989 UTAH L. REV. 63 (1989) and Comment, *Emerging International Antitrust Perspectives on Research and Development Joint Ventures*, 16 LAW & POLY IN INT'L BUS. 1181 (1984).
15. In a recent search, few judicial references to NCRA were found. Those cases found only cited the act as support for other legislated attorney's fee provisions or as federal preemption. *See, e.g.,* Coghlan v. Starkey, 852 F.2d 806, 817 (5th Cir. 1988) (awarding attorney's fees to prevailing defendant) and California v. Arc America Corp., 490 U.S. 93, 101, 109 S. Ct. 1661, 1665 (1988) (preemption of state antitrust recoveries).
16. A succinct explanation of congressional findings and intent can be found in the Act. *See* National Cooperative Production Amendments of 1993, Pub. Law No. 103-42, § 2, 107 Stat. 117, 117.
17. H.R. REP. NO. 94, 103rd Cong., 1st Sess. 8.
18. *Id.*
19. Of particular concern was the emergence of European and Japanese consortiums tasked with developing high definition television (HDTV). *Id.* U.S. antitrust laws, often said to be obsolete, were also unfavorably compared to the pro-business industrial policies set forth in Europe and Japan. *Id.* at 9.
20. *Id.* at 4.
21. Legislation to extend NCRA protections to production joint ventures had been introduced as early as 1988. However, a variety of alternative proposals and sensitive issues delayed passage until 1993. Some alternate proposals suggested establishing codified criteria to define rule of reason analysis, creating safe harbors (antitrust immunity), and certifying joint ventures. Another proposal suggested protections be available only for small businesses. *See id.* at 5-8. Treatment of foreign entities, however, was the most debated proposal for NCPA. *See infra* note 26.

- The other significant issue of concern was the increased risk of antitrust violations and anticompetitive effects with production ventures. Obviously, the more involved participants become, the greater the possibility of such violations. The legislation attempts to mitigate these phobias of potential participants by enumerating and refining the specific conduct allowed of a joint venture under the Act.
22. H.R. REP. NO. 94, 103rd Cong., 1st Sess. 4.
 23. *Id.*
 24. 15 U.S.C.A. § 4301(a)(6).
 25. *See* 15 U.S.C.A. § 4301(b).
 26. One of the most sensitive features of NCPA was the treatment of foreign participants in regards to damage limitations. Earlier proposals had minimum U.S. ownership percentages to be eligible for protections, but threatened overseas trade retaliations tempered this requirement. 138 CONG. REC. 2477, 2482-83 (daily ed. Feb. 27, 1992).
 27. 15 U.S.C.A. § 4306.
 28. Reports on joint venture participation and U.S. competitiveness must be presented by the Attorney General. These include a yearly list of ventures and list of cases filed by the government, if any, against such ventures. Also, reports on industries involved in ventures and trends in U.S. competitiveness in said industries must be filed. Antitrust treatment of U.S. businesses in countries of international venture participants that have filed under NCRPA must also be evaluated. 15 U.S.C.A. § 4305 note.
 29. 15 U.S.C.A. § 4301(a)(6).
 30. *Id.*
 31. *See* 15 U.S.C.A. § 4301(b).
 32. 15 U.S.C.A. § 4301(b)(7).
 33. *See, e.g.*, 15 U.S.C.A. §§ 4301(b)(1), (5), (8).
 34. 15 U.S.C.A. § 4301(b)(2)(B).
 35. 15 U.S.C.A. § 4301(b)(2)(C).
 36. H.R. REP. NO. 94, 103rd Cong., 1st Sess. 17.
 37. *Id.*
 38. 15 U.S.C.A. § 4302. For a discussion of rule of reason analysis and joint ventures, *see* Note, *Rule of Reason Analysis in Intellectual Property Joint Ventures*, 68 Den. U. L. Rev. 315 (1991).
 39. *Id.*
 40. H.R. REP. NO. 94, 103rd Cong., 1st Sess. 11.
 41. The worldwide capacity clause for determining the relevant market was added by NCPA in 1993. Congress noted that the clause was added for no reason except that a particular interest has been expressed for antitrust analysis to account for worldwide capacity when relevant. *Id.* at 18-19. The inclusion of this clause was unnecessary because "market" is a general term, evaluated on a case-by-case basis. Nevertheless, it favors any challenged venture by ensuring consideration of a broader relevant market.
 42. S. REP. NO. 427, 98th Cong., 2nd Sess. 13, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3105, 3110.
 43. Clayton Act, 15 U.S.C. § 15(a) (1988).
 44. 15 U.S.C.A. § 4303(e).
 45. 15 U.S.C.A. § 4303(a)(1).
 46. 15 U.S.C.A. § 4303(a)(2). This last provision allowing defendants to potentially be awarded attorney's fees was a major concern during the debate of NCRA. A recent search shows that this is the most frequently cited NCRA section, but generally only as a footnote supporting awards of attorney fees in other types of litigation. *Supra* note 15. This issue's relative dormancy during the past nine years suggests that it is really a non-issue.
 47. 15 U.S.C.A. § 4304(b).
 48. *See* 15 U.S.C. § 15(a).
 49. A venture should be aware of time requirements for filing. At least one source has suggested that the clock may begin to run when the parties sign a preliminary agreement stating their intention to enter into a joint venture. Holmes, *supra* note 14, at 257. *See also* H.R. CONF. REP. NO. 1044, 98th Cong., 2nd Sess. 17 (1984), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3105, 3142 (suggesting generally accepted principles of contract law be used).
 50. 15 U.S.C.A. §§ 4305(a).
 51. 15 U.S.C.A. § 4305(a)(3).
 52. 15 U.S.C.A. § 4305(a).
 53. *Id.*
 54. 15 U.S.C.A. § 4305(e).
 55. 15 U.S.C.A. § 4305(b).
 56. *Id.*
 57. 15 U.S.C.A. § 4305(a).
 58. 15 U.S.C.A. § 4305(c).
 59. 15 U.S.C.A. § 4305(c)(2).
 60. 15 U.S.C.A. § 4305(d).
 61. *Id.* Normally, agencies have the discretion to disclose information, but under NCRPA, there is no discretion available and, therefore, no disclosure. Freedom of Information Act, 5 U.S.C. § 552(b) (1988). *See also* H.R. CONF. REP. NO. 1044, 98th Cong., 2nd Sess. 20 (1984), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3105, 3145.
 62. 15 U.S.C.A. § 4305(d).
 63. 15 U.S.C.A. § 4306(1).
 64. 15 U.S.C.A. § 4306(2).
 65. H.R. REP. NO. 94, 103rd Cong., 1st Sess. 19.
 66. *See, e.g., Id.* at 20.
 67. *Id.* at 19.
 68. *See supra* notes 58-59 and accompanying text.
 69. *See* H.R. CONF. REP. NO. 1044, 98th Cong., 2nd Sess. 18 (1984), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3105, 3143.
 70. This article, though presenting the issue, does not treat antitrust problems associated with information exchanges.
 71. If changes are forthcoming, they could be some of those initially proposed for NCPA but not contained in the final act. These include a codification of the rule of reason (defining market power and enumerating criteria for specifying competitive effects), offering safe harbors for small firms without market power, certification of joint ventures, and permissible marketing collaboration. *See supra* note 21.
 72. H.R. REP. NO. 94, 103rd Cong., 1st Sess. 17.