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Bits and Bytes from the Chair

By Mark G. Malven, *Dykema Gossett PLLC*

Thank you very much for your votes and the opportunity to serve as Chair of the Information Technology Law Section this year. I would like to start by noting that, due to the good work of my predecessors and many of you, my personal view is that our Section is doing quite well in accomplishing our objectives and in being of service to our members. I am excited to work with my fellow Officers, Council Members and Section members to build on this great foundation and make this another great year for our Section.

I would also like to thank Jeremy Bisdorf for his leadership this past year, and for his service to our Section as an Officer over the past four years. Jeremy has been a highly effective Chair and we are certainly better for his efforts. Thank you Jeremy!

Looking forward, here are some highlights of our plans for the upcoming year:

- Repeating our successful IT Law seminar with ICLE for a fourth consecutive year. We welcome all suggestions for topics or other means to further increase the value of this seminar.
- Continuing the increased publications schedule for our two newsletters, the *Michigan IT Lawyer* and the Information Technology Law Section e-Newsletter. Once again, any and all suggestions are welcome.
- Having another Spring Networking Event. Our co-sponsored event with Detroitnet.org was a big hit last year and we plan to repeat with a similar type of event next spring.
- Sponsoring the IT themed issue of the *Michigan Bar Journal*, that will be published in June 2011. All are encouraged to submit articles for possible publication. The articles should



2010-2011

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be 1000 – 2500 words in length, and submissions are due to me by February 1, 2011. Note that articles that do not make it into the *Bar Journal* will be considered for future publication in our newsletters.

- Increasing our use of social media. We have a Facebook page and we recently created an official LinkedIn group for the Section. We have set up a working group to identify means to maximize use of and value from these resources. One area we know we will be focusing on is facilitating recruitment and job search activities. If you would like to participate in our social media strategy or have ideas to share, please let us know.

In closing, I want to emphasize that the mission of our Section, and our job as Council Members and Officers, is to be of service to the membership. With that in mind, please do not hesitate to contact me or anyone else on the Section Council with any comments, suggestions or ideas. you may have regarding how we may be of greater services to you as a member of the Information Technology Law Section.

Best regards,

Mark



During the IT Section's 2010 Annual Meeting, Mark G. Malven (left) accepts the 2010-2011 Chairperson title from the 2009-2010 Chairperson, Jeremy D. Bisdorf (right).

Bilski v. Kappos: The Supreme Court Rejects The Federal Circuit's "Machine-or-Transformation" Test As The Sole Test In Determining Whether A Claimed Business Method Is Patent Eligible While Keeping The Door Open For Business Method Patents Under 35 U.S.C. § 101

By the Proprietary Rights Committee of the Information Technology Law Section, State Bar of Michigan.
Chairperson, David R. Syrowik, *Brooks Kushman PC*

Introduction

In the *Bilski* case,¹ on June 28, 2010, the U.S. Supreme Court ruled that business method patent claims for hedging risk did not define a patentable process under 35 U.S.C. § 101 but rather was an attempt to patent an abstract idea. Prior Supreme Court precedent² provides that such ideas, laws of nature and physical phenomena are specific exceptions to § 101's dynamic and wide scope as to patentable subject matter.³

Despite an extensive concurring opinion authored by Justice Stevens,⁴ who would have held that all business methods are unpatentable, Justice Kennedy, who authored the majority opinion, held that a business method was one kind of "method" that, at least in some circumstances, is eligible for patenting under § 101.⁵ In saying this, the Court rejected the exclusivity of the Federal Circuit's "machine-or-transformation" test in determining patent-eligible subject matter under the statute.

Instead of coming up with a test, the Court looked to the Federal Circuit to come up with "other limiting criteria" in evaluating business method as well as other process patents in the Information Age.⁶ The Court suggested that the Federal Circuit look to the definition of the term "process" in § 101 and the "guideposts" of the *Benson*, *Flook* and *Diehr* Supreme Court cases in coming up with guidelines under the statute.⁷

Part I of this report takes a look at what happened in the Patent Office with respect to the original patent application. Part II of this report looks at Chief Judge Michel's Federal Circuit opinion as well as some of the other opinions including Judge Rader's dissenting opinion. Part III of the report takes an in-depth look at the Court's various opinions including Justice Kennedy's majority opinion, Justice Steven's concurring opinion and Justice Breyer's concurring opinion.

Part IV of the report looks at the Patent Office's response to the *Bilski* case.

At The Patent Office

In Front Of The Patent Examiner

On April 10, 1997, a patent application was filed in the U.S. Patent and Trademark Office by applicants, Bernard L. Bilski and Rand Warsaw. The application describes and claims a procedure including a series of steps for managing or protecting against the risk amongst buyers and sellers of commodities (*i.e.* hedging risks in commodities trading). Claim 1 of the patent application is "a method for managing the consumption risk costs of a commodity sold by a commodity provider at a fixed price" and comprises the steps of:

- (a) initiating a series of transactions between said commodity provider and consumers of said commodity wherein said consumers purchase said commodity at a fixed rate based upon historical averages, said fixed rate corresponding to a risk position of said consumers;
- (b) identifying market participants for said commodity having a counter-risk position to said consumers; and
- (c) initiating a series of transactions between said commodity provider and said market participants at a second fixed rate such that said series of market participant transactions balances the risk position of said series of consumer transactions.⁸

Although the patent application makes clear that the "method can be used for any commodity to manage consumption risk in a fixed bill price product,"⁹ it includes specific applications of the method, particularly in the field of

energy, as a means of enabling suppliers and consumers to minimize the risks resulting from fluctuations in demand during specified time periods.¹⁰ Energy suppliers and consumers may use that method to hedge their risks by agreeing upon a fixed series of payments at regular intervals throughout the year instead of charging or paying prices that fluctuate in response to changing weather conditions. The patent application describes a series of steps, including the evaluation of historical costs and weather variables and the use of economic and statistical formulas, to analyze these data and to estimate the likelihood of certain outcomes.¹¹

The patent Examiner rejected petitioners' application on the ground that it "is not directed to the technological arts," insofar as it "is not implemented on a specific apparatus" such as a computer and "merely manipulates [an] abstract idea and solves a purely mathematical problem without any limitation to a practical application."¹²

At The Board Of Patent Appeals And Interferences

The Board of Patent Appeals and Interferences ("Board") affirmed the Examiner's decision, but it rejected the position that a patentable process must relate to "technological arts" or be performed on a machine.¹³ Instead, the Board denied petitioners' patent on two alternative, although similar, grounds: first, that the patent involves only mental steps that do not transform physical subject matter,¹⁴ and, second, that it is directed to an "abstract idea," and did not produce a "useful, concrete and tangible result."¹⁵

At The Court Of Appeals For The Federal Circuit

Petitioners appealed to the United States Court of Appeals for the Federal Circuit. After briefing and argument before a three-judge panel, the Court *sua sponte* decided to hear the case *en banc*.

The *en banc* Court of Appeals affirmed the Board's decision in a 9-3 decision. The case produced five different opinions. Eleven of the twelve judges agreed that petitioners' claims do not describe a patentable "process" under § 101. Summaries of some of the opinions are provided here as Justice Kennedy stated that "students of patent law would be well advised to study these scholarly opinions."¹⁶

Chief Judge Michel's Opinion

Chief Judge Michel's opinion, joined by eight other judges, rejected several possible tests for what is a patent-

eligible process, including the prior Freeman-Walter-Abele test, the "useful concrete and tangible result" test, and the "technological arts" test, all of which had been proposed as patent eligibility tests since the Supreme Court's trilogy. The Court also refused to adopt a test that barred business methods.¹⁷ Rather, the majority interpreted Supreme Court jurisprudence to "enunciate[] a definitive test to determine whether a process claim is tailored narrowly enough to encompass only a particular application of a fundamental principle rather than to pre-empt the principle itself."¹⁸ The Court concluded that a "claimed process is surely patent-eligible under § 101 if: (1) it is tied to a particular machine or apparatus, or (2) it transforms a particular article into a different state or thing."¹⁹ The Court further concluded that this "machine-or-transformation test" is "the *sole* test governing § 101 analyses,"²⁰ and therefore the "test for determining patent eligibility of a process under § 101."²¹ Applying that test, the Court held that petitioners' claim is not a patent-eligible process.²²

Judge Dyk's Concurring Opinion

In a separate opinion reaching the same conclusion, Judge Dyk analyzed the history of the English and U.S. patent jurisprudence commencing with the Statute of Monopolies and the Act of 1793, respectively. He concluded that "the history of § 101 fully supports the majority's holding that Bilski's claims did not contain patentable subject matter" and that the majority decision reflected "careful and respectful adherence to the Congressional purpose" in enacting patent legislation. Despite the legitimate questions of applying eighteenth and nineteenth century legal and technological precedents to modern problems, Judge Dyk found that history enlightening.²³

Judge Mayer's Dissenting Opinion

Three judges wrote dissenting opinions, although two of those judges agreed that petitioners' claim is not patent-eligible. In one of these opinions, Judge Mayer would have held that petitioners' claim "is not eligible for patent protection because it is directed to a method of conducting business."²⁴ He argued the adoption of a "technological standard for patentability."²⁵

Judge Rader's Dissenting Opinion

Judge Rader (now Chief Judge Rader) would have rejected petitioners' claim on the ground that it seeks to patent merely an abstract idea.²⁶ Judge Rader explained:

“This Court labors for page after page, paragraph after paragraph, explanation after explanation to say what could have been said in a single sentence: ‘Because *Bilski* claims merely an abstract idea, this Court affirms the Board’s rejection.’”

Judge Rader concluded that the new “machine-or-transformation” test was hopelessly flawed:

In sum, this court today invents several circuitous and unnecessary tests. It should have merely noted that *Bilski* attempts to patent an abstract idea. Nothing more was needed. Instead this opinion propagates unanswerable questions: What form or amount of “transformation” suffices? When is a “representative” of a physical object sufficiently linked to that object to satisfy the transformation test? (e.g., Does only vital sign data taken directly from a patient qualify, or can population data derived in part from statistics and extrapolation be used?) What link to a machine is sufficient to invoke the “or machine” prong? Are the “specific” machines of *Benson* required, or can a general purpose computer qualify? What constitutes “extra-solution activity?” If a process may meet eligibility muster as a “machine,” why does the Act “require” a machine link for a “process” to show eligibility?²⁷

At The Supreme Court

Justice Kennedy’s Majority Opinion

Justice Kennedy began by stating that § 101 of the Patent Act defined the subject matter that may be patented:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

Justice Kennedy underscored the expansiveness of § 101 by quoting: “In choosing such expansive terms . . . modified by the comprehensive ‘any,’ Congress plainly contemplated that the patent laws would be given wide scope.”²⁸ Congress took this permissive approach to patent eligibility to ensure that “ingenuity should receive a liberal encouragement.”²⁹

Justice Kennedy explained that despite such “wide scope” there are exceptions on this scope of patent-eligibility: “laws of nature, physical phenomena, and abstract ideas”³⁰ and that the concepts covered by these exceptions are “part of the storehouse of knowledge of all men . . . free to all men and reserved exclusively to none.”³¹

To allay the fears of some, Justice Kennedy stated that § 101 is not the sole tool for determining patentability of a patent claim: “The §101 patent-eligibility inquiry is only a threshold test. Even if an invention qualifies as a process, machine, manufacture, or composition of matter, in order to receive the Patent Act’s protection the claimed invention must also satisfy ‘the conditions and requirements of this title.’” Those requirements include that the invention be novel, (see § 102), nonobvious, (see § 103), and be fully and particularly described, (see § 112).³²

Justice Kennedy again referred back to the Patent Act in determining whether the “machine-or-transformation” test is the sole test in determining patentability. Section 100(b) of the Patent Act defines “process” as:

process, art or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material.

Justice Kennedy stated that adopting the “machine-or-transformation” test as the sole test for what constitutes a “process” (as opposed to just an important and useful clue) violates the statutory interpretation principle that words of a statute are to be interpreted as taking their “ordinary, contemporary, common meaning.”³³ The Court was unaware of any “ordinary, contemporary, common meaning,”³⁴ of the definitional terms “process, art or method” that would require these terms to be tied to a machine or to transform an article.

Justice Kennedy faulted the Court of Appeals for incorrectly concluding that the Supreme Court has endorsed the “machine-or-transformation” test as an exclusive test.³⁵ The Court explained that while *Cochrane v. Deener*³⁶ explained that a “process” is “an act, or a series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing,” this was dictum. The Court explained that while *Benson*³⁷ noted that “[t]ransformation and reduction of an article ‘to a different state or thing’ is the clue to the patentability of a process claim that does not include particular machines,” it had explicitly declined to “hold that no process patent could ever qualify if it did not meet [machine or transformation] requirements.”³⁸

The Court also distinguished *Flook* which stated “assum[ing] that a valid process patent may issue even if it does not meet [the machine-or-transformation test].”³⁹

Justice Kennedy stated that these Courts’ precedents merely established that the “machine-or-transformation” test is a useful and important clue, an investigative tool, for determining whether some claimed inventions are processes under § 101. However, the “machine-or-transformation” test

is not the sole test for deciding whether an invention is a patent-eligible “process.”⁴⁰

Moving to business methods, Justice Kennedy made it clear that business methods are not categorically outside of § 101’s scope stating that “a business method is simply one kind of ‘method’ that is, at least in some circumstances, eligible for patenting under §101.”⁴¹

After distinguishing *Benson* and *Flook*, the Court then took time to explain what its prior decisions in *Benson*, *Flook* and *Diehr* (i.e. the trilogy of cases) stood for. These explanations are important since later in the opinion the Court referred to these decisions as “guideposts” in determining patent-eligible subject matter:

In *Benson*, the Court considered whether a patent application for an algorithm to convert binary-coded decimal numerals into pure binary code was a “process” under §101. (Citation omitted.) The Court first explained that “[a] principle, in the abstract, is a fundamental truth; an original cause; a motive; these cannot be patented, as no one can claim in either of them an exclusive right.” (Citation omitted.) The Court then held the application at issue was not a “process,” but an unpatentable abstract idea. “It is conceded that one may not patent an idea. But in practical effect that would be the result if the formula for converting . . . numerals to pure binary numerals were patented in this case.” (Citation omitted.) A contrary holding “would wholly pre-empt the mathematical formula and in practical effect would be a patent on the algorithm itself.” (Citation omitted.)⁴²

In *Flook*, the Court considered the next logical step after *Benson*. The applicant there attempted to patent a procedure for monitoring the conditions during the catalytic conversion process in the petrochemical and oil-refining industries. The application’s only innovation was reliance on a mathematical algorithm. (Citation omitted.) *Flook* held the invention was not a patentable “process.” The Court conceded the invention at issue, unlike the algorithm in *Benson*, had been limited so that it could still be freely used outside the petrochemical and oil-refining industries. (Citation omitted.) Nevertheless, *Flook* rejected “[t]he notion that post-solution activity, no matter how conventional or obvious in itself, can transform an unpatentable principle into a patentable process.” (Citation omitted.) The Court concluded that the process at issue there was “unpatentable under §101, not because it contain[ed] a mathematical algorithm as one component, but because once that algorithm [wa]s assumed to be within the prior art, the

application, considered as a whole, contain[ed] no patentable invention.” (Citation omitted.) As the Court later explained, *Flook* stands for the proposition that the prohibition against patenting abstract ideas “cannot be circumvented by attempting to limit the use of the formula to a particular technological environment” or adding “insignificant postsolution activity.” (Citation omitted).⁴³

Finally, in *Diehr*, the Court established a limitation on the principles articulated in *Benson* and *Flook*. The application in *Diehr* claimed a previously unknown method for “molding raw, uncured synthetic rubber into cured precision products,” using a mathematical formula to complete some of its several steps by way of a computer. (Citation omitted.) *Diehr* explained that while an abstract idea, law of nature, or mathematical formula could not be patented, “an application of a law of nature or mathematical formula to a known structure or process may well be deserving of patent protection.” (Citation omitted.) *Diehr* emphasized the need to consider the invention as a whole, rather than “dissect[ing] the claims into old and new elements and then . . . ignor[ing] the presence of the old elements in the analysis.” (Citation omitted.) Finally, the Court concluded that because the claim was not “an attempt to patent a mathematical formula, but rather [was] an industrial process for the molding of rubber products,” it fell within §101’s patentable subject matter. (Citation omitted.)⁴⁴

Consistent with the trilogy of precedents the Court found that:

The concept of hedging, described in claim 1 and reduced to a mathematical formula in claim 4, is an unpatentable abstract idea, just like the algorithms at issue in *Benson* and *Flook*. Allowing petitioners to patent risk hedging would preempt use of this approach in all fields, and would effectively grant a monopoly over an abstract idea.⁴⁵

Finally, Justice Kennedy emphasized the importance of the patent statute as well as the trilogy of cases as follows: “The Court, therefore, need not define further what constitutes a patentable “process,” beyond pointing to the definition of that term provided in § 100(b) and looking to the guideposts in *Benson*, *Flook*, and *Diehr*.”

Rather than proposing a test to be employed instead of the exclusive “machine-or-transformation” test, the Court

suggested that the Federal Circuit develop guidelines in determining patent-eligible subject matter under the statute: “. . . we by no means foreclose the Federal Circuit’s development of other limiting criteria that further the purposes of the Patent Act and are not inconsistent with its text.”⁴⁶

Justice Steven’s Concurring Opinion

Justice Steven’s concurrence argues that the majority interprets the term “process” too broadly.⁴⁷ He would have categorically excluded business methods from patentability, as they have not traditionally been patentable in the U.S.⁴⁸

Justice Breyer’s Concurring Opinion

Justice Breyer’s concurrence began by agreeing with Justice Stevens “that a ‘general method of engaging in business transactions’ is not a patentable ‘process’”⁴⁹ In a second part of his opinion, joined by Justice Scalia, Breyer highlighted four points which he felt were consistent with both the opinion of the Court and Justice Stevens’ concurring opinion:⁵⁰

First, although the law’s description of what is patentable under § 101 “is broad, it is not without limit.”

Second, the Court has repeatedly stated that “transformation and reduction of an article to a different state or thing is *the clue* to the patentability of a process claim that does not include particular machines.”

Third, while the machine-or transformation test has always been a “useful and important clue,” it has never been the “sole test” for determining patentability.

Fourth, although the machine-or-transformation test is not the only test for patentability, this by no means indicates that anything which produces a “useful, concrete, and tangible result,” [as held in *State Street Bank v. Signature Financial Group*] is patentable.

Back To The Patent Office Post-Bilski

Four weeks after the U.S. Supreme Court’s *Bilski* decision, the Patent and Trademark Office (*i.e.* PTO) issued guidance to patent Examiners in the form of a multi-factor reference list, with each factor weighed separately and no single factor determinative as to whether a process claim is patent-eligible under §101 of the Patent Act.⁵¹

A summary of the reference list is as follows:

Factors Weighing Toward Eligibility

- Recitation of a machine or transformation (either express or inherent).
 - Machine or transformation is particular.
 - Machine or transformation meaningfully limits the execution of the steps.
 - Machine implements the claimed steps.
 - The article being transformed is particular.
 - The article undergoes a change in state or thing (*e.g.* objectively different function or use).
 - The article being transformed is an object or substance.
- The claim is directed toward applying a law of nature.
 - Law of nature is practically applied.
 - The application of the law of nature meaningfully limits the execution of the steps.
- The claim is more than a mere statement of a concept.
 - The claim describes a particular solution to a problem to be solved.
 - The claim implements a concept in some tangible way.
 - The performance of the steps is observable and verifiable.

Factors Weighing Against Eligibility

- No recitation of a machine or transformation (either express or inherent).
- Insufficient recitation of a machine or transformation.
 - Involvement of machine or transformation with the steps is merely nominally, insignificantly, or tangentially related to the performance of the steps, *e.g.* data gathering, or merely recites a field in which the method is intended to be applied.
 - Machine is generically recited such that it covers any machine capable of performing the claimed step(s).
 - Machine is merely an object on which the method operates.
 - Transformation involves only a change in position or location of article.
 - “Article” is merely a general concept.

- The claim is not directed to an application of a law of nature.
- The claim would monopolize a natural force or patent a scientific fact, e.g. by claiming every mode of producing an effect of that law of nature.
- Law of nature is applied in a merely subjective determination.
- Law of nature is merely nominally, insignificantly, or tangentially related to the performance of the steps.
- The claim is a mere statement of a general concept.
 - Use of the concept, as expressed in the method, would effectively grant a monopoly over the concept.
 - Both known and unknown uses of the concept are covered, and can be performed through any existing or future-devised machinery, or even without any apparatus.
 - The claim only states a problem to be solved.
 - The general concept is disembodied.
 - The mechanism(s) by which the steps are implemented is subjective or imperceptible.

The Patent Office stated that the factors included inquiries from the “machine-or-transformation” test as well as inquiries from Supreme Court precedent. While such a reference list may provide some guidance in some cases, the reference list calls to mind the unanswerable questions posed in Judge Radar’s dissenting opinion at the Federal Circuit. ■

Endnotes

1 130 S.Ct. 3218.
 2 *Diamond v. Diehr*, 450 U.S. 175, 185 (1981); *Parker v. Flook*, 437 U.S. 584, 589 (1978); and *Gottschalk v. Benson*, 409 U.S. 63, 67 (1972) (these cases are referenced to herein as the patent eligibility “trilogy”).
 3 See *Bilski v. Kappos*, at 3227.
 4 *Id.*, at 3231-3257.
 5 *Id.*, at 3228.
 6 *Id.*, at 3231.
 7 *Id.*
 8 *In re Bilski*, 545 F.3d 943, 949 (Fed. Cir. 2008).
 9 *Id.*
 10 *Id.*
 11 *Id.*, at 950.
 12 *Id.*
 13 *Id.*
 14 *Id.*

15 *Id.*
 16 *Bilski, supra*, at 3224.
 17 *In re Bilski*, 545 F.3d 943, 949-960 and n.19.
 18 *Id.*, at 954.
 19 *Id.*, at 954-955.
 20 *Id.*, at 955.
 21 *Id.*, at 956.
 22 *Id.*, at 963-966.
 23 *Id.*, at 972.
 24 *Id.*, at 998.
 25 *Id.*, at 1010.
 26 *Id.*, at 1011.
 27 *Id.*, at 1015.
 28 *Diamond v. Chakrabarty*, 447 U.S. 303, 308 (1980).
 29 *Id.*, at 308–309 (quoting 5 Writings of Thomas Jefferson 75-76 (H. Washington ed. 1871)).
 30 *Chakrabarty, supra*, at 309.
 31 *Funk Brothers Seed Co. v. Kalo Inoculant Co.*, 333 U.S. 127, 130 (1948).
 32 *Bilski, supra*, at 3225.
 33 *Diehr, supra*, at 182.
 34 *Id.*
 35 *Bilski, supra*, at 3226.
 36 94 U.S. 780, 788 (1877).
 37 409 U.S. 63, 70 (1972)
 38 *Id.*, at 71.
 39 *Flook, supra*, at 588, n.9.
 40 *Bilski, supra*, at 3227.
 41 *Id.*, at 3228.
 42 *Id.*, at 3230.
 43 *Id.*
 44 *Id.*
 45 *Id.*, at 3231.
 46 *Id.*
 47 *Id.*, at 3232.
 48 *Id.*, at 3257.
 49 *Id.*
 50 *Id.*, at 3258-3259.
 51 75 Fed. Reg. 43, 922.

Recent Developments in Information Technology Law

By David R. Syrowik, *Brooks Kushman PC*

PATENTS – Case Law – U.S. Courts of Appeal

As reported at 95 USPQ2d 1353, on May 26, 2010, the U.S. Court of Appeals for the Federal Circuit ruled that accused “work-around” products do not infringe asserted claims directed to apparatus and method for decoding MPEG-compatible packetized program map information for digital television programs, which require assembly of information to form channel map “for identifying,” or “suitable for use in identifying,” packetized datastreams, since accused products do not convert all of channel map information from “virtual channel table” into usable format, and thus do not satisfy “suitable for use,” “for identifying,” or “for decoding” limitations of claims. *Vizio Inc. v. International Trade Commission*.

As reported at 96 USPQ 2d 1022, on August 6, 2010 the U.S. Court of Appeals for the Federal Circuit ruled that the district court clearly erred in finding that applicants, in prosecuting patent for software-based algorithm and method for generating and delivering telephone messages, made misrepresentation regarding prior art with intent to deceive U.S. Patent and Trademark Office, since inference that applicants believed their characterization of prior art to be correct is equally as reasonable as inference of deceptive intent. *Ring Plus Inc. v. Cingular Wireless Corp.*

As reported at 95 USPQ 2d 1673, on July 6, 2010 the U.S. Court of Appeals for the Federal Circuit affirmed summary judgment of non-infringement of patent directed to date transmission in telecommunications networks, since district court properly construed asserted claims that require insertion of date in packetized format into any “available payload field” or any “frame” in bit stream, and plaintiff concedes that it cannot prove infringement under that construction; however, action is remanded for reconsideration of invalidity counterclaim, since judgment that claims are not anticipated was based on improper construction of “empty payload field” limitation. *Technologies Inc. v. Cisco System Inc.*

As reported at 96 USPQ 2d 1065, on August 9, 2010 in the U.S. Court of Appeals for the Federal Circuit vacated a finding of intent to deceive in action in which inventor and patent counsel failed to fully disclose information in undated brochure during prosecution of application directed to integrated medical databases used in emergency medi-

cal transport industry, since district court did not find that either counsel or inventor was aware of brochure’s contents. *Golden Hour Data Systems Inc. v. emsCharts Inc.*

As reported at 95 USPQ2d 1417, on June 4, 2010, the U.S. Court of Appeals for the Federal Circuit ruled that direct infringement of apparatus claim directed to computer that is claimed in functional terms does not require performance of all elements of claim; thus, even absent its use, such claim is infringed if accused product is designed in manner that enables user to utilize claimed function without having to modify accused product. *Silicon Graphics Inc. v. ATI Technologies Inc.*

As reported at 95 USPQ2d 1654, on June 23, 2010, the U.S. Court of Appeals for the Federal Circuit ruled that an accused system for administering annuity policies does not infringe claims directed to computerized methods for administering variable annuity plans having guaranteed minimum payment feature, which pays scheduled benefits “even if the account value is exhausted.” *Lincoln National Life Insurance Co. v. Transamerica Life Insurance Co.*

COPYRIGHTS – CASE LAW – U.S. COURTS OF APPEAL

As reported at 80 BNA’s PTCJ 717, on September 28, 2010 the U.S. Court of Appeals for the Second Circuit ruled that the downloading of a copy of a copyrighted musical work implicates the copyright holder’s right of reproduction but does not implicate the copyright holder’s public performance right under section 106 of the Copyright Act. Affirming a district court’s ruling on the public performance issue, the court, however, vacates the lower courts assessment of licensing fees against internet music operations and remands the question of establishing reasonable fee for further consideration. *United States v. American Society of Composers, Authors and Publishers*.

As reported at 96 USPQ 2d 1201, on September 10, 2010 the U.S. Court of Appeals for the Ninth Circuit ruled that a software user is licensee, rather than owner of copy, if copyright owner specifies that the user is granted licenses, significantly restricts user’s ability to transfer software, and

imposes notable use restrictions; direct customer of software developer in present case was licensee, rather than owner of copies of software, and thus was not entitled to invoke first-sale doctrine. *Vernor v. Autodesk Inc.*

As reported at 95 USPQ2d 1082, on March 21, 2010, the U.S. Court of Appeals for the First Circuit ruled that claim alleging infringing use of plaintiff's copyrighted source code for its aircraft maintenance and engineering software is sufficiently related to claim of infringing "possession" of source code, asserted in prior action, that doctrine of claim preclusion bars present suit; there is also sufficiently close relationship between defendant named in present infringement action and defendant in prior action that "new" defendant may assert claim preclusion as defense to later suit. *Airframe Systems Inc. v. Raytheon Co.*

COPYRIGHTS/DMCA – Case Law – U.S. Courts of Appeal

As reported at 80 BNA's PTCJ 433, on July 29, 2010, the U.S. Court of Appeals for the Fifth Circuit ruled that anticircumvention provision of Digital Millennium Copyright Act, 17 U.S.C. § 120(a)(1)(A), prohibits only those forms of "access" that would violate or impinge on protections Copyright Act otherwise affords to copyright owners, and "circumvented" technological measure therefore must protect copyrighted material against infringement of right that Copyright Act protects, not from mere use or viewing; in present case, defendants did not violate anticircumvention provision by bypassing external hardware security key, or "dongle," in using plaintiff's copyrighted software programs for servicing uninterruptible power supply machines. As reported at 80 BNA's PTCJ 764, on September 29, 2010, the Court issued a modified opinion. *MGE UPS Systems Inc. v. GE Consumer and Industrial Inc.*

TRADEMARKS – Case Law – U.S. Courts of Appeal

As reported at 80 BNA's PTCJ 336, on July 8, 2010, the U.S. Court of Appeals for the Ninth Circuit held that an auto brokerage service was entitled to make at least some use of the car maker's "Lexus" trademark in its Internet domain name. *Toyota Motor Sales U.S.A. Inc. v. Tabari.*

As reported at 80 BNA's PTCJ 760, on September 30, 2010, the U.S. Court of Appeals for the Seventh Circuit ruled that a woman dismayed to find links to "shameful" websites and advertisements upon doing a Yahoo search for her name lacked standing to sue the search engine for trademark infringement. *Stayart v. Yahoo!, Inc.*

As reported at 96 USPQ 2d, 1310, on August 3, 2010, the U.S. Court of Appeals for the Ninth Circuit ruled that infringement defendants are likely to prevail on their claim that plaintiff's "Advertising.com" mark is generic for internet advertising services, since the term "advertising" is concededly generic, and ".com" is top-level domain indicator that refers generically to almost anything connected to business on internet, since extensive precedent supports conclusion that combination of ".com" and "advertising" does not result in descriptive mark, since "Advertising.com" does not appear to represent "rare instance" in which addition of TLD to generic term results in distinctive mark. *Advertise.com Inc. v. AOL Advertising Inc.*

TRADEMARKS/PERSONAL JURISDICTION – Case Law – U.S. Courts of Appeal

As reported at 80 BNA's PTCJ 761, on September 29, 2010, the U.S. Court of Appeals for the Seventh Circuit ruled that domain name registrar GoDaddy.com's extensive online marketing efforts in Illinois sufficed to establish specific personal jurisdiction over it there in a cybersquatting action. *UBID Inc. v. GoDaddy Group Inc.*

TRADE SECRETS – Case Law – U.S. Courts of Appeal

As reported at 95 USPQ2d 1305, on May 11, 2010, the U.S. Court of Appeals for the Second Circuit ruled that policyholder information that defendant insurance agents allegedly took from plaintiffs' computer system does not qualify as trade secret, since information is readily available from physical policyholder files. *Nationwide Mutual Insurance Co. v. Mortensen.*

LICENSING/SOFTWARE – Case Law – U.S. Courts of Appeal

As reported at 80 BNA's PTCJ 825, on October 18, 2010, the U.S. Court of Appeals for the fifth Circuit ruled that form-database technology licensee's provision of the technology to its lawyers to access and use to prepare loans for the licensee was "on behalf of and for the benefit of" the licensee, and thus a violation of the licensing agreement. *Compliance Source Inc. v. GreenPoint Mortgage Funding Inc.*

PATENTS – Case Law – U.S. District Courts

As reported at 80 BNA's PTCJ 344, on July 7, 2010, the U.S. District Court for the Northern District of Illinois ruled

that claims covering a touch-screen navigation device patent were invalid as they were anticipated by an earlier navigation system that was sold with the 1996 Acura RL. *SP Technologies LLC v. Garmin International Inc.*

As reported at 80 BNA's PTCJ 533, on August 12, 2010, Oracle filed a lawsuit for patent and copyright infringement against Google Inc. in the U.S. District Court for the Northern District of California. The fight is over Google's Android operating system for cell phones. *Oracle America Inc. v. Google Inc.*

As reported at 94 USPQ2d 1934, on March 17, 2010, the U.S. District Court for the Northern District of California ruled that plaintiff has failed to state claim for false patent marking under 35 U.S.C. § 292, even though plaintiff alleged that defendant described his firewall technology on website as "functioning" after sole embodiment of firewall had been destroyed in hard-drive crash, since "functioning" description, considered in context, did not indicate that software was operating on website, since software was running in background of website does not transmute website itself into unpatented article, and since plaintiff has not established that firewall invention was unpatented. *Juniper Networks v. Shipley.*

As reported at 80 BNA's PTCJ 602, on August 27, 2010, a Seattle-based patent licensing firm formed by Microsoft Inc.'s co-founder, Paul Allen, files a patent infringement lawsuit against internet search, social networking, and e-commerce powerhouses, but not his old company. *Interval Licensing LLC v. AOL Inc.*

COPYRIGHTS – Case Law – U.S. District Courts

As reported at 80 BNA's PTCJ 330, on July 9, 2010, the U.S. District Court for the District of Massachusetts ruled that a jury's \$675,000 statutory damages award in the Joel Tenenbaum file sharing infringement case is unconstitutionally excessive because it is far greater than necessary to serve the government's legitimate interest in compensating copyright owners and deterring infringement. *Sony BMG Music Entertainment v. Tenenbaum.*

As reported at 95 USPQ2d 1822, on May 28, 2010, the U.S. District Court for the Northern District of California ruled that amended complaint sufficiently states claim for contributory infringement against defendant social networking website operator, stemming from alleged publishing of infringing video game on defendant's website, since complaint clearly alleges that defendant had actual knowledge that infringing game was available using its system, and that defendant

nevertheless continued to allow users to search for and access accused game. *Miller v. Facebook Inc.*

As reported at 80 BNA's PTCJ 382, on July 16, 2010, the U.S. District Court for the Western District of Wisconsin ruled that the equal owner of a software company did not show that he made a copyrightable contribution to a software program or that the other owner who wrote the code executed a written assignment to the company. *Woods v. Resnick.*

As reported at 80 BNA's PTCJ 542, on August 9, 2010, the U.S. District Court for the Central District of California sanctioned lyrics websites for failure to remove infringing content in violation of an earlier injunction. *Peermusic III Ltd. v. Live Universe Inc.*

As reported at 80 BNA's PTCJ 575, on August 9, 2010, the U.S. District Court for the Western District of Washington ruled that the "discovery rule" under federal copyright law did not require a sculptor to scan the Internet for possible photographic infringers of his works. *Mackie v. Hipple.*

As reported at 95 USPQ2d 1226, on March 15, 2010, the U.S. District Court for the District of Utah ruled that plaintiff has not brought "sham" lawsuit by alleging that defendant engaged in trademark infringement, unfair competition, false designation of origin, false advertising, and passing off by purchasing sponsored advertising on search engines that is triggered by plaintiff's "1-800Contacts" trademarks, since plaintiff's allegations that defendant purchased keywords related to plaintiff's website and/or trademarks are sufficient to plead use of plaintiff's marks "in commerce," and since purchase of another's trademark, through search engine, for purpose of diverting Internet traffic violates Lanham Act. *1-800Contacts Inc. v. Memorial Eye PA.*

As reported at 95 USPQ 2d 1330, on June 9, 2010, the U.S. District Court for the Southern District of New York ruled that plaintiffs in action in which defendant recording studio was found liable for vicarious infringement of audio software copyrights are denied award of attorneys' fees, since defendant advanced reasonable defense by arguing that it had no control over sound engineers who acted as independent contractors. *Waves Audio Ltd. v. Reckless Music LLC.*

COPYRIGHTS/PREEMPTION – Case Law – U.S. District Courts

As reported at 80 BNA's PTCJ 734, on September 15, 2010, the U.S. District Court for the Eastern District of Virginia ruled that "scrapping" of website data by competitor does not support computer crimes claim. *Cvent Inc. v. Eventbrite Inc.*

COPYRIGHTS/DMCA – Case Law – U.S. District Courts

As reported at 80 BNA's PTCJ 289, on June 22, 2010, the U.S. District Court for the Southern District of New York ruled that under the safe harbor provision of the Digital Millennium Copyright Act, an online service provider has a duty to take down infringing content when it has "knowledge of specific and identifiable infringements of particular individual items," in a case in which copyright owners have tried to hold the popular website YouTube liable for infringing videos posted by users. *Viacom International Inc. v. YouTube Inc.*

COPYRIGHTS/DOMAIN NAMES – Case Law – U.S. District Courts

As reported at 80 BNA's PTCJ 343, on June 24, 2010, the U.S. District Court for the Southern District of New York authorized the seizure of the domain names of seven popular websites accused of criminal copyright infringement for sharing films and television shows without permission. *United States v. TVShark.net.*

TRADEMARKS – Case Law – U.S. District Courts

As reported at 80 BNA's PTCJ 427, on July 22, 2010, the U.S. District Court for the Southern District of New York ruled that an Internet registrar did not induce a hacker's trademark infringement and so was not contributorily liable. *Baidu Inc. v. Register.com Inc.*

TRADEMARKS/DOMAIN NAMES – Case Law – U.S. District Courts

As reported at 80 BNA's PTCJ 512 and 514, on August 3, 2010 and August 2, 2010, respectively, the U.S. District Court for the Eastern District of Virginia dismissed Rosetta Stone's unjust enrichment claim challenging Google's AdWords and ruled that Google prevailed in AdWords infringement case under keyword "functionality" doctrine. *Rosetta Stone Ltd. v. Google Inc.*

TRADEMARKS/CYBERSQUATTING – Case Law – U.S. District Courts

As reported at 95 USPQ 2d 1730, on June 9, 2010, the U.S. District Court for the Eastern District of California granted defendant summary adjudication of Plaintiff's claim for cybersquatting under 15 U.S.C. § 1125(d), based on defendant's registration of "racklybilt.com" and other domain

names using forms of Plaintiff's business name, since defendant did not use domain names in connection with goods or services, set up website using names, offer to sell names, or profit from registering names. *Rackly Bilt Custom Trailers Inc. v. Harley Murray Inc.*

UNFAIR TRADE PRACTICES/MISAPPROPRIATION – Case Law – U.S. District Courts

As reported at 96 USPQ 2d 1077, on March 18, 2010, the U.S. District Court for the Southern District of New York ruled that defendant online paid-subscription financial news service that collected and redistributed portions of major financial firms' investment reports has misappropriated firms' "hot news," since Plaintiffs incur substantial expense in generating their search reports and recommendations, since recommendations are clearly time-sensitive, since defendant's core business is its "free-riding" on sustained, costly efforts by plaintiffs to generate equity research, and since plaintiffs have shown that defendant's conduct substantially threatens plaintiffs' business. *Barclays Capital Inc. v. Theflyonthewall.com.*

PATENTS – U.S. Patent and Trademark Office

On July 27, 2010, the PTO released a notice containing examination guidelines in response to the U.S. Supreme Court's decision in *Bilski v. Kappos*, Interim Guidance for Determining Subject Matter Eligibility for Process Claims in View of *Bilski v. Kappos*, 75 Fed. Reg. 43,922 (Jul. 27, 2010). The notice includes a reference sheet of factors examiners should consider when analyzing method claims that may be directed to an abstract idea. 75 Fed. Reg. 43,927-28. The notice is available at www.uspto.gov/patents/law/notices/75fr43922.pdf.

On January 2010, the PTO released a notice proposing a remedy for claims directed to computer (or machine) readable media, rejected under 35 U.S.C. § 101 on the grounds that the claims cover a signal, non-statutory subject matter under *In re Nuijten*. U.S. PATENT & TRADEMARK OFFICE, SUBJECT MATTER ELIGIBILITY OF COMPUTER READABLE MEDIA (JAN. 26, 2010). The notice suggests that applicants add the limitation "non-transitory" to the claim, stating that typically, such an amendment should not introduce new matter. The notice is available at www.uspto.gov/patents/law/notices/101_crm_20100127.pdf.

TRADEMARKS – U.S. Patent and Trademark Office

As reported at 95 USPQ2d 1498, on June 9, 2010, the Trademark Trial and Appeal Board ruled that applicant's "Activecare" computer software is similar, for purposes of

Recent Developments . . . continued

likelihood-of-confusion analysis, to services offered by registrant under its “Active Care” mark, even though computer-related goods and services are not related *per se*, since applicant’s goods, which include software that analyzes and repairs or optimizes performance settings for personal computers, are complementary in function and purpose to software installation, maintenance, and updating services offered by registrant. *In re Iolo Technologies LLC*.

COPYRIGHT – Copyright Office

As reported at 80 BNA’s PTCJ 417, on July 26, 2010, Librarian of Congress James H. Billington announced that six classes of works will be except from the Digital Millennium Copyright Act’s prohibition against circumvention of access-control technologies. Among the exemptions in this fourth triennial round of such rulemaking under the DMCA is a provision that would allow “jailbreaking” of the technological measures on wireless telephones that prevent third-party software applications from being installed and run on the phones.

FOREIGN LAW – France

As reported at 80 BNA’s PTCJ 436, on July 20, 2010, a Reims regional appeal court ruled that eBay, as publisher, is liable for sales of counterfeit Hermes bags. *eBay France v. Hermes International*. ■

2010 IT Law Seminar Review

The Information Technology Law Section held its Third Annual Information Technology Law seminar on September 22, 2010, at the St. John’s Inn in Plymouth, Michigan. Based on the feedback received from seminar participants, the event was a great success, and a number of attendees are already looking forward to next year’s seminar. The IT Law Seminar has become the banner event for the Information Technology Section of the State Bar of Michigan, and provides a wonderful opportunity to promote one of the section’s core missions: sharing knowledge about the myriad issues that constitute ‘IT Law.’

This year, for the first time, the seminar was an all day event that allowed presenters with more time to provide in-depth analysis, which was very well received. The IT Section greatly appreciates the participation of each of the speakers, all of whom put in a significant amount of effort to prepare and present their materials. The seminar moderator was Charles A. Bieneman, Rader Fishman & Grauer PLLC, and this year’s topics and presenters were:

- ‘The Top Ten Licensing Mistakes to Avoid’, H. Ward Classen, Deputy General Counsel, US Commercial Businesses, Computer Sciences Corporation
- ‘A Guide to Privacy Law’, Robert L. Rothman, Privacy Associates, International LLC
- ‘Cloud Computing and Its Key Legal Issues’, Karl A. Hochkammer, Honigman Miller Schwartz and Cohn LLP
- ‘The Intersection of Insolvency, IT, and IP Laws’, Michael S. Khoury, Jaffe Raitt Heuer & Weiss PC
- ‘Protecting Trade Secrets: Lessons Learned from the Litigation Front Lines’, a panel presentation by William Cosnowski, Jr., Delphi Automotive Systems LLC, Leigh C. Taggart, Rader Fishman & Grauer PLLC, and Bryce C. Pilz, University of Michigan Office of the General Counsel.
- ‘Patentability of Computer-Related Inventions’, Roberta J. Morris, Lecturer in Law, Stanford Law School

Those attending the seminar in person were invited to a plated lunch that coincided with the Information Technology Section’s annual meeting, and after the day’s presentations, there was a complimentary networking reception that was well attended.

As previously, the seminar was held in conjunction with the Institute for Continuing Legal Education (ICLE). The section would like to thank the folks at ICLE for their help. As usual, ICLE did a great job in helping organize, promote, and put on the seminar.

Planning for the 2011 seminar will begin in a few months. If you have ideas for the seminar, or would be willing to participate in the planning process, please contact Charlie Bieneman at cab@raderfishman.com. ■

Meet a Section Member: Ronald S. Nixon



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■ **What is the name of your firm/corporation/employer?**

Kemp Klein Law Firm, Troy

■ **What is your area of practice?** Litigation and Appeals in a wide-range of business and employment disputes

■ **When did you first become involved with the Section?**

I think I started attending meetings in 2003.

■ **Where did you grow up?**

Farmington Hills, Michigan

■ **Where else have you lived?** I have always been a Michigander (or Michiganian, if you prefer)

■ **Where did you attend undergraduate and law school?** University of Michigan for both

■ **What was your undergraduate major?** A.B., Honors in English

■ **What are your hobbies, other interests?** Computers, golf and bowling. I build a new desktop every two or three years, my handicap is 18, and my average has sunk over the last two years from 191 to the point where I have trouble writing it down.

■ **Favorite restaurant?** I have no particular favorites, but I have always preferred boisterous and friendly environments, with diversions like sports and trivia, to quiet fine dining. Please share yours with me and I may show up sometime.

■ **A recent book you read?** I have not read a recent book, although I recently re-read the *Hitchhikers Guide to the Galaxy* series of books.

■ **Last vacation?** Hilton Head, SC

■ **Favorite legal case (with a tie to Michigan) that can be found in Westlaw or Lexis?**

For humor: *Fisher v Lowe*, 122 Mich App 418, 333 NW2d 67 (1983)

Because I wrote the winning brief: *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206; 737 NW2d 670 (2007) [If anyone looks it up, please remember that I am a dog lover. It was about property rights, not dogs.]

■ **Who is your hero? (a parent, a celebrity, an influential person in one's life)** My grandmother for her kindness and capacity to forgive. She once had her purse stolen at knifepoint while leaving her bank and commented afterward, "He probably needed it more than me."

■ **If you had to describe yourself using three words, they would be...** Diligent, inquisitive, humorous

■ **What is your favorite movie of the past ten years?** *Lord of the Rings* (is it really three movies if they filmed them all at the same time?)

■ **What do you like to do most with a free hour?** Watch an episode of *Criminal Minds*, *House*, or *24* with my wife next to me, one of my dogs resting on my lap, and a frosty mug of beer in my right hand.

■ **What is the most significant event of the last three months?** The successful cancer surgery of a close relative.

■ **What one word would you put on your gravestone?** Doh!

■ **What email can Section members use to contact you?** Ron.Nixon@kkue.com

■ **A short comment on why you became involved with the Information Law Technology Section:** Computers and technology have always been of interest to me, and I wanted to find ways to bring my hobby and profession closer together.

Publicly Available Websites for IT Lawyers

Following are some publicly available websites relating to varying aspects of information technology law practice. Some of these websites may require payment for certain services. Neither the State Bar of Michigan nor the IT Law Section endorses these websites, the providers of the website, or the goods or services offered in connection therewith. Rather these websites are provided for information purposes only and as possible useful tools for your law practice.

Please provide any feedback or recommendations for additional websites to michael@gallo.us.com.

As part of an ongoing 'High Five' feature series, the productivity blog 'Lifehacker' polls readers for favorite tools. Following are a few categories from calendar year 2010 that may be of interest!

- <http://lifehacker.com/5677725/five-best-file-encryption-tools> - Five file encryption tools (that happen to be free) that can be used to protect your data
- <http://lifehacker.com/5660244/five-best-disk-image-tools> - Five disk imaging tools
- <http://lifehacker.com/5635900/five-best-fax-services> - Five fax services
- <http://lifehacker.com/5556555/five-best-web+based-conferencing-tools> - Five web-based conferencing tools
- <http://lifehacker.com/5545568/five-best-personal-web-hosts> - Five personal web hosts
- <http://lifehacker.com/5503770/five-best-online-file-sharing-services> - Five online file sharing services
- <http://lifehacker.com/5498381/five-best-offline-backup-tools> - Five offline backup tools ■



Mission Statement—Information Technology Law Section, State Bar of Michigan

The purposes of the Section are to review, comment upon, and appraise members of the State Bar of Michigan and others of developments in the law relating to information technology, including:

- the protection of intellectual and other proprietary rights;
- sale, leasing, distribution, provision, and use of, hardware, software, services, and technology, including computer and data processing equipment, computer software and services, games and gaming, information processing, programming, and computer networks;
- electronic commerce
- electronic implementation of governmental and other non-commercial functions;
- the Internet and other networks; and
- associated contract and tort liabilities, and related civil and criminal legal consequences. ■

2011 Edward F. Langs Writing Award Essay Competition Rules

1. Awards will be given to up to three student essays, which in the opinion of the judges make the most significant contribution to the knowledge and understanding of information technology law. Factors to be taken into consideration include: originality; timeliness of the subject; depth of research; accuracy; readability; and the potential for impact on the law.
2. Essay must be original, deemed to be of publishing quality, and must not have been submitted to any other contest within the previous 12 months.
3. Essay must be typed, double spaced, at least ten pages in length, must contain proper citations listed as either endnotes or footnotes, and must have left, right, top, and bottom margins of one inch.
4. Essay must include the submitter's name, email address, mailing address, telephone number, and school attended.
5. A total of \$1,500 in US dollars shall be divided between the award winning essays, and all rights to award winning essays shall become the property of the State Bar of Michigan.
6. The Information Technology Section of the State Bar of Michigan reserves the right to make editorial changes, and to publish award winning essays in the Section's newsletter, the *Michigan IT Lawyer*.
7. Essay must be submitted as a Microsoft Word document, postmarked by June 30, 2011, and emailed to dsyrowik@brookskushman.com.