

# Intellectual Property

2014 SUMMER BULLETIN

## Administrative Patent Judges: Not Your Typical Federal Judge

BY JENNIFER R. BUSH

In the less than two years since the America Invents Act (AIA) made available the institution of trials before the United States Patent and Trademark Office (USPTO), practitioners have kept close watch over the statistics for *inter partes*, covered business methods, and post-grant reviews. However, as the number of filed petitions for USPTO trials has increased, little attention has been focused on a related and equally rapidly growing number: that of the administrative patent judges deciding these cases.

The AIA-created administrative proceedings take place before the Patent Trial and Appeal Board, which is an administrative tribunal within the USPTO whose members are administrative patent judges. From September 2012 to February 2014, the number of judges on the Board doubled to just under 180. USPTO Deputy Director Michelle Lee had stated a goal of 200 judges by mid-year 2014. The challenge is staffing the numbers of administrative patent judges needed while maintaining the quality of those hires such that all have the technical background and knowledge of patent law necessary for the position.

The formal requirements for application to the administrative patent judge position include both objective and subjective criteria to help achieve this goal. The objective criteria are as expected, including being a U.S. citizen or national, completing an application with accompanying documents such as a resumé and transcripts, and providing proof of technical and law degrees, as well as proof of active bar membership in good standing.

The subjective criteria include a “demonstrated ability to litigate or draft decisions around patentability” and a writing sample of no more than 8,000 characters on the topic of the strengths, weaknesses, and impacts of *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007), on the patentability decision. The Board also “prefers” candidates with 10–15 years’ patent prosecution and/or litigation experience, preferably in the fields of electrical, computer, mechanical, or data processing.

In practice, many of these requirements seem to hold up. Based on a sampling of about half of the current administrative patent judges from their LinkedIn profiles, most in fact have the “preferred” 10-plus years of experience. A full 84 percent are former patent attorneys with experience practicing in the private sector, and of these, the number is heavily weighted toward patent litigation experience. About one quarter (23 percent) have experience as examiners or other USPTO roles prior to becoming an administrative patent judge. A good number (12 percent) have experience clerking for the U.S. Court of Appeals for the Federal Circuit. And 4 percent have experience in either the military, the Department of Justice, or the United States International Trade Commission (USITC).

In addition to trials, administrative patent judges serve in various areas of the USPTO such as *ex parte* appeals, interferences, *inter partes* reexamination appeals, and management functions. According to the recruitment brochure, all administrative patent judges “begin

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with a docket of *ex parte* appeals,” with assignments to other areas on an as needed basis. However, the same brochure shows that a full 39 percent of administrative patent judges are currently staffed on trials. These statistics also play out in reality. While many trial administrative patent judges are seasoned veteran judges, there are several staffed on trials who have less than two years’ experience.

A sampling of a few of the administrative patent judges with the highest caseloads appears to be representative. Of five of the judges with the greatest number of trials docketed to them, two are experienced judges well-known to the interference bar, with more than 10 years’ experience in *inter partes* matters at the Board: Jameson Lee and Sally C. Medley.

Lee was admitted to the bar in 1986 and has been an administrative law judge since at least 1997. He was also the lead judge in the decision *Garmin v. Cuozzo Speed Tech.*, No. IPR2012-00001 (P.T.A.B. 2013)—the first *inter partes* review decision on the merits.

Medley worked as a systems engineer for five years for Lockheed and for NASA’s Kennedy Space Center. She joined the USPTO as an examiner in 1993 and became an administrative patent judge in 2000.

A few recently hired administrative patent judges who handle a large number of AIA trials include Brian J. McNamara, Thomas L. Giannetti, and Jennifer Bisk, all of whom became administrative patent judges in 2012.

McNamara has more than 14 years’ experience as an engineer, 13 years’ experience as an adjunct professor of law, and 25 years’ experience in private practice. Giannetti worked as an engineer for over five years, and was in private practice for 24 years. Bisk worked as an engineer for several years, clerked for several years at the U.S. Court of Federal Claims and the Federal Circuit, and spent about three years in private practice before becoming an administrative patent judge.

A closer look at a few of the most recent appointees shows that highly successful attorneys from the private sector, such as Charles Boudreau and John Horvath, view being an administrative patent judge as an attractive prospect.

Boudreau became an administrative patent judge in May. He most recently served as an associate general counsel

after spending almost nine years in private practice. Prior to that, he clerked for the Federal Circuit for two years and worked as a technology specialist and a research chemist.

Horvath became an administrative patent judge in June. He has been a patent attorney for almost 15 years, having spent more than 10 years practicing in law firms.

One possible reason the position continues to attract these well-established attorneys is better work-life balance. According to Judge Bart A. Gerstenblith, in private practice he was challenged professionally but also suffered personal challenges, feeling “torn between” staying late at the office and arriving home before his kids went to bed. As an administrative patent judge, Gerstenblith says he continues to feel challenged professionally, but that the personal challenges are gone. After serving just over a year as an administrative law judge, he moved to a full-time teleworking schedule, and notes that he is able to actually “sign off” when not working—an increasingly rare expectation in private practice.

What all this reveals is that the USPTO is delivering on its goal of recruiting administrative patent judges with strong technical backgrounds and extensive experience practicing patent law.

Understanding the backgrounds of the administrative patent judges can serve an important strategic role. As in so many other contexts, the well-worn adage of “know your audience” is critical to success in AIA trials. These are not your typical federal court judges—most administrative patent judges have devoted their entire careers to the practice of patent law.

## ***Alice v. CLS*: Still in Wonderland**

BY DANIEL R. BROWNSTONE

On June 19, 2014, the Supreme Court decided *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 134 S. Ct. 2347 (U.S.). While—to the relief of some and the chagrin of others—the case did not sound the death knell for software patents, the decision imposed more stringent limits on subject matter that can be considered for patent protection.

Alice Corporation (Alice) obtained patents on its technology for reducing risk in financial markets. A brief

explanation of that technology is helpful in understanding the issue that the Supreme Court faced.

Many types of trades that take place on financial markets are not completed instantly—rather, an agreement is made that requires each party to deliver something to the other party. In a foreign currency trade, for example, two parties may agree today that the first party will sell Japanese yen to the second party in exchange for some amount of U.S. dollars, with delivery to occur three days from today. Inherent in such an agreement is the chance that one of the parties will not live up to its obligation, while the other party will already have delivered its requirement. This risk that one party will deliver and the other will not is called “settlement risk.”

Alice developed and obtained patents on methods and accompanying systems for reducing settlement risk. A trusted independent third party obtains a start-of-day balance for a party, and maintains shadow credit records and shadow debit records for that party. Each time the party tries to enter into a transaction, the trusted intermediary only allows the transaction if it will not result in the value of the shadow debit record being less than the value of the shadow credit record. At the end of the trading day, the intermediary instructs the relevant financial institutions to execute the trades against the actual credit and debit records for the party.

CLS Bank International (CLS) also provides settlement services in the foreign exchange market. In 2007, CLS filed a declaratory judgment suit against Alice seeking a judgment that Alice’s patents were invalid, unenforceable, and not infringed. CLS argued that Alice’s patents claimed subject matter not eligible for patent protection under 35 U.S.C. § 101. For purposes of deciding that issue, the parties both agreed that the claims as written *required* electronic implementation. Nevertheless, the district court held the claims invalid under 35 U.S.C. § 101, with the method claims directed to “an abstract idea of employing an intermediary to facilitate simultaneous exchange of obligations in order to minimize risk,” and system claims that would preempt the use of the abstract concept of using—on any computer—a neutral intermediary for simultaneous exchange of obligations to reduce risk.

Alice appealed to the Federal Circuit. In July of 2012, a three-judge panel issued a split decision. CLS petitioned for rehearing *en banc*. The court granted the motion,

withdrew the panel opinion, and issued a highly fractured decision that Alice’s claims were not patent eligible.

In the remaining *en banc* opinions, the judges variously opined that only the method and computer-readable medium claims were invalid (“Labeling this system claim an ‘abstract concept’ wrenches all meaning from these words ....”); that the court had gone too far (“[I]f all of these claims, including the system claims, are not patent-eligible, this case is the death of hundreds of thousands of patents, including all business method, financial system, and software patents as well as many computer implemented and telecommunications patents.”); that the court’s inability to reach consensus would hurt the public (“With today’s judicial deadlock, the only assurance is that any successful innovation is likely to be challenged in opportunistic litigation, whose result will depend on the random selection of the panel.”); and that the court ignored the actual record in the case (*Linn, dissenting*). Chief Judge Rader, who has since retired from the bench, authored “Additional Reflections,” in which he urged the court to adopt a plain meaning of § 101, writing “[w]hen all else fails, consult the statute!” In the face of this cacophony, Alice appealed and the Supreme Court granted *certiorari*.

On June 19, the Supreme Court issued a unanimous opinion finding all asserted claims of Alice’s patents unpatentable under § 101. Justice Thomas authored the opinion, and Justice Sotomayor filed a concurrence, joined by Justices Ginsburg and Breyer.

After reciting the facts and history of the case, the Court began by setting forth as its objective the task of distinguishing between patents that claim “the building blocks of human ingenuity,” which are not patent eligible, and those that “integrate the building blocks into something more,” which are. *Alice Corp.*, 134 S. Ct. 2347 (U.S.).

First, the Court found that Alice’s claims were directed to a patent-ineligible concept—specifically, “the abstract idea of intermediated settlement,” which is “a fundamental economic practice long prevalent in our system of commerce.”

Next, following the framework laid out in *Mayo*, the Court looked to see whether Alice’s claims recited an inventive concept that would transform the abstract idea into

something patent eligible. In *Mayo*, the Court held that a limitation in a claim that recited the application of a law of nature was not more meaningfully limiting than a recitation of the law of nature itself—that is, one cannot simply state the law of nature and add the words “apply it.” The *Alice* court extended that reasoning, noting that stating an abstract idea and adding the words “apply it using a computer” is similarly deficient.

The next question for the Court to address was whether Alice’s claims did more than simply instruct the reader to implement the abstract idea of intermediated settlement on a computer. Deconstructing a representative claim and examining each element individually, the Court determined that the involvement by the computer in each step was solely to perform “well-understood, routine, conventional activities previously known to the industry.” And, when considered as a whole, the claims did not improve the computer itself, or improve any other technology or technical field. Since the claims did nothing “significantly more” than instruct a practitioner to implement an abstract idea on a generic computer, the Court held them patent ineligible. Like the Federal Circuit, the Supreme Court also held the system claims to be patent ineligible once the method claims had been similarly invalidated, noting that a contrary result would reward a skilled draftsman.

Justice Sotomayor, joined by Justices Ginsburg and Breyer, authored a one-paragraph concurrence. In addition to agreeing that Alice’s method claims were drawn to an abstract idea, the three justices also indicated that business methods should be categorically unpatentable.

At first read, the *Alice* decision seems measured. While some had feared that the Court might heavily restrict or even eliminate software from the realm of patent eligibility, commentators were quick to note that the word “software” cannot be found anywhere in the decision. Indeed, the opinion includes examples of software that would be patent eligible, such as where the claims describe an invention that improves the functioning of the computer itself. The opinion establishes a parallel between the ineligibility in *Mayo* of claims to basic applications of a law of nature and the ineligibility of claims to basic computer applications of an abstract idea.

Regrettably, however, the Court did not articulate either a definition of, or a test for, identifying an abstract idea. Nor did the opinion indicate what might constitute

“significantly more” than an instruction to apply an abstract idea.

As with many Supreme Court decisions, it will take some time to determine the impact of *Alice*. Immediately following the decision, the USPTO issued preliminary guidelines instructing examiners to perform a two-part analysis for abstract ideas. First, determine whether a claim is directed to an abstract idea, such as a fundamental economic practice, method of organizing human activity, an idea “of itself,” or a mathematical formula. If so, then examiners must consider whether the claims amount to “significantly more” than the abstract idea itself. If they do not, then the claims will be rejected as patent ineligible under § 101.

The Federal Circuit has already applied *Alice*, invalidating claims of a patent directed to software for image processing, *Digitech Image Techs., LLC v. Elecs. for Imaging, Inc.*, 2014 WL 3377201 (Fed. Cir. July 11, 2014), and district courts have similarly found claims invalid in view of the new precedent. See, e.g., *DietGoal Innovations v. Bravo Media*, No. 13 Civ. 8391, 2014 WL 3582914 (S.D.N.Y. July 8, 2014). And as the USPTO struggles to update training materials for thousands of examiners, anecdotal evidence suggests some initial uncertainty as to what will be considered allowable.

These are, however, early days. As with each Supreme Court case on § 101 eligibility, the lower courts and the USPTO will eventually fill in some of the gaps, reducing the present uncertainty surrounding the abstract ideas exception. Our advice to clients who innovate in the software space is to articulate in patent applications the technical aspects of their solutions, providing flexibility for claims of varying scope and technical complexity as may be warranted by upcoming refinements to examination policy and court decisions on subject-matter eligibility.

## Quick Updates

### No More Time Outs—Thoughts on *Blackhorse v. Pro-Football, Inc.*

The 177-page tome that the Trademark Trial and Appeal Board (TTAB) recently issued in *Blackhorse v. Pro-Football, Inc.* is remarkable for its length and its subject matter: cancellation of professional football’s REDSKINS mark as disparaging to Native Americans. However, this is not

the first time the TTAB has crossed that controversial threshold.

The decision underscores a little known fundamental of U.S. trademark law: rights primarily are based on use of a mark, not registration. You do not need a registration to enforce rights in a mark. The decision does not mean that the NFL is required to change the team name or that the NFL can no longer prevent others from making commercial use of the name.

The TTAB makes this distinction clear at the beginning of the decision: “This decision concerns only the statutory right to *registration* under Section 2(a). We lack statutory authority to issue rulings concerning the right to *use* trademarks.” (emphasis in original).

Owning a federal trademark registration has its benefits, such as nationwide constructive notice of rights, and *prima facie* and ultimately, in many cases, conclusive evidence of exclusive rights to use the mark for the identified goods or services. Registration also allows the owner to record with U.S. Customs and Border Protection to garner that agency’s assistance in seizing and potentially destroying counterfeits (obviously a big issue for the NFL). But even if a registration is cancelled, the underlying common law rights continue in the geography where the mark is used and known.

To determine whether an owner has common law rights in a mark, courts not only require actual and continuous use of the mark but also look to factors such as widespread distribution and the public’s association with the mark. An owner of common law rights can still sue for infringement in state or federal court and obtain both injunctive relief and monetary damages in appropriate cases. Without federal registration, an owner still has other avenues, albeit slightly more limited and definitely more costly, to enforce its rights in a mark.

While disparagement is a bar to federal registration of a mark (under T.M.E.P. § 1203.3, the TTAB may cancel a trademark registration that “may disparage... persons, living or dead... or bring them into contempt or disrepute”), the key, underlying question here is whether disparagement is a valid basis under the common law for invalidating trademark rights. If so, the NFL may soon find that it cannot enforce the REDSKINS mark *at all*.

The traditional spectrum of distinctiveness, by which we determine whether a mark is sufficiently distinctive to be

protected as a mark, only covers four categories—generic, descriptive, suggestive, and arbitrary/fanciful—not disparagement. California’s relevant law, presumably substantially codifying the common law, tracks the federal law on disparagement: California’s Business and Professions Code § 14205(b) makes clear that disparaging marks are excluded from state registration, but the Code also defers to the common law in § 14259: “nothing... shall adversely affect the rights or the enforcement of rights in marks acquired in good faith at any time within common law.” Can one acquire common law rights *in good faith* in a disparaging “mark”? This is an open question, as the legislative history of the Lanham Act and case law shed no light on this issue.

Beyond the question of whether disparagement might invalidate the NFL’s ability to enforce its common law trademark rights, is yet another interesting question: What is the precedential value, if any, of the TTAB decision in subsequent common law enforcement efforts by the NFL? In *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 569 F.3d 383 (8th Cir. 2009), the Eighth Circuit held that the TTAB’s decision that there was a likelihood of confusion between two marks was not binding and had no precedential role in the subsequent infringement action because the TTAB’s likelihood of confusion tests differed from that of the courts; while the TTAB heavily emphasized the appearance and sound of the two marks for registration purposes, the courts focus on marketplace realities in assessing likelihood of confusion, the test for infringement. *B&B Hardware’s* petition for *certiorari* is pending before the U.S. Supreme Court.

Speaking of which, recent headlines announced suit by a Native American Rights group against the Cleveland Indians, for \$9 billion in damages for using that name. The issues raised in *Blackhorse* will remain in the headlines, and in the courts, for some time to come.

### **Increasing Legislative Momentum for a Federal Private Right of Action for Trade Secret Misappropriation**

Currently, under the Economic Espionage Act, only the government has the right to bring a federal action against trade secret offenders. Nor has the government’s recent enforcement been particularly robust. Last year, the Department of Justice prosecuted only 25 trade secret actions. That may be about to change, however, as support is growing for a bipartisan bill currently being considered by the Senate Judiciary Committee. The

Defend Trade Secrets Act of 2014 would allow trade secret owners to bring a federal cause of action for trade secret misappropriation, as is already the case for patent and copyright owners.

During the recent Senate Judiciary Committee hearings on the bill, representatives from large and small companies discussed the many benefits of creating a harmonized federal legal framework for civil trade secret plaintiffs. First, under the current system of state law enforcement, a company that operates in more than one state bears significant additional and unnecessary costs to investigate the different requirements of different state laws, making it difficult to craft an effective and uniform national compliance plan. The variance in state laws also tends to increase the costs of litigation and attorneys' fees. Second, trade secret theft today is increasingly likely to involve the movement of the secret across state lines, making discovery and service of process difficult. While federal courts permit subpoenas to be issued nationwide, state courts are often not as efficient at obtaining discovery from individuals or entities located in other states.

Trade secret cases often require swift action by courts across state lines to preserve evidence, because once the trade secret has been divulged to a competitor, the harm from disclosure may be irreparable. This is particularly true when the theft is by a former employee looking to flee the country, as is increasingly the case. With this in mind, the proposed legislation would authorize federal courts, acting on an affidavit or verified complaint, to issue injunctions to: (i) preserve evidence, including by making a copy of electronically stored information; (ii) prevent any actual or threatened trade secret misappropriation; and (iii) allow for the seizure of any property that is used to "commit or facilitate" trade secret theft. As noted by one proponent of the bill, the unfortunately common scenario of a departing employee downloading confidential materials from his employer frequently occurs on a Friday afternoon. Whereas it may take several weeks to obtain any remedy in state court, proponents are confident that by accessing the power of the federal courts, employers will have a much better chance of isolating and seizing the stolen materials before it is too late.

A companion bill, HR 5233, was introduced in the House on July 29. We will keep you apprised of these developments.

### **Canada to ISPs: Get a Notice, Give a Notice**

The Canadian government recently announced the implementation of its long-awaited "notice and notice" regime, a controversial component of the 2012 Copyright Modernization Act. The system, which is expected to be in force by January 2015, was delayed while the government considered, and ultimately rejected, the possibility of corresponding regulations.

The notice and notice regime compels an Internet Service Provider (ISP) that has been notified that infringing content has been made available on its service to provide notice to the subscriber responsible for posting the content. The subscriber's identity may then be released pursuant to a court order. Under the Copyright Modernization Act, the notice must identify the allegedly infringed work, the claimant's interest in the work, the date and time of the allegedly infringing activity, and location data for the electronic location associated with the activity. In addition to forwarding this notice to the alleged infringer "as soon as feasible," the ISP is obligated to inform the copyright owner of its forwarding, or, if applicable, of the reason why it was not able to do so. The ISP must also retain a record of the sent notice for specified periods of time to allow the copyright owner to identify the user who purportedly posted the infringing content. The regime's lack of accompanying regulations means that ISPs cannot charge copyright owners for forwarding notices of claimed infringement. ISPs that fail to comply with their obligations, however, will face statutory damages between 5,000 and 10,000 Canadian dollars.

Search engines are treated differently under the new system. While copyright owners may send them notices, search engine providers are not required to forward the notices to alleged infringers. However, if a website to which a search engine links removes copyrighted material, the search engine must remove cached versions of the page within 30 days or risk liability for copyright infringement.

The new regime, which many of Canada's largest ISPs have voluntarily used for some time, allows ISPs to retain the discretion to remove purportedly infringing content. This feature distinguishes the Canadian system from the notice and takedown regime that the United States implemented as part of the Digital Millennium Copyright Act (DMCA). The DMCA requires an online service provider

that receives a notice that infringing content has been made available on its service to move expeditiously to remove the content.

The Canadian government touts the notice and notice system as a “made in Canada solution” that helps to crack down on internet piracy and modernize the country’s copyright laws for the digital age. However, because the regime does not require ISPs to remove allegedly infringing content the burden is on copyright owners to police infringement. Parties who wish to protect their rights in Canada must therefore understand the unique enforcement role they play under the notice and notice system.

### ***Inter Partes* Review Orders Provide Procedural Guidance**

As *inter partes* reviews move forward before the Patent Trial and Appeal Board, Board rulings are providing procedural guidance for practitioners regarding depositions and evidentiary objections.

An order issued in April in *Dynamic Drinkware LLC v. Nat’l Graphics, Inc.*, found that counsel for the patent owner had improperly instructed a witness not to answer on relevance grounds. No. IPR2013-00131, Paper 31 (P.T.A.B. Apr. 29, 2014). The petitioner was attempting to question the witness regarding a divisional application. Administrative Patent Judge Thomas L. Giannetti noted that the Board’s Testimony Guidelines provide that “[c]ounsel may instruct a witness not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the Board, or to present a motion to terminate or limit testimony.” Counsel should have stated objections on the record or initiated a conference call with the Board if counsel believed that the examination was being conducted in bad faith or was intended to unreasonably annoy or embarrass the witness. The panel did not impose sanctions but instead ordered the patent owner to produce the witness and to bear the cost of the court reporter for additional examination.

The Board clarified when it will consider the use of videotaped depositions in *Atrium Medical Corp. v. Davol Inc.* No. IPR2013-00184, Paper 24 (P.T.A.B. Sept. 30, 2013). The patent owner sought authorization to file motions requesting permission to videotape depositions and to use the videotaped testimony during trial. No. IPR2013-00184, Paper 23 (P.T.A.B. Sept. 24, 2013). After a telephone conference, Administrative Patent Judge Jameson Lee wrote that the parties could agree amongst

themselves whether to videotape depositions and that no authorization was required if the parties agreed. However, Board authorization is required for submission of videotaped deposition testimony. The panel noted, “As a general rule, the Board would view the video-recording of only such testimony for which a party has demonstrated a specific reason or need for viewing by the Board.” Paper 24. Here, the patent owner could not articulate a reason or need and so the request was premature.

The Board has also addressed how a party should make the Board aware of supplemental evidence filed in response to an evidentiary objection. 37 CFR § 42.64(b)(2) provides that, upon an objection to evidence submitted during a preliminary proceeding, a party relying on that evidence may serve supplemental evidence within ten business days. However, the rule does not specify how to make the Board aware of either the objection or the service of the supplemental evidence. In *Sealed Air Corp. v. Pergis Innovative Packing, Inc.*, the patent owner had filed its evidentiary objections with the Board. The Board explained that in situations where the evidentiary objection is satisfied by the supplemental evidence, there is no need for the Board to be made aware of it. Nos. IPR2013-00554 to 2013-00558, Paper 16 (P.T.A.B. Apr. 1, 2014). In the event the objection is not overcome, the objecting party can file a motion to exclude and the party relying on the evidence can include the supplemental evidence in its opposition to the motion. Therefore, the Board will be made aware of the objection and supplemental evidence only if the dispute cannot be resolved by the parties. The Board ordered the evidentiary objections filed by the patent owner expunged from the record.

These early orders on procedural issues provide valuable guidance as practitioners continue to learn to navigate the *inter partes* review process.



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