

Colorado Bar Association  
**INTELLECTUAL PROPERTY SECTION**  
**NEWSLETTER**

**July 2009**

**July IP Section Event**

**You Tube, My Space and The User Generated Content Revolution:  
Key Legal Issues and Potential Liability**  
**July 23, 2009; 11: 45 a.m. - 1:15 p.m.**  
**Denver ChopHouse, Large Banquet Room**

User generated content has rapidly emerged as an Internet phenomenon, as growing numbers of bloggers, Facebook users, music remixers, amateur video creators, wikipedians, tweeters, Flickr photographers, and Amazon.com feedback contributors prove that "social media" has hit the mainstream. The rapid shift from traditional media to user-created media raises significant legal questions, ranging from intellectual property issues to questions of consumer privacy to calls for regulation to protect children and guard against defamation in this emerging medium. For example, the advent of user-generated content has strained an already criticized Digital Millennium Copyright Act, causing some to suggest that the safe harbor regime did not contemplate user generated and submitted content. Viacom and YouTube are actively litigating these issues as we speak, and the outcome of this case and several cases raising similar questions could significantly impact the advent of user generated content and the extent to which established media companies can turn the UGC phenomenon into viable ventures. Likewise, the broad and potentially destructive reach of content posted on the Internet has caused some courts to question the absolute immunity previously afforded ISPs under Section 230 of the Communications Decency Act in cases involving UGC. Separately, state and federal authorities are increasingly seeking to hold ISPs and websites responsible for invasions of privacy and decency by their users.

Presenter:

Ashlie Beringer, a partner in Gibson, Dunn & Crutcher's Palo Alto office who specializes in representing new media, Internet and technology companies, will address these and other key legal issues arising from the dramatic proliferation of UGC as mainstream media.

*Cost: \$35 for IP Section Members, \$45 for the general public, and CU/DU Law students are free. Includes a catered lunch and parking. RSVP by calling (303) 860-1115 ext. 727 or by e-mailing [lunches@cobar.org](mailto:lunches@cobar.org) before Noon on Monday, July 21, 2009.*

*Cancellations after Monday, July 21, 2009 and no-shows will be billed for the cost of the program. Checks can be sent to the Colorado Bar Association, 1900 Grant St., Suite 900, Denver, CO 80203. Also, please call or e-mail your RSVP when sending a check. Checks should be made payable to the CBA. If leaving a message, please spell your name, specify that you are attending the Intellectual Property Section July Luncheon, leave your phone number, and specify if you would prefer a vegetarian lunch.*

## **August IP Section Event**

### **GLOBAL IP STRATEGY: USING DATA TO HELP SECURE A FIRST WIN**

**August 27, 2009; 11: 45 a.m. - 1:15 p.m.**

**Denver ChopHouse, Large Banquet Room**

In the increasingly global marketplace, and the ever-present reality of limited resources, the question facing many corporate patentees is now "Where in the world should I sue?" and, more specifically, "Where in the world should I sue first?" A favorable first litigation outcome may increase the chance of a favorable settlement globally. The Global IP Project, initiated in 2002 by Michael Elmer of Finnegan, gathers, analyzes, and compares objective global patent litigation data as a basis for client counseling in case evaluation, forum shopping, and foreign filing strategies. Mr. Elmer continues to manage this project which includes data from 30 countries. This unique global data includes litigation statistics from 1997-2007 in many of the 30 countries, including industry-specific patentee win rate data for 2006 and 2007. Michael Elmer, an experienced patent litigator with Finnegan, will visit present the global comparative patentee win rate data and discuss both US and global patent litigation forum shopping strategies.

*Cost: \$35 for IP Section Members, \$45 for the general public, and CU/DU Law students are free. Includes a catered lunch and parking. RSVP by calling (303) 860-1115 ext. 727 or by e-mailing [lunches@cobar.org](mailto:lunches@cobar.org) before Noon on Monday, August 24, 2009.*

*Cancellations after Monday, August 24, 2009 and no-shows will be billed for the cost of the program. Checks can be sent to the Colorado Bar Association, 1900 Grant St., Suite 900, Denver, CO 80203. Also, please call or e-mail your RSVP when sending a check. Checks should be made payable to the CBA. If leaving a message, please spell your name, specify that you are attending the Intellectual Property Section June Luncheon, leave your phone number, and specify if you would prefer a vegetarian lunch.*

**September IP Section Event**

**REEXAMINATION IN PATENT LITIGATION**  
**September 24, 2009; 11: 45 a.m. - 1:15 p.m.**  
**Denver ChopHouse, Large Banquet Room**

Save the date!

## Report on Past IP Section Events:

### Report on the June 23, 2009 IP Section Luncheon ( *Wyers v. Master Lock Co.*: A Look at Validity and Reasonable Royalties...Without An Expert)

On June 23, 2009, IP Section members attended a luncheon presentation on *Wyers v. Master Lock Co.*, the latest District of Colorado patent case to reach a jury verdict. Aaron P. Bradford and Michael P. Dulin of Hensley Kim & Holzer, trial counsel for Mr. Wyers, gave a fascinating presentation on the unusual case.

Mr. Wyers, who was in attendance, heads Wyers Products Group, a small Colorado-based lock manufacturer and seller embroiled in a patent dispute with Master Lock over his trailer hitch lock design. Notably, he overcame invalidity attacks on his patents and received a remarkable 24% reasonable royalty award from the jury without the help of expert witnesses on either issue, despite countervailing testimony from Master Lock experts on both fronts.

At the outset of the case, Mr. Wyers's original trial counsel went missing for an extended period of time, causing Mr. Wyers to miss disclosure and discovery deadlines and lose several motions by default. When Mr. Bradford and Mr. Dulin took over the case, Master Lock's attorneys agreed to allow Mr. Wyers to respond to Master Lock's motions for summary judgment, but refused to consent to expert witnesses. Magistrate Judge Michael Watanabe agreed, refusing to allow experts to testify for Mr. Wyers. As a result, Judge Lewis T. Babcock ruled that Mr. Wyers could not, as a matter of law, prove any claims for lost profits without expert testimony about the marketplace.

Unfazed by the setback, Mr. Wyers took the stand and testified extensively, telling a compelling story about his inventions and small Colorado-based company. His attorneys also successfully used the prosecution history from related patents and other evidence to establish the USPTO, the patent examiner, and even Master Lock's own engineers and marketers as "silent experts," riding the presumption of Mr. Wyers's patents' validity to victory over Master Lock's expert witness-supported assertions of obviousness.

Mr. Wyers also testified about his unwillingness to license his patents to his competitors and the tremendous success of his patented lock, both of which his attorneys used to craft a hypothetical royalty negotiation heavily slanted in his favor. Despite Master Lock's expert estimate of a 2.5% reasonable royalty rate, the jury awarded Mr. Wyers a 24% royalty rate, resulting in a verdict of over \$5 million for Mr. Wyers.

Mr. Wyers's attorneys also discussed several interesting aspects of undertaking patent litigation in the District of Colorado:

- Colorado juries are likely to be highly educated. More than 75% of the members of the trial jury and a focus group consulted by Mr. Wyers's attorneys before the case had a college education. The trial jury included several technical, academic, and legal professionals, including a software designer, a science teacher, and, serving as the foreperson, a legal assistant.

- Twelve out of the thirteen jury trials for patent infringement in the District of Colorado have resulted in substantial jury verdicts, although some of those verdicts have been subsequently vacated on appeal.
- The Federal Circuit has affirmed Judge Babcock in approximately 75% of his patent cases – a far cry from the oft-quoted 50% reversal rate of the federal judiciary as a whole.
- Judge Babcock was extremely expeditious in this case, proceeding to trial in under three years and issuing “virtually immediate” rulings on motions in limine, claim construction, and motions for summary judgment.
- The model jury instructions for patent infringement crafted by a committee of local experts proved to be satisfactory for both parties in the case.

In summary, the presentation questioned underlying assumptions about the need for expert witnesses and provided a helpful case study for patent litigators considering Colorado as a venue. Still, many commentators urged restraint in drawing conclusions from the case until the Federal Circuit hands down its ruling on the pending appeal.

*Special thanks to Blake Reid of University of Colorado for this summary.*

## **Report on July 8 IP Section Special Event (IP Practice Update: The Changing Dynamics of the IP and Patent Markets)**

On July 8, Kate Patterson of Patterson Davis Consulting gave an insightful presentation on the changing environment for IP practitioners. Describing a full-service IP practice as a three-legged stool comprised of protecting the rights (through prosecution), asserting the rights (through litigation), and monetizing the rights (through litigation or licensing), she discussed how the current economics have shifted the focus of IP monetization from bet-the-company litigation to analyzing and acquiring IP portfolios of competitors. Ms. Patterson also discussed opportunities for attorneys in the Colorado markets to expand their practices by offering unique industry experience, creative fee structures, and of course, high-quality, responsive legal work.

A significant part of Ms. Patterson’s consulting practice involves advising law students about how to break into IP practice. Ms. Patterson encouraged the law students in the audience to think outside the box and to be assertive in finding the right fit in firms. She recounted a story of a boutique IP firm in the Bay Area that was not listed on the traditional lists and was difficult to even find – and considered candidates who did find it as “passing the first test.” Ms. Patterson encouraged students and young lawyers who are affected by the current economic downturn to take a job in industry and learn something to bring back to law practice.

Ms. Patterson rounded out her presentation with several helpful handout, including the Patterson Davis Quickie List of Colorado Firms Practicing IP.

## **ANNOUNCEMENTS:**

### **Health Information Exchange Planning Conference – July 22, 2009**

[http://coloradotechnology.yourmembership.com/events/event\\_details.asp?id=67313](http://coloradotechnology.yourmembership.com/events/event_details.asp?id=67313)

### **Call for Suggestions or Ideas**

The IP Section Officers are also soliciting your suggestions and ideas for topics and speakers for our Luncheon programs for 2009. Please forward any comments you may have to Nina Wang at [nwang@faegre.com](mailto:nwang@faegre.com).

### **IP Newsletter**

Subject to editorial discretion and review, the IP Section newsletter is open to the submission of short articles and columns on IP topics of interest. If you are interested in contributing, please contact Nina Wang at [nwang@faegre.com](mailto:nwang@faegre.com).

### **IP Section Website**

Don't forget to check out the Colorado Bar Association website. Please refer to it often for updates on news and events.

<http://www.cobar.org/group/index.cfm?EntityID=PATENT>

The Colorado Bar Association has posted member directories for each practice section on-line. See ours at:

<http://www.cobar.org/directory/sections.cfm?section=PATENT>

Our contact at the Colorado Bar is Melissa Nicoletti, the Director of Sections and Committees. She can be reached at (303) 824-5321, or [melissan@cobar.org](mailto:melissan@cobar.org).

## Recently Filed U.S.D.C. Colorado Cases

CAPTION	TYPE	CASE NO.	JUDGE	FILING ATTORNEY(S)
Ballivian v. Mountain Travel	Copyright	09cv1346	Richard P. Matsch	Randall Keith Fuicelli Fuicelli & Lee, P.C.
Home Design Services, Inc. v. Kendrick, et al.	Copyright	09cv1385	Christine M. Arguello	Ian Thomas Holmes Parrish Lawhon & Yarnell, P.A.
F. E.A., Inc. v. John Does 1-100	Trademark	09cv1386	John L. Kane	Cara R. Burns Hicks Mims Kaplan & Burns
American Automobile Association V. Clayton	Trademark	09cv1457	Robert E. Blackburn	Elizabeth Harris Getches Moye White, LLP
American Automobile Association V. Basad, Inc.	Trademark	09cv1458	John L. Kane	Elizabeth Harris Getches Moye White, LLP
Chevron Intellectual Property LLC v. Burns et al.	Trademark	09cv1445	Wiley Y. Daniel	Annie Chu Haselfeld Holland & Hart LLP
Home Design Services, Inc. v. Schroeder Construction et al.	Copyright	09cv1437	Richard P. Matsch	Ian Thomas Holmes Parrish Lawhon & Yarnell, P.A.
Meehan v. United States Hang Gliding and Paragliding Association, Inc.	Copyright	09cv1459	Philip A. Brimmer	Tim Meehan Pro Se
Colorado Doorways, Inc. v. Multi-Family Building Products, Inc.	Trademark	09cv1467	Philip A. Brimmer	Tobin Duff Kern Sherman & Howard, LLC
The Kong Company, LLC v. Worldwise, Inc., et al.	Trademark	09cv1475	Richard P. Matsch	Todd P. Blakely Sheridan Ross, P.C.
Big O Tires, LLC v. D&T Auto Sales and Services, Inc., et al.	Trademark	09cv1509	Marcia S. Krieger	Harold R. Bruno III Robinson, Waters & O'dorisio, P.C.
Cleary Building Corp. v. Dame	Trademark	09cv1578	Christine M. Arguello	Eamonn J. Gardner Cooley Godward Kronish LLP
Pineda v. Keyes, et al.	Trademark	09cv1596	Boyd N. Boland	Floyde W. Pineda Pro Se

Please email Nina Wang at [nwang@faegre.com](mailto:nwang@faegre.com) with any interesting Colorado District Court IP decisions or IP news involving Colorado Companies (e.g., issued patents, trademark or copyrights).

## IP LAW DEVELOPMENTS FROM BNA

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### **Patents**

#### Federal Circuit Vacates Tafas Panel Ruling; Agrees to Rehear PTO Rules Case En Banc

On July 6, granting the wishes of a deeply-concerned patent community, the U.S. Court of Appeals for the Federal Circuit agreed to rehear the Tafas case, vacating the panel decision that authorized the Patent and Trademark Office to set new rules for patent application continuations and claims (Tafas v. Doll, Fed. Cir., No. 2008-1352, en banc rehearing granted 7/6/09).

The rules would set threshold limits of two continuation applications and one request for continued examination. They would also permit applicants to present a total of five independent claims and 25 total claims, or require a filing of an examination support document by applicants who wished to exceed those limits.

Implementation of the rules was at first enjoined by the U.S. District Court for the Eastern District of Virginia before they were to take effect in 2008. But a divided Federal Circuit panel vacated that decision March 20 in finding that the PTO had the authority to impose those “procedural” rules.

The per curiam rehearing order was issued by 11 of the 12 court judges. Judge Alan D. Lourie did not participate in the rehearing poll.

The two original plaintiffs in the case parties, independent inventor Triantafyllos Tafas and pharmaceutical firm Smith-KlineBeecham Corp. d/b/a GlaxoSmithKline, had requested the en banc rehearing in separate petitions June 3. Their petitions were supported by the American Intellectual Property Law Association in an amicus brief filed June 17.

The parties will be allowed to file additional briefs, with the appellant PTO's brief due in 30 days. Amicus briefs will also be entertained.

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### **Patents**

#### Group Assembled by Chief Judge Michel Publishes Model Patent Jury Instructions

A revised version of “Model Patent Jury Instructions” was published June 17 by a group of patent practitioners and judges brought together by Chief Judge Paul R. Michel of the U.S. Court of Appeals for the Federal Circuit.

The instructions generally cover the same topics as prior publications of model instructions, and also include model jury verdict forms. The new version incorporates suggestions made by several commentators after a draft was circulated last December. “We have ... benefited tremendously from extensive comments we received during the public comment period from a

diverse and large number of contributors,” according to the introduction to the 80-page document.

### Modest Changes to Obviousness Instructions

“The underlying idea was to benefit from the collective experience of both judges and attorneys who are interested in creating an easier to understand and streamlined set of model jury instructions” for patent infringement cases, the introduction noted. But it was expected that some instructions would be more controversial than others.

In September, Michel told BNA (172 PTD, 9/5/08) that he anticipated extensive commentary about the committee's proposal for jury instructions on obviousness, in the wake of *KSR International Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 82 USPQ2d 1385 (2007) (86 PTD, 05/4/07).

Indeed, revisions to the obviousness instructions were expected in the wake of the December publication of the draft instructions for public comment (245 PTD, 12/22/08).

However, the revised version retains the earlier draft's “teachings, suggestions, and motivations” language from the Federal Circuit's obviousness test that the Supreme Court held was too rigid in *KSR*. The obviousness instruction was modified only by adding the italicized portion of the following sentence: “Additionally, teachings, suggestions, and motivations may be found in the nature of the problem solved by the claimed invention, or any need or problem known in the field of the invention at the time of and addressed by the invention.”

By contrast, model jury instructions published by the American Intellectual Property Law Association do not mention the TSM test, and in fact recommend telling the jury that “you do not need to look for precise teaching in the prior art directed to the subject matter of the claimed invention.”

The only other significant change to the obviousness section of the revised instructions is a much more detailed “committee note” on applying the burden of proof to underlying factual findings.

### Damages Instructions Moot on Entire Market Value Rule

As the patent reform debate, which has largely been rekindled since the first draft was published, has focused on damages, that section of the instructions was a potential point of controversy. However, the instructions include no mention of the “entire market value” rule that has been the key point of disagreement in the debate (see, e.g., 62 PTD, 4/3/09).

Instruction 6.6 on “Reasonable Royalty—Definition” describes only the hypothetical negotiation between patent owner and infringer “taking place just before the time when the infringing sales first began,” and lists 10 “real world facts” for the jury to consider. Those facts correlate roughly with many of the well-known Georgia-Pacific factors:

Georgia-Pacific Factor	Real Word Fact
1) the royalties received by the patent holder for the licensing of the patent, which proves or tends to prove an established royalty	Licenses or offers to license the patent at issue in this case
2) the rates paid by the alleged infringer for the use of	Licenses involving comparable patents

other patents comparable to the patent	
<no parallel>	The licensing history of the parties
3) the nature and scope of the license, as exclusive or nonexclusive; or as restricted or unrestricted in terms of territory or identity of buyers of the manufactured product	<no parallel>
4) the patent holder's established policy and marketing program to maintain their patent monopoly by not licensing others to use the invention or by granting licenses under special conditions designed to preserve that monopoly	Whether the patent owner had an established policy of refusing to license the patent at issue
5) the commercial relationship between the patent holder and the alleged infringer, such as, whether they are competitors in the same territory in the same line of business; or whether they are inventor or promoter	The relationship between the patent owner and alleged infringer, including whether or not they were competitors
6) the effect of selling the patented specialty in promoting sales of other products of the alleged infringer; the existing value of the invention to the patent holder as a generator of sales of its nonpatented items; and the extent of such derivative or convoyed sales	The significance of the patented technology in promoting sales of the alleged infringer's products and earning it profit
7) the duration of the patent and the term of the licenses	<no parallel>
8) the established profitability of the product made under the patent; its commercial success; and its current popularity	<no parallel>
9) the utility and advantages of the patent property over old modes or devices, if any, that had been used for working out similar results	Alternatives to the patented technology and advantages provided by the patented technology relative to the alternatives
10) the nature of the patented invention; the character of the commercial embodiment of it as owned and produced by the patent holder; and the benefits to those who have used the invention	<no parallel>
11) the extent to which the alleged infringer has made use of the invention; and any evidence tending to prove the value of that use	<no parallel>
12) the portion of the profit or of the selling price that may be customary in the particular business or in comparable businesses to allow for the use of the invention or similar inventions	Licensing practices in the relevant industry
13) the portion of the realizable profit that should be credited to the invention as distinguished from nonpatented elements, the manufacturing process, business risks, or significant features or improvements added by the infringer	The portion of the alleged infringer's profit that should be credited to the invention as distinguished from nonpatented features, improvements or contributions
14) the opinion and testimony of qualified experts	<no parallel>
15) any other economic factor that a normally prudent businessperson would, under similar circumstances, take into consideration in negotiating the hypothetical license	Any other economic factor that a normally prudent businessperson would, under similar circumstances, take into consideration in negotiating the hypothetical license

## Other Changes, Additions

The revised instructions also include the following additions to and notable changes to the draft instructions:

- Under instruction 5.1, “Invalidity—Generally,” both the original draft and the final version omit any reference to the presumption of validity. However, the final version includes a committee note adding that: “Some courts, however, follow the more traditional approach, and instruct the jury on the presumption. Both approaches appear consistent with Federal Circuit law.”
- Instruction 6.4 on “Damages—Lost Profits” adds text for a jury to assess “collateral products.” This language was not included in the reasonable royalty section.
- A new instruction 3.13 is added on “Joint Direct Infringement,” citing the controversial “control or direction” standard for the relationship between two parties whose combined actions are alleged to infringe, most recently clarified in *MuniAuction Inc. v. Thomson Corp.*, 532 F.3d 1318, 87 USPQ2d 1350 (Fed. Cir. 2008) (137 PTD, 7/17/08), and criticized by the Intellectual Property Owners Association as “a safe harbor for intentional infringement” of all process patents (163 PTD, 8/22/08).
- A new instruction 5.8 was added on “Improper Inventorship,” summarized in the statements that: “To be an inventor, one must make a significant contribution to the conception of one or more of the claims of the patent. Whether the contribution is significant is measured against the scope of the full invention.”

Committee Members Leaders in Practice, Judiciary

The committee comprising this “National Patent Jury Instruction Project” is chaired by Edward R. Reines of Weil Gotshal & Manges, Redwood Shores, Calif., a former Federal Circuit Bar Association president, and also includes:

- Kenneth C. Bass III of Sterne, Kessler, Goldstein & Fox, Washington, D.C.;
- Donald R. Dunner of Finnegan, Henderson, Farabow, Garrett & Dunner, Washington, D.C.;
- Pamela Banner Krupka, Los Angeles, recent chair of the Intellectual Property Law section of the American Bar Association;
- Roderick R. McKelvie of Covington & Burling, Washington, D.C., and former judge of the U.S. District Court for the District of Delaware;
- Teresa Stanek Rea of Crowell & Moring, Washington, D.C., and president of the American Intellectual Property Law Association;
- Judge Patti B. Saris of the U.S. District Court for the District of Massachusetts;
- Judge T. John Ward of the U.S. District Court for the Eastern District of Texas; and
- Judge Ronald M. Whyte of the U.S. District Court for the Northern District of California.

On a sad note, Ken Bass passed away April 27. The instructions will endure as one of many illustrations of his contributions to the patent community.

By Tony Dutra

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## Trademarks

### Supreme Court Will Review Decision On Single Entity Status for NFL and Teams

The U.S. Supreme Court decides to review a Seventh Circuit ruling that an exclusive 10-year license granted by the National Football League to Reebok International, Ltd. for use of the teams' logos and trademarks in the manufacture and sale of headwear does not violate Sherman Act § 1 (American Needle Inc. v. Nat'l Football League, U.S., No. 08-661, cert. granted, 6/29/09).

The Seventh Circuit reasoned that Sherman Act § 1 liability does not accrue to the licensing agreement because NFL teams share a vital economic interest in collectively promoting NFL football in competition with other forms of entertainment and thus are best described as a single source of economic power when promoting NFL football through licensing the teams' intellectual property.

The excluded headwear vendor, American Needle Inc., had argued that the district court incorrectly denied its Rule 56(f) motion before granting summary judgment to the NFL defendants on its §1 claim and that the district court was wrong to grant the NFL defendants' motions for summary judgment on its §1 and §2 claims.

American Needle, the Seventh Circuit explained, failed to show that the decision to deny additional discovery was wrong. The district court "did not abdicate its discretion over discovery matters to the NFL defendants without explanation," as asserted by American Needle. Its denial was thoroughly explained, the Seventh Circuit found.

American Needle provided no evidence that it might have obtained from the NFL defendants "that would create a genuine issue" as to the defendants' single entity defense. Thus, its §1 claim, the Seventh Circuit concluded, was unviable.

The Seventh Circuit also concluded that American Needle presented no genuine issue of material fact that precludes judgment as a matter of law. American Needle failed to persuade the Seventh Circuit that it was error to conclude that the NFL teams constitute a single entity under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), when collectively licensing their intellectual property.

While it has "yet to render a definitive opinion as to whether the teams of a professional sports league can be considered a single entity in light of *Copperweld*," the Seventh Circuit observed that, due to the "many and conflicting characteristics that professional sports leagues generally exhibit," the court has expressed "skepticism that *Copperweld* could provide the definitive single-entity determination for all sports leagues alike." See *Chi. Prof'l Sports Ltd. v. Nat'l Basketball Ass'n (Bulls II)*, 95 F.3d 593, 600 (7th Cir. 1996). This suggests that the question—whether a given professional sports league is a single entity—should be addressed not only "one league at a time" but also "one facet of a league at a time" *Id.*, at 600.

The Seventh Circuit therefore limited its scrutiny of the district court's decision to: (1) the actions of the NFL, its member's teams, and NFL Properties; and (2) the actions of the NFL and its member teams as they pertain to the teams' agreement to license their intellectual property collectively via NFL Properties.

In the context here, the court determined that, while the various NFL teams could have competing interests regarding the use of their intellectual property “that could conceivably rise to the level of potential intra-league competition, those interests do not necessarily keep the teams from functioning as a single entity.” *Bulls II*, at 597-98. Thus, the Seventh Circuit concluded that it was not error for the district court to not consider “whether the NFL teams could compete against one another when licensing and marketing their intellectual property.”

Having reached this conclusion, the Seventh Circuit ruled that American Needle's argument—that the NFL teams have deprived the market of independent sources of economic power—“unravels.” Because NFL teams can function only as one source of economic power when collectively producing NFL football, it “thus follows that only one source of economic power controls the promotion of NFL football; it makes little sense to assert that each individual team has the authority, if not the responsibility, to promote the jointly produced NFL football.”

The NFL teams, the court determined, are best described as a single source of economic power when promoting NFL football through licensing the teams' intellectual property. Having reached this conclusion, the court explained that American Needle's failure to state a claim under §1 “necessarily dooms its §2 monopolization claim.” American Needle, the court held, has “no colorable claim” that the NFL teams and NFL Properties created a monopoly by awarding Reebok the exclusive headwear licensing contract. The award of summary judgment to the NFL defendants, the Seventh Circuit held, was not in error.

The two questions presented in this successful petition for certiorari are:

- are the NFL and its member teams a single entity that is exempt from rule of reason claims under Sherman Act § 1 simply because they cooperate in the joint production of NFL football games, without regard to their competing economic interests, their ability to control their own economic decisions, or their ability to compete with each other and the league?
- is the agreement of NFL teams among themselves and with Reebok International, pursuant to which the teams agreed not to compete with each other in the licensing and sale of consumer headwear and clothing decorated with the teams' respective logos and trademarks, and not to permit any licenses to be granted to Reebok's competitors for a period of 10 years, subject to a rule of reason claim under Sherman Act § 1, when the teams own and control the use of their separate logos and trademarks and, but for their agreement not to, could compete with each other in licensing and sale of team products?

Counsel for petitioner: Glen D. Nager, Jones Day, Washington, D.C.; Jeffrey M. Carey, Northfield, Ill.; counsel for respondents: Gregg H. Levy, Covington & Burling, Washington, D.C.; Timothy B. Hardwicke, Reebok International, Ltd., Chicago, Ill.; counsel for U.S. government: Elena Kagan, Solicitor General, Washington, D.C.; counsel for amici: Shepard Goldfein (for National Hockey League), Skadden Arps Slate Meagher & Flom LLP, New York, N.Y., and Jeffrey A. Mishkin (for National Basketball Association and NBA Properties), Skadden Arps Slate Meagher & Flom LLP, New York, N.Y.

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### **Contract or Overflow Work**

Naval Academy grad with M.S. Chemistry and over 25 years' patent experience available for patent prosecution (chemical, mechanical, design, business methods) and trademark work at reasonable rates. Admitted in California and D.C. only. Please contact James K. Poole at (970) 472-5061; FAX (970) 472-5041, or [jkpoole@aol.com](mailto:jkpoole@aol.com). Mail materials or inquiries to P.O. Box 925, Loveland, CO 80539. (expires 07/09)

### **Trademark Paralegal**

Trademark paralegal with 17 years of experience. I can assist you with USPTO filings and with creation and upkeep of your docket. I have worked in firms in Denver but currently would prefer to work on a contract basis. References available. Call Jennifer Rothschild at 303-850-9297. (expires 09/09)

### **Teaching Fellowship in Transactional Law**

The University of Denver Sturm College of Law, Student Law Office, invites applications for a three-year clinical teaching fellowship in transactional law. The fellowship is designed for experienced lawyers who are interested in exploring the possibility of a career in law school clinical teaching.

The Student Law Office currently houses five clinical programs including a Civil Rights Clinic, a Criminal Defense Clinic, a Mediation Clinic, a Community Law Clinic, and an Environmental Law Clinic. The transactional fellow, in collaboration with supervising faculty, will be responsible for designing, creating and implementing a transactional component which will be added to our existing Community Law Clinic. The transactional component of the Community Law Clinic will provide legal services for a variety of clients including non-profits, small businesses and other community groups.

The three-year fellowship will provide the fellow the opportunity to supervise and train law students who are representing clients. The fellow will also teach classes, attend workshops designed to train the fellow as a clinical teacher and pursue a scholarly agenda. Fellows in the Clinic will be integrated into the intellectual life of the law school and the larger University. Fellows are invited to attend faculty workshops at which works in progress will be presented, and to attend mentoring sessions for faculty.

Fellowship requirements: Applicants must have at least five years of legal experience, must have a demonstrated commitment to public interest lawyering and must possess strong academic credentials. Applicants must be admitted to the Colorado Bar or willing to seek admission.

Fellowship salary and benefits: Salary is competitive and is based on years of legal experience. Benefits include excellent University of Denver Sturm College of Law medical, vacation, and other fringe benefits and full access to all law school and other university facilities.

Application procedure and materials: Applicants should submit the following materials through <http://www.dujobs.org/hr> and to Professor Christine Cimini, Director of Clinical Programs, University of Denver Sturm College of Law, 2255 E. Evans Ave., Denver, CO 80208. Materials can also be sent electronically to Professor Cimini through the clinic's administrative assistant at [lsaraceno@law.du.edu](mailto:lsaraceno@law.du.edu):

1. a cover letter describing your prior legal, teaching, and other relevant experience; your aspirations regarding clinical teaching; and any other information relevant for assessing your potential as a clinical teacher and supervising attorney;
2. a detailed resume;
3. under other documents: a writing sample (10-15 pages); and
4. a list of at least three references.

The University of Denver is committed to enhancing the diversity of its faculty and staff and encourages applications from women, minorities, people with disabilities and veterans. DU is an EEO/AA employer.

## **IP Section Officer Contact Information**

### Chair:

Michael Drapkin, Esq.  
Townsend and Townsend and Crew  
1400 Wewatta Street, Suite 600  
Denver, CO 80202  
303.571.4000  
mldrapkin@townsend.com

### Vice-Chair:

John Posthumus, Esq.  
Greenberg Traurig, LLP  
1200 17th Street, Suite 2400  
Denver, CO 80202  
303.572.6500  
posthumusj@gtlaw.com

### Secretary/Treasurer:

Nina Y. Wang, Esq.  
Faegre & Benson, LLP  
3200 Wells Fargo Center  
1700 Lincoln Street  
Denver, CO 80203  
303.607.3500  
nwang@faegre.com

All correspondence, phone calls, facsimiles and emails concerning this newsletter, as well as advertising submissions should be directed to Nina Y. Wang at [nwang@faegre.com](mailto:nwang@faegre.com).