

New York District Court Judge Invalidates Patent Claiming Composition of and Method of Isolating Genes

The district court in the Southern District of New York recently issued a decision in which patent claims directed to isolated DNA compositions and methods of isolation were determined to be invalid. The sole issue decided by the Court in *Association for Molecular Pathology v U.S. Patent and Trademark Office*, was whether the patent claims at issue met the threshold test for patentability, namely, whether these claims comprised patentable subject matter. In finding that the patent claims at issue did not meet this threshold, the ruling is a significant move away from current standards in the context of DNA and gene-related inventions. It may take years before the impact of this

decision on the biotechnology industry is determined. Myriad Genetics, one of the defendants, has indicated it plans to appeal the decision to the Federal Circuit Court of Appeals, and depending on the Federal Circuit's decision and how the issue is framed or further developed in subsequent cases, the Supreme Court may take the opportunity to weigh in on the issue as well. It is doubtful that the USPTO will change its internal examination guidelines until all appeals of the current decision have been exhausted. Nevertheless, claim drafting strategies for biotechnology inventions may need to change to accommodate potential changes in the law. *continued on page 2*

Google Expands Use of Trademarks in Its AdWords Despite Adverse Court Rulings Finding "Use in Commerce" and New Class Action Suits

In a recent decision by the European Court of Justice, the Court ruled in favor of Google in a consolidated case spearheaded by Louis Vuitton relating to Google's Adwords program. The Court found that Google was not in breach of EU trademark law for its passive sale of third-party trademarks as keywords. However, Google's "safe harbor" is limited, as Google must act expeditiously to take down advertisements when

trademark owners complain that the ads or websites linked from the keywords infringe their trademarks. Despite the finding of no infringement by Google, the decision may leave individual advertisers open to liability for use of a competitor's trademark as a keyword. The ECJ has left it to national courts to decide on a case-by-case basis whether trademark infringement has taken place. *continued on page 2*

Recent Ruling in Favor of Comcast Sends FCC Back to the Drawing Board on Net Neutrality and Tangles Plans to Expand Internet Access

In September 2009, the FCC proposed new rules for net neutrality, requiring internet service providers to treat all content equally and not put any site at a disadvantage by slowing transmission speed or access. A recent decision in *Comcast Corp v Federal Communications Commission* sent the FCC back several steps, finding that that FCC, as an administrative agency, does not have the power to regulate internet service providers in this manner, as it is outside the scope of the specific powers delegated by Congress.

The dispute started with allegations that Comcast deliberately slowed access to the Bit Torrent peer-to-peer site. Comcast replied that its actions were necessary to manage the level of traffic and protect against slowdowns for other customers during peak times but the FCC issued sanctions in 2008 ordering Comcast to halt any slowdowns. Eventually, Comcast agreed to change its practices, but requested a review by the appeals court as to whether the FCC had the authority to sanction Comcast under its scope of

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Social Media and Senators How a Small Vermont Brewery Gave Rise to a Potential Study of Trademark Policing Tactics

Rock Art Brewery LLC is a Vermont-based brewer of craft beers that produces about 3,000 barrels of beer annually. Hansen Beverage Co. is the maker of the MONSTER brand energy drink and has over \$600 million in annual sales. During fall 2009, Rock Art produced a barleywine beer called VERMONSTER and filed an application to register that trademark. Hansen sent a cease and desist letter to Rock Art claiming that VERMONSTER infringed its MONSTER mark.

Rock Art responded to Hansen on two fronts. First, by directly corresponding with Hansen's counsel on the trademark claim and standing firm in its position that market differences between energy drinks and craft beers negated potential confusion. Second, at an abstract level, Rock Art viewed the dispute as essentially David v Goliath. Firmly believing this, Rock Art used social media to its advantage. From the beginning, Rock Art notified its Twitter followers and Facebook fans of the issues, nature of the dispute and its view of same. The rockartbrewery.com website became a repository of information regarding the squabble and links to press pieces discussing same. The Hansen/Rock Art matter garnered attention in newspapers across the country and stories on ABC News, MSNBC and CNN. A Facebook fan page called "Vermonters and Craft Beer

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Is Your Browser Policy Holding You Back?

Internet Explorer 6 does not have the best reputation among the technically aware due to its security holes, lack of features, and arrant disregard for modern web standards. Yet, it is the default and often the only browser at the majority of large companies. This article looks at how this came to be and questions the efficacy of the status quo. *continued on page 3*

Gene Patent (continued from page 1)

Regarding the substance of the case itself, defendant Myriad Genetics and a group of academic researchers had sequenced Breast Cancer Susceptibility Genes 1 and 2 (BRCA1 and BRCA2), two human genes linked to breast cancer. The parties applied for and obtained patents covering the isolated and sequenced genes. Myriad Genetics developed and marketed genetic tests designed to identify mutated genes. The Association for Molecular Pathology and other organization brought the current suit seeking a declaration that the patents covering the BRCA1 and BRCA2 isolated and sequenced DNA and related methods were invalid as pertaining to unpatentable subject matter.

Central the District Court's decision regarding claims covering the BRCA1 and BRCA2 compositions was the idea that purification of a natural compound, without more, does not transform a product of nature into patentable subject matter. The Court reviewed a number of Supreme Court and accompanying lower court decisions and determined that patentable subject matter, in the context of purified products of nature, must possess "markedly different characteristics" in order to meet the threshold requirement for patentability. On this point, the Court found that the claimed isolated/purified DNA was not markedly different from native DNA as it exists in nature and is therefore not patentable subject matter. Patent claims covering methods for analyzing and comparing DNA sequences suffered a similar fate. The Court held that these claims lacked physical transformation of material and were therefore unpatentable as well.

While the immediate implications of this decision are clear, namely, the potential invalidity of a vast number of issued patents, competing interests on both sides of the issue have compelling arguments to make. DNA-related patents typically rep-

resent the fruits of the earliest stages of research. Without patent protection, and the ability to license patented technology, organizations are unlikely to be able to raise the millions of dollars in capital necessary to advance the discovery of useful tests or treatments. Nevertheless, the research and development of large-scale genome projects may be hindered if each individual human gene is patented and subject must be licensed for such projects to move forward. The *Association for Molecular Pathology v U.S. Patent and Trademark Office* is likely the beginning of the story with competing concerns of all concerned parties likely to be accounted for in future caselaw, legislation and USPTO practice guidelines.

AdWords (continued from page 1)

In Google's AdWords program, advertisers bid on and purchase keywords, which may include trademarks of third parties. When an internet user types in a search term using Google's search engine, the resulting hits include regular or "natural" search results based on relevance, along with "Sponsored Links" results triggered by the keywords in the search query. These "Sponsored Links" is paid contextual advertising that is auctioned through Google's AdWords, with the highest bidder usually having its Sponsored Link listed first.

The ECJ found that Google's sale of trademarks as keywords, as a "referencing service provider," was not considered use of the marks under EU law. It further held that the keyword ads are not likely to have an adverse effect on the advertising function of the trademark. The court determined, however, that use of third-party trademarks as keywords or advertising links was considered "use in the course of trade" by the purchaser of the keyword, whether or not the trademark appeared in the ad text itself. Liability for the advertiser may arise if the ad does not enable the average internet user, or enables that

user with difficulty, to ascertain whether the goods or services originate from the owner of the trademark (or an undertaking economically connected to it), or whether they originate from a third party.

National courts will have the power to adjudicate whether source confusion has actually occurred. The analysis will determine whether the online advertisement is considered trademark infringement, and whether Google's participation is active enough to remove its safe-harbor defense and provide liability based on Google's knowledge of and control over the infringing activity. Courts will have to consider whether Google's Keyword Suggestion Tool would be considered sufficient active participation to negate any exemptions that Google has garnered as a service provider.

While the current judgment refers to keywords that are "identical" to the trademark and to goods that are "identical" to the trademark owner's goods, it is anticipated that forthcoming decisions in the EU will address the liability of an advertiser for keywords that are similar to the trademark and are used for complimentary goods. Although Google appears to have averted blanket liability for keyword sales in the EU, its benefits may be limited due to potential advertiser liability.

Net Neutrality (continued from page 1)

power. The U.S. Court of Appeals for the D.C. Circuit agreed with Comcast that the FCC lacked such authority and vacated the prior sanctions.

This ruling was not a ruling against the principles of net neutrality, rather, it is solely a finding that the FCC does not have "any statutorily mandated responsibility" to enforce net neutrality by service providers, according to the opinion by Judge David Tatel. The FCC has replied that it remains committed to the principles

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Social Media *(continued from page 1)*

Drinkers Against Monster” sprouted and quickly rose to over 18,000 members.

Ultimately, Hansen backed down. The VERMONSTER trademark has since matured to registration and Vermonster Beer remains available. Whatever the ultimate impact of Rock Art’s use of social media in this dispute was is unknown but clearly shows that utilization of such outlets can be persuasive, as evidenced by the nationwide following and press coverage the dispute received. Indeed, one particularly influential follower of the dispute was Senator Patrick Leahy of Vermont.

Senator Leahy sponsored legislation making certain amendments to the Lanham Act regarding Madrid Protocol filings. In addition to these technical amendments, Senator Leahy added a measure directing the Commerce Department to study trademark litigation tactics to determine whether large corporations are potentially misusing trademark laws by attempting “to enforce trademark rights beyond a reasonable interpretation of the scope” of those rights to essentially harass small businesses like Rock Art, which in turn may “stifle” innovation and entrepreneurship. President Obama signed the law and it went into effect March 17, 2010.

No timeline has been set for any such study to commence or complete. The results should prove interesting from both the perspective of the brand owner and its duty to police its marks and from the perspective of a small business and the incentive to innovate. Irrespective of the results of any study conducted as required by the Leahy-sponsored Amendment to the Lanham Act, the Amendment itself and the history leading up to it underscore the growing importance of social media. Twitter and Facebook are changing how people interact, how products are marketed and, now, how some disputes are resolved.

Net Neutrality *(continued from page 2)*

of unimpeded access, and will continue with efforts to create such rules, however, it remains to be seen whether the FCC will pursue further appeal in order to do so, or whether it will turn to Congress to revise the FCC’s grant of authority. With the FCC spokeswoman Jen Howard’s statement that the FCC must ensure any future agenda rests on “solid legal foundation,” and a statement by Democratic FCC commissioner Michael J. Copps, that “[i]t is time we stop doing the ‘ancillary authority’ dance and instead rely on the statute Congress gave us to stand on solid legal ground in safeguarding the benefits of the Internet for American consumers,”

Browser Policy *(continued from page 1)*

Throughout the 1990s, Netscape and Microsoft fought for dominance in the browser market by releasing more and more unique features for their browsers. Without a common standard, a website could work fine in one browser and be unusable in another, and it was common to display “best viewed in Netscape” or “best viewed in Internet Explorer” buttons, inviting users to download the optimal browser. By the end of the decade Microsoft had defeated Netscape, which was largely due to tying Internet Explorer to its Windows operating system.

When IE6 was released on August 27, 2001, it received a warm welcome from the web community. Web developers praised its DOCTYPE support, which allowed designers to use standards-based markup by declaring a document type; if a site did not have a document type declared, IE6 would render it in “quirks mode”—an ugly legacy from the browser wars.

By 2004 Internet Explorer had a 95% market share but was starting to show its age. In the ‘90s, Microsoft was releasing a new version of Internet Explorer every year or two. Now, without a strong competitor, it left its browser stagnant. Occasional se-

it seems that a revision of the FCC’s grant of authority would be the more concrete approach, rather than further pursuit in the court system.

This recent decision may have been focused solely on the issues of the FCC’s authority in enforcing net neutrality, but it also places the FCC’s recently announced plans for improved infrastructure to increase access to the internet into question. If the FCC has no power to regulate service providers’ management of their networks, then the FCC may also have no power to oversee any improvement of the existing broadband infrastructure.

curity breaches were becoming more and more common and the tech-savvy users began flocking to new competitors, such as Firefox and Safari. These new browsers had improved security, more features and better support for W3C standards.

Five years have passed between the releases of Internet Explorer 6 and Windows Internet Explorer 7. Microsoft timed the release to coincide with the release of Windows Vista. The new operating system was poorly received, and even though IE7 was available for Windows XP, many did not see a reason to upgrade. Likewise, people did not flock to IE8 when it was released last year together with Windows 7.

Simply because the majority of large companies are still using Windows XP, many of them are still using the browser that came with it. Some companies are reluctant to switch because their intranets and in-house applications were developed for IE6—perhaps using Microsoft’s Front-Page 2000 software—instead of for the most widely supported web standards, and upgrading the browser would require changing these applications as well. From this perspective, sticking with IE6 is easy

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Browser Policy *(continued from page 3)*

to rationalize as the simplest and cheapest option. The reality, however, is that in an era when more and more companies use cloud computing and software-as-a-service solutions, when one accounts for compromised security and productivity,

the old IE6 browser may actually cost the company more.

It is time for corporate IT departments to consider installing an alternate browser for internet use and limiting IE6 access to the company's intranet.