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In this issue

*Egyptian Goddess* Strengthens U.S. Design Patent Rights.....1  
Tiffany Loses Suit Against eBay Over Counterfeits.....3  
Federal Circuit Clarifies ITC Authority on Exclusion Orders.....4  
Tougher Obviousness Test for U.S. Patents: KSR's Continuing Impact.....5  
New Law Creates IP "Czar," Stiffer Infringement Penalties.....6  
FCC Allows Operation of Wireless Devices in Unused White Space...7  
Beware of Requests to "Register" Published PCT Applications.....8

*Egyptian Goddess* Strengthens U.S. Design Patent Rights

By Meaghan Hemmings Kent

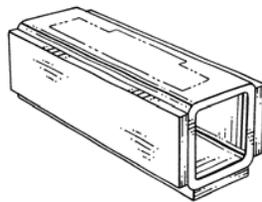
The Federal Circuit issued a unanimous *en banc* decision recently that is good news for design patent holders. First, it loosened the standard for infringement by rejecting one of the tests that needed to be met for a patent holder to demonstrate infringement, and second, it placed the burden of unearthing prior art on the accused infringer.

The old infringement test required that a plaintiff in a design patent case prove both (1) that the accused device is “substantially similar” to the claimed design under what is referred to as the “ordinary observer” test, and (2) that the accused device contains “substantially the same points of novelty that distinguished the patented design from the prior art.” *Goodyear Tire & Rubber Co. v. Hercules Tire & Rubber Co.*, 162 F.3d 1113 (Fed. Cir. 1998).

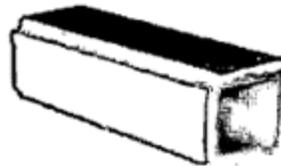
In *Egyptian Goddess*, the Court held that the ordinary observer test should be the sole test for proving whether a design patent has been infringed and that the “point of novelty” test no longer needed to be used. The Federal Circuit articulated that the current test is “a test that asks how an ordinary observer with knowledge of the prior art designs would view the differences between the claimed and accused designs.” In other words, the test is now “the ordinary observer test through the eyes of an observer familiar with the prior art.” The Court explained

that “unlike the point of novelty test, the ordinary observer test does not present the risk of assigning exaggerated importance to small differences between the claimed and accused designs relating to an insignificant feature simply because that feature can be characterized as a point of novelty.” The Court clarified that whether there are novel features is still part of the consideration, because “examining the novel features of the claimed design can be an important component of the comparison of the claimed design with the accused design and the prior art. But the comparison of the designs, including the examination of any novel features, must be conducted as part of the ordinary observer test, not as part of a separate test focusing on particular points of novelty that are designated only in the course of litigation.”

The design patent at issue in this case related to a four-sided nail buffer. Unfortunately for the plaintiff patent holder, the Federal Circuit applied the new standard – “whether an ordinary observer, familiar with the prior art designs, would be deceived into believing the accused buffer is the same as the patented buffer” – and affirmed the district court’s entry of summary judgment in favor of the defendant, stating “in light of the similarity of the prior art buffers to the accused buffer, we conclude that no reasonable fact-finder could find that [plaintiff] met its burden of showing, by a preponderance of the evidence, that an ordinary observer, taking into account the prior art, would believe the accused design to be the same as the patented design.”



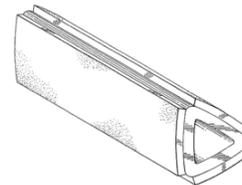
Plaintiff's patented design



Defendant's product



Prior art



Prior art

While *Egyptian Goddess* does not dispose of the novelty consideration entirely, it does decrease the emphasis that was previously placed on particular points of novelty. The Federal Circuit further held that the burden of producing prior art designs would be placed on the accused infringer. Previously, courts have stated that the burden to introduce prior art under the point of novelty test falls on the patentee.

Finally, the Federal Circuit raised the issue of whether trial courts should conduct claim construction in design patent cases. The Court reasoned that since the drawing is typically a better description than words, a court is “not obligated to issue a detailed verbal description of the design if it does not regard verbal elaboration as necessary or helpful,” but on the other hand, “a district court’s decision regarding the level of detail to be used in describing the claimed design is a matter within the court’s discretion, and absent a showing of prejudice, the court’s decision to issue a relatively detailed claim construction will not be reversible error.”

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# Tiffany Loses Suit Against eBay Over Counterfeits

By Janet Satterthwaite

eBay has successfully defended a lawsuit brought by Tiffany, which alleged trademark infringement and contributory trademark infringement for eBay's facilitation of a marketplace for the sale of counterfeit Tiffany jewelry. eBay won despite the Court acknowledging that a significant percentage of Tiffany goods sold on eBay are counterfeit. Tiffany has filed a notice of appeal.

More than 6 million new listings appear on eBay every day, and at any given time, 100 million listings appear on the web site. eBay's revenue is based on listings and a percentage of the eventual sale. The court found that eBay made \$4 million over three years from the sale of Tiffany goods. Tiffany's research indicated that 73% of this was counterfeit; the court agreed that at least a significant number of the items were counterfeit.

The *Tiffany* court concluded that the concept of contributory infringement could apply to entities like eBay that "provide a marketplace for infringement and maintain direct control over that venue." (This is important because it acknowledges that the eBay facility *could*, in theory, be covered under a claim of contributory infringement). But the court found that although eBay had posted a "generalized notice" that some portion of Tiffany goods sold on its web site were counterfeit, that did not translate into knowledge of *specific infringers*. The court found that eBay had not been willfully blind to evidence of counterfeiting on its web site and that eBay acted responsibly upon notification through application of the VeRO notice and takedown program.

Moreover, not all Tiffany merchandise sold through eBay is counterfeit. The court noted the doctrine of contributory trademark infringement should not be used to require defendants to refuse to provide a product or service to those who merely *might* be infringing. Tiffany had suggested that any lot of five items or more should automatically be considered counterfeit, because Tiffany does not use third party resellers. But the Court found that because there were listings of five or more items that were all genuine, Tiffany's argument was not persuasive.

The court concluded that "reason to know" does not extend, under current law, to a duty to seek out and prevent violations.

This is exactly the opposite of the conclusion reached by the French courts. In June 2008, two French courts issued opinions in cases filed by HERMES and Louis Vuitton (LVMH). Like the Tiffany court, the HERMES and LVMH courts (Troyes and Paris, respectively) also found that eBay exerts sufficient control over its web site, to be more than merely a passive host. In contrast to the Tiffany court, however, the French courts found that being in the category of editor of services on the web site gave eBay a responsibility to take affirmative measures to prevent fraudulent activity. The LVMH court simply awarded (large) damages to the plaintiff, but the HERMES court went a bit further and set out standards for eBay to implement in order to reduce fraud.

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# Federal Circuit Clarifies ITC Authority on Exclusion Orders

By Martin L. Saad

In a recent decision, the Federal Circuit clarified the ITC's authority to issue Limited and General Exclusion Orders prohibiting the importation of accused products. *See Kyocera Wireless Corp. v. Qualcomm Inc.*, Case No. 07-1493 (Fed. Cir. Oct. 14, 2008) (available at <http://www.cafc.uscourts.gov/opinions/07-1493.pdf>). In the decision, the Federal Circuit reversed and vacated an ITC Limited Exclusion Order (LEO) that purported to apply to companies that were not named respondents in the ITC investigation. The court found that the ITC's statutory authority only allowed LEO's against products imported by named respondents. The court explained that the ITC may issue a General Exclusion Order (GEO) to exclude products imported by persons not named in the investigation, but only when limited statutory exceptions – not at issue in *Qualcomm* – apply.

The decision involved an ITC investigation of Qualcomm microchips used in wireless devices, such as cell phones and PDAs. Broadcom petitioned the ITC to examine whether Qualcomm's chips, when programmed to enable certain battery-saving features, infringed a Broadcom patent. Qualcomm manufactured its chips abroad and sold them to device manufacturers, all of whom manufactured their products abroad and imported them into the United States. Qualcomm did not program the chips with the battery-saving features claimed in the patent, but provided the necessary software and training to the manufacturers to program the chips. Broadcom did not name the manufacturers as respondents in the investigation, but argued that Qualcomm should be held liable for inducing the manufacturers to infringe the patent by programming the chips.

The ITC found Broadcom's patent to be valid, but not directly infringed by Qualcomm, because Qualcomm did not itself program the chips with the battery saving features. However, the Commission found that Qualcomm contributorily infringed the patent by inducing the manufacturers to infringe the patent. The Commission issued an LEO "against the importation of all downstream products containing the accused technology." The LEO was not limited to importation by Qualcomm, but applied to all products containing the technology, regardless of importer.

Qualcomm appealed the decision to the Federal Circuit. Others subject to the LEO joined in the appeal, including manufacturers of mobile devices containing Qualcomm chips and network operators whose networks depend on such products. The Federal Circuit affirmed the ITC's findings of validity and no direct infringement, but it reversed and remanded the contributory infringement finding, and reversed and vacated the LEO.

On contributory infringement, the court noted that it had issued a new standard of intent following the ITC's decision, but before deciding the appeal. The intervening decision held that specific intent to induce infringement, not just general intent to induce the infringing acts, was necessary. In this case, it was not enough that Qualcomm provided the software and instruction on how to program the chips. Rather, it was necessary for the ITC to find that Qualcomm had knowledge of the patent and specifically intended to induce infringement of it. The court remanded the issue to the ITC for further review under the new standard.

The court then reversed the LEO, finding that the ITC has no statutory authority to issue an LEO against companies that were not respondents in the action. According to the ITC's enabling statute, "The authority of the Commission to order an exclusion from entry of articles shall be limited to persons determined by the Commission to be violating [19 U.S.C. 1337(d)]...." The Federal Circuit held that such authority does not permit the ITC to issue an LEO that would apply to non-respondents that were not "persons determined by the Commission to have violated" the statute.

The court further explained that the statute does allow the ITC to enter a GEO prohibiting importation of products by non-respondents, but only in two circumstances: (1) when a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or (2) there is a pattern of violation of this section and it is difficult to identify the source of infringing products. The ITC did not make findings on either exception to support a GEO, yet issued an LEO applying to non-respondents. Hence, the Federal Circuit vacated the LEO as going beyond the ITC's statutory authority.

The decision is important for all involved in ITC proceedings, as it affects the scope of the ITC authority to enter the primary relief sought in Section 337 investigations. It may play a role in distribution practices as well as litigation strategy. Indeed, the court faulted Broadcom for the "strategic decision" not to name downstream manufacturers as respondents, despite knowing their identities and knowing that virtually all infringing devices were not imported by Qualcomm.

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## Tougher Obviousness Test for U.S. Patents: KSR's Continuing Impact

By Michael A. Gollin

In 2007, in the *KSR v. Teleflex* decision, the Supreme Court rejected the Federal Circuit's standard on patent obviousness, according to which a claim is nonobvious unless the prior art includes some teaching, suggestion, or motivation to modify prior knowledge into the claimed invention. The Supreme Court held that there are many other grounds for rejecting or invalidating a claim as obvious. The USPTO embraced the new decision in its guidelines for examiners. See Examination **Guidelines** for Determining **Obviousness** Under 35 U.S.C. 103 in View of the Supreme Court Decision in *KSR International. Co. v. Teleflex Inc*, Federal Register, Vol. 72, No. 195, Wednesday, October 10, 2007, available at [www.uspto.gov/web/offices/com/sol/notices/72fr57526.pdf](http://www.uspto.gov/web/offices/com/sol/notices/72fr57526.pdf).

In effect, the USPTO has given its examiners more discretion to reject claims, and, in our experience, examiners are using that discretion quite aggressively. Moreover, the USPTO has instituted a practice of second review by a quality assurance group, whose stated role is to reduce errors. Because of these USPTO initiatives, the allowance rate for patent applications has dropped by some measures from 70+% to about 40% in recent years, according to data that Commissioner of Patents John Doll presented last month at a meeting of the BIO IP Counsels Committee.

As a practical matter, we have responded by treating every patent prosecution more like a litigation. We try to focus early on defining the invention, especially the commercially significant aspects of the invention. We conduct more prior art searches for new invention disclosures and assess pending applications more conservatively than before. We consult closely with the inventors to identify evidence of nonobviousness, including unexpected results, documented advantages over prior art approaches (especially comparative data), public recognition of the invention, and demonstrations of why prior approaches went in the wrong direction. This evidence is key to building strong arguments of nonobviousness, and we can use the evidence in declarations submitted to the USPTO. Such evidence should ultimately be persuasive on appeal, if the examiners do not accept it. We interview examiners more frequently and often bring in their supervisors. We are having some success using these approaches, but they are more time-consuming and expensive than in past years. Ultimately there are some inventions that would have been patentable in prior years but are not now. The change is more extreme in the mechanical and material sciences, but affects biotechnology and pharmaceutical patents as well. Ultimately, innovation requires ever more careful strategic management of intellectual property, integrating patenting activities with trade secret, trademark, and copyright protections.

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## New Law Creates IP "Czar," Stiffer Infringement Penalties

**By A. Kesso Diallo**

On October 13, 2008, President Bush signed into law The Prioritizing Resources and Organization for Intellectual Property Act of 2008 (Pro IP). With over 400 votes in the House and a unanimous Senate vote, this law, lawmakers believe, will better protect U.S. intellectual property and improve executive branch enforcement of IP laws. The law includes provisions that expand forfeiture penalties against infringers, clarify that copyright registration is not required for prosecution, increase funding to the Department of Justice, and provide for a new executive branch officer who will oversee and coordinate all federal responsibility for IP matters. Lawmakers hope these provisions will lead to increased prosecution against large commercial pirates as well as individuals.

The US Chamber of Commerce is one of the chief supporters of the law. The world's largest business federation's CEO and president, Tom Donohue, commended the Senate for its unanimous approval of the bill. He stated, "This is a win for both parties and, more importantly, for America's innovators, workers whose jobs rely on intellectual property, and consumers who depend on safe and effective products." Also in support of Pro IP were NBC Universal's Chief Executive Jeff Zucker, the Recording Industry Association of America, and the Motion Picture Association of America.

While some are celebrating the passage of the new law as a triumph for innovators, others, such as Public Knowledge, a Washington, DC based public interest group that fights legislation it feels slows technology innovation or prevents fair use, strongly voiced opposition. Aided by other groups, it is responsible for the Senate removal of a provision that would have allowed the Department of Justice to bring civil suits and claim damages on behalf of private

copyright holders.

The concerns of these groups echo those voiced by William Patry, Senior Copyright Counsel for Google and author of the renowned treatise "Patry on Copyrights." In 2007, he stated that he worried that the bill "seeks to expand radically the amount of statutory damages that can be recovered, and in cases where there are zero actual damages." He further stated, "The provision is intended to benefit the record industry but will have terrible consequences for many others."

The Department of Justice also raised concern over the passage of the law because of its creation of a new enforcement officer: the Intellectual Property Enforcement Coordinator (IPEC). In an email sent shortly after the House passed the bill, Peter Carr, the department's spokesperson, wrote, "Establishing such an office would undermine the traditional independence of the Department of Justice in criminal enforcement matters." He further voiced concern over the political influence this position would be subject to. "Establishing such an office in [the White House] would codify precisely the type of political interference in the independent exercise of DOJ prosecutorial judgment that many members of Congress and senators have alleged over the last couple years."

The IPEC, appointed by the President and with the Senate's consent, will report directly to the President and Congress and chair a committee of representatives from offices including the Office of Management and Budget, the Department of Justice, the U.S. Trade Representative, the Patent and Trademark Office, the Department of Homeland Security, and the FDA.

The law's language attempts to keep the role of the Department of Justice intact. Congress included a provision that states, "The IPEC may not control or direct any law enforcement agency, including the Department of Justice, in the exercise of its investigative or prosecutorial authority." However, the IPEC is responsible for creating a joint strategic plan that unites all of the law-enforcement agencies and other countries, and facilitates information sharing.

Despite the dissidence created by the new law, supporters are pleased with the government's attention to IP enforcement. Many advocates of Pro IP, as well as those opposed, such as Public Knowledge, are hopeful an "orphan works" copyright law, allowing filmmakers and musicians to use copyrighted material if the copyright owner cannot be found, is soon to follow.

You can find the text of Pro IP, as passed by both the House and Senate, on the Thomas website: <http://thomas.loc.gov/cgi-bin/query/z?c110:S.3325>:

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## FCC Allows Operation of Wireless Devices in Unused White Space

**By Frederick M. Joyce**

A recent order by the Federal Communications Commission (FCC) opens new possibilities for manufacturers of wireless devices. On November 4, 2008, the FCC adopted rules to permit the use of new wireless devices in the broadcast television spectrum on a "secondary" basis at locations where that spectrum is

not in use by broadcasters, the so-called white space.

Throughout the year, interested parties, including Microsoft, Motorola, and Philips Electronics, submitted prototype devices to the FCC's Office of Engineering and Technology (OET) for testing to determine whether they could operate in the "white space" without causing harmful interference to broadcast TV or to unlicensed wireless devices such as microphones. The OET released its report for Phase II testing, along with a peer review report of white space devices, in October 2008; the FCC voted on new rules shortly after the release of the report. Wireless use of TV white space had been energetically opposed by the National Association of Broadcasters. Google and other prominent high-tech companies pushed hard for permission to deploy unlicensed devices in this spectrum; their views carried the day.

The new rules provide for the operation of fixed and personal/portable devices in the TV white spaces on an unlicensed basis. The devices will be permitted to operate on most channels between TV channels 2 and 51. With limited exceptions, white space devices must have a geolocation capability. The devices must also be able to access over the Internet a database of protected radio services and the locations and channels that may be used by the unlicensed devices at each location. The FCC will solicit third parties to establish and maintain that database, and white space devices must access the database to obtain a list of permitted channels before operating. Additionally, the devices must have the ability to "sense" TV and wireless microphone signals. The FCC said that its new rules constituted a "conservative first step" and cautioned that it will closely monitor developments in this area to ensure that white space devices do not cause harmful interference to licensed services.

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## Beware of Requests to "Register" Published PCT Applications

**By Keith G. Haddaway, Ph.D., Ryan M. Flandro, and Debbie S. Walker\***

In the February 2008 edition of Venable's *IP News & Comment*, we issued a warning regarding numerous "official looking" patent notices received by several of our clients requesting payment for "registration" of a particular pending patent application. This update is provided as a reminder, particularly to those with pending international or foreign patent applications, to be wary of any notices mailed directly to you and to contact an attorney if you have questions regarding whether action and/or payment is required.

The notices appear to be solicitations issued by sources unrelated to The International Bureau of the World Intellectual Property Organization (WIPO). They generally contain information related to a particular international PCT application and are being sent directly to the public address of record for the listed inventor and/or applicant. Through the notices, these outside sources are soliciting PCT applicants and agents to pay fees upwards of \$2000 for services provided by their companies. Most notices refer to a "Register of International Patent Applications" and bear quite official looking insignia. The overall form of the notice appears to represent that the fees requested are necessary to maintain the specified application. A reading of the "fine print" on these notices, however, reveals that they are solicitations to list the published PCT application in a private database. Some of the language used in the notices is as follows:

Dear Addressee!

We offer to include your corporate text in our private company directory, as far as it is included in the WIPO Gazette for International Patent Application. Our offer includes the placement of addresses on the basis of our own data records, the completion of the related work and the carrying out of individual researches. With regard to the exact details of our service (address service, individual researches, access to databases), we refer to our general terms and conditions of trade overleaf, these forming the basis for our conclusion of business. You confirm this offer by remitting the following amount and in doing so, you confirm that the wording of the entry entered by ourselves and rendered here is correct. The duration of the period of entry as the entitled user always amounts to one year as from the conclusion of the contract. The entry includes the name of the company and its postal data. For the sake of completeness, we have provided you with the publication number, publication date, international application no. international filing date, priority date title and the reference number. Any requests for amendments and additions are to be made in writing. THIS IS NOT AN INVOICE. THIS IS A SOLICITATION. YOU ARE UNDER NO OBLIGATION TO PAY THE AMOUNT STATED UNDERNEATH, UNLESS YOU ACCEPT THIS OFFER.

It is important that PCT applicants and agents note that any notices or fee invitations issued by WIPO will bear the official "International Bureau of WIPO" designation in the bottom left-hand corner of the document. If the WIPO insignia is not present, the invitations are not in any way connected to WIPO or any of its official publications. WIPO alone publishes all PCT applications at no charge to the applicant, and there is no "Register of International Patent Applications" maintained or required by WIPO. Although the notices may offer other services in addition to the registration, such as access to other applications stored on the private database and patent research services, it is important to note that WIPO makes published patent applications publicly available on the internet. Businesses interested in a particular technology have ready access to all publications. The legal ramifications of the PCT publication are outlined in Article 29 of the Patent Cooperation Treaty.

The receipt of any notifications or invitations from any other outside sources should be reported immediately to the proper legal representative to ensure that unnecessary fees are not paid. If you receive any notices and are unsure of whether any action is required, please contact us. The PCT Information Services at WIPO may also be contacted in this regard at the numbers listed below.

Telephone: 011 41 22 338 8338

Fax: 011 41 22 338 8339

Email: [pct.infolince@wiop.int](mailto:pct.infolince@wiop.int)

Some of the sources that have been known to issue these misleading notifications and invitations can be viewed at:

[www.wipo.int/pct/en/warning/pct\\_warning.htm](http://www.wipo.int/pct/en/warning/pct_warning.htm)

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***Note to Trademark Owners:***

The same precautions apply to trademark owners. The following notice appears on the U.S. Patent and Trademark Office's website:

[Warning to USPTO Customers re Trademark Monitoring and Document Filing Companies:](#) You may receive unsolicited communications from companies requesting fees for trademark-related services, such as monitoring and document filing. Although solicitations from these companies frequently display customer-specific information, including USPTO serial number or registration

number and owner name, companies that offer these services are not affiliated or associated with the USPTO or any other federal agency. The USPTO does not provide trademark monitoring or any similar services. Such companies typically charge a service fee in addition to applicable USPTO fees. In many instances, applicants and registrants have mistakenly believed that the USPTO has issued these communications or that these companies are affiliated with the USPTO. Complaints about such companies or communications may be made to the Federal Trade Commission, at [www.ftcomplaintassistant.gov](http://www.ftcomplaintassistant.gov).

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