Eastern District of Virginia IP

Year In Review

2016

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INTRODUCTION AND OVERVIEW

Patent litigation filings in the Eastern District of Virginia (the District) were down again this year although there was an increase in trademark-related litigation. In the copyright arena, the District decided a case of first impression under the Digital Millennium Copyright Act (DMCA), sustaining a jury verdict of willful infringement against an ISP and denying it the benefit of the “safe harbor” provided for under that statute. That decision is of national significance and the appeal to the Fourth Circuit will be closely watched by ISPs and copyright owners alike.

The District continued its long tradition of moving cases along quickly regardless of their complexity, the number of parties or procedural challenges. Motions are promptly heard and decided, discovery extensions are rare and trial dates are set early and are adhered to — which present both challenges and opportunities for litigants in intellectual property cases. While some other jurisdictions may see more filings, none is better than the District in bringing cases to trial expeditiously (often within a year of filing) and in giving careful consideration to complicated issues whether heard by judge or jury. The cases that are filed in the District are handled efficiently and with a healthy regard for adherence to deadlines, precedent and the rules of procedure. In short, the District remains a robust forum for litigating all types of intellectual property cases.

The District considered a number of interesting cases in 2016 in the copyright, trademark and patent arenas. Below we review some of the key decisions and findings from the year.

COPYRIGHT CASES

We begin our discussion this year with a significant copyright decision, *BMG Rights Management LLC v. Cox Communications, Inc.*, which resulted in a jury verdict against Cox for $25 million in statutory damages.[1] The decision is currently on appeal to the Fourth Circuit.

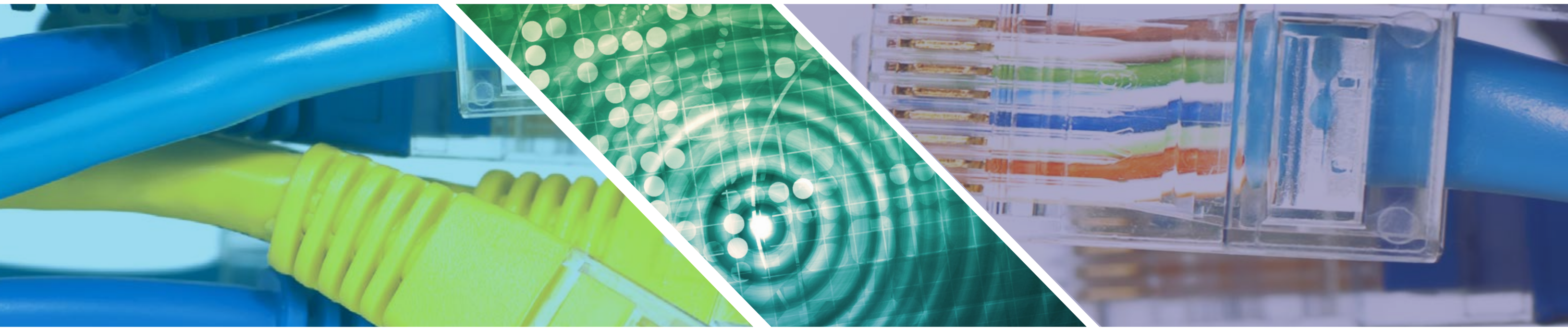
The court's opinion commences with a discussion of the "safe harbor" provision for Internet Service Providers (ISPs) under the DMCA. In an extraordinary holding prior to trial, Judge Liam O'Grady ruled on summary judgment that Cox could not rely on the safe harbor in its defense at trial. Stressing that "Congress reserved its safe harbors for ISPs who hold up their end of the bargain,"[2] Judge O'Grady then proceeded to articulate the numerous ways in which Cox failed to do so: "[T]he record was replete with evidence that foreclosed any assertion by Cox that it had reasonably implemented a repeat-infringer policy."[3] Most notably, the pretrial record included detailed evidence of Cox's implementation of a cynical "thirteen-strike policy" that seemed designed more to frustrate than to promote the goals of a legitimate safe harbor. Judge O'Grady took particular note of the fact that Cox took no action on the receipt of the subscriber's first notice of copyright infringement. Similarly, the second, third, fourth, fifth, sixth and seventh notices simply generated an email to the subscriber warning that if Cox "continues to receive infringement claims such as this one concerning your use of our service, we will suspend your account and disable your connection until you confirm you have removed the infringing material."[4] The eighth and ninth notices consisted of a single web page containing a warning. The customer could self-reactivate by simply clicking an acknowledgement. After the tenth and eleventh notices, Cox suspended service and required the subscriber to call a support technician. But this suspension was short lived as the technician merely advised the customer of the reason for suspension, recommended that the customer remove the allegedly infringing material and then reactivated service. On the twelfth notice, the subscriber was again suspended and directed to specialized technicians. Finally, on the thirteenth notice, the subscriber was again suspended and this time considered for termination. In addition to this thirteen-strike policy, Cox implemented its graduated response system on a rolling six-month basis. This meant that if a customer did not hit termination review within six months, the process would start over.[5]

Based on these undisputed facts, Judge O'Grady determined that Cox could not invoke the protection afforded by the DMCA's safe harbor. Thus, the case proceeded to trial under "the nebulous doctrines of secondary copyright liability to the digital world."[6] As noted above, Cox was found liable by a jury, which awarded the plaintiff $25 million in statutory damages.

In its post-trial motions, Cox first argued that BMG failed to show direct copyright infringement, based on the testimony and analysis of plaintiff's investigator. Specifically, the testimony at trial consisted of BMG's authorized agent, Rightscorp, acting in an investigative capacity as part of BMG's efforts to stop infringement of its copyrights. Cox argued that such evidence could not be the basis of a unauthorized distribution claim under the Copyright Act. Judge O'Grady expressly rejected this argument, noting courts have "consistently relied upon evidence of downloads by a plaintiff's investigator to establish both unauthorized copying and distribution of a plaintiff's work."[7] Judge O'Grady concluded that "the evidence that Cox IP addresses uploaded over 100,000 copies of BMG's works to Rightscorp can form the basis of a distribution claim."[8]

Cox further argued that BMG did not establish Cox's secondary liability for infringement.[9] This argument broke down into two parts: (i) Cox argued the evidence at trial established that its Internet services are capable of substantially noninfringing uses, which should have generally immunized Cox from liability for contributory infringement under the US Supreme Court's holding in *Sony Corp. of America v. Universal City Studies, Inc.[10]; and (ii) Cox argued that the only way BMG could overcome the Sony* safe harbor would be to establish inducement under the Supreme Court's holding in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd*.[11] Judge O'Grady rejected both of these arguments.

[1] No. 1:14-cv-1611, 2016 WL 4224964 (E.D. Va. Aug. 8, 2016) (appeal filed).
[2] *Id.* at *4.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.* at *9.
[8] *Id.*
[9] *Id.*
[10] 464 U.S. 417 (1984).
[11] 545 U.S. 913 (2005).



First, Judge O'Grady disagreed with Cox's broad interpretation of *Sony*. The court held that *Sony* precludes "the imputation of fault based solely on 'the design or distribution of a product capable of substantial lawful use, which the distributor knows is in fact used for infringement.' "[12] However, BMG's claim against Cox was not so limited. Judge O'Grady stated that "BMG's claim goes beyond design choice or the mere provision of a service and therefore it goes beyond *Sony.*"[13] BMG claimed, for example, that Cox "ignored specific notices of infringing activity and continued to provide material support to its users' infringement of BMG works despite its ability to suspend or terminate customers with the push of a button."[14] Unlike the seller in *Sony*, Cox maintained an ongoing relationship with the users of its services. Judge O'Grady emphasized that "an ongoing relationship between a defendant and direct infringers presents a potential for culpability quite beyond distribution or design."[15]

Judge O'Grady also rejected Cox's second argument — that BMG was required to prove active inducement.[16] The court held that this was too narrow a reading of the case law. Rather, BMG was only required "to prove that Cox had knowledge that users of its internet service were infringing BMG's copyrights and that Cox materially contributed to that infringement."[17] The court also discussed the knowledge standard and held that BMG was required to prove that "Cox knew or should have known of [the] infringing activity [that is, direct infringement of BMG's copyrighted works by users of Cox's Internet service]."[18] The court held that there was sufficient evidence for the jury to find in favor of BMG on this issue. This included evidence that Cox configured its graduated response system in such a way as to reduce both the total number of notices entering the system and the amount of customer-facing action. Judge O'Grady concluded, "Cox could not also turn a blind eye to specific infringement occurring on its network."[19] Judge O'Grady recognized the significance of his rulings and stated: "the Court acknowledges that the application of traditional contributory infringement to large intermediaries like Cox magnifies the uncertainties in this area of the law and raises the specter of undesirable consequences that may follow. This case may provide the vehicle for consideration of those questions."[20] This highly unusual comment may further invite close scrutiny of this case by the Fourth Circuit.

The court went on to discuss various jury instructions and evidentiary rulings challenged by Cox. Most notably, Cox argued that the court's instruction on statutory damages did not properly explain that a compilation is considered a single work for purposes of statutory damages.[21] The court rejected this argument. The court held that BMG was entitled to a per-work recovery even though some of the works were, at one time, published as part of an album. Thus, the instruction proposed by Cox was not necessary.[22]

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12 *BMG*, 2016 WL 4224964 at *11.
13 *Id.* at *12.
14 *Id.*
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.* at *13.
19 *Id.* at *14.
20 *Id.*
21 *Id.* at *16.
22 *Id.* at *17.

The court next turned to BMG's post-trial motions. The jury returned a verdict in favor of Cox on BMG's claim for vicarious infringement, and BMG filed a motion for judgment as a matter of law on this issue. The court noted that vicarious liability requires proof that the defendant had "an obvious and direct financial interest" in the infringing activity.[23] The court determined that the evidence supported the jury's verdict in favor of Cox on this issue.[24]

The court then turned to BMG's motion for permanent injunction. Specifically, BMG requested an injunction whereby Cox would be "enjoined from knowingly and materially contributing to the unauthorized copying, uploading, downloading, transmitting, or distributing by others using its network of any musical composition in which BMG owns or controls an exclusive right under the United States Copyright Act."[25] In rejecting this proposed injunction, Judge O'Grady noted that it was "essentially an order to Cox not to violate the law." As such, the requested injunction failed Rule 65(d)'s requirement that an injunction "state its terms specifically [ ] and describe in reasonable detail … the act or acts restrained or required."[26] The court further observed that the proposed injunction lacked conduct-based instructions. Specifically, the only conduct identified required Cox to notify subscribers of certain information within BMG's notices within two days of receipt. Finally, Judge O'Grady stressed that the balance of hardship did not favor an injunction. "The relief requested would have a substantial spillover effect far beyond the parties to this lawsuit. While there is without a doubt a significant public benefit in reducing copyright infringement, BMG has not demonstrated to the court's satisfaction that such a reduction here would not come at the expense of other nontrivial interests, including privacy and access to the internet."[27] Accordingly, Judge O'Grady denied the request for permanent injunction.

BMG was by far the most significant copyright case decided in the District this year, but a few others are worth noting.

In *Humphreys & Partners Architects, L.P. v. Lessard Design, Inc.*, the defendant filed a motion alleging that the plaintiff committed a fraud on the court based on an allegation that plaintiff's counsel assisted in the preparation of an expert report.[28]

This matter before Judge T.S. Ellis, III, arose out of an architectural design copyright infringement case. Judge Ellis had previously awarded summary judgment in favor of the defendant on all of the plaintiff's claims. The defendant subsequently moved for costs and attorneys' fees. In those filings, defendant's counsel submitted detailed billing records.

Upon review of the billing records, plaintiff's counsel found alleged evidence that defendant's counsel committed fraud before the court by "improperly" assisting in the preparation of the expert report. Accordingly, the plaintiff moved to set aside the judgment based on a claim of fraud on the court pursuant to Fed. R. Civ. P. 60(d)(3).

23 *Id.* at *24 (citations omitted).
24 *Id.*
25 *Id.* at *26.
26 *Id.*
27 *Id.* at *28.
28 No. 1:13-cv-433, 2016 WL 4578146 (E.D. Va. Jan. 1, 2016).

In rejecting this argument, Judge Ellis held that the plaintiff could not show, based on the time entries alone, that the expert reports were false. Similarly, plaintiff could not show the expert reports were part of "a deliberate scheme to directly subvert the judicial process."[29] Judge Ellis then rejected plaintiff's argument that the time entries called into question the award of summary judgment in favor of the defendants. The plaintiff argued that because the time entries created "genuine issues of material fact" with respect to the independence and credibility of the expert witnesses, summary judgment should have not been entered.

Judge Ellis disagreed. The court noted that the plaintiff had failed to raise any issues of credibility with respect to the expert reports during the summary judgment briefing. As such, plaintiff was required to do more than "raise a genuine issue of material fact as to the credibility of the witnesses."[30] Instead, in order to prevail on a motion to set aside the judgment for fraud, the plaintiff was required to prove a "deliberate scheme to directly subvert the judicial process."[31] In Judge Ellis' view, the plaintiff's proffered evidence that an attorney played some role in preparing an expert report fell far short of establishing fraud on the court.

In *LHF Productions, Inc. v. John Does 1-10,* Judge M. Hannah Lauck granted a motion to sever in a copyright infringement case alleging claims against multiple defendants who used BitTorrent protocol to download and/or share the movie *London Has Fallen*.[32] In granting the motion, the court stated: "LHF has merely alleged that the Defendants used BitTorrent to download and share pieces of the Movie. LHF has not included any facts that suggest the Defendants shared those pieces with each other, thus engaging in the same transaction or occurrence."[33] Judge Lauck granted similar motions in several other BitTorrent cases.[34]

PATENT CASES

We next turn to several patent litigation decisions from the District in 2016. Similar to last year, we review several invalidity cases, mostly holding the patent-at-issue invalid. This year's review also includes recent claim construction opinions once again emphasizing plain and ordinary meaning of patent terms. The District also had an opportunity to consider several inequitable conduct cases. We round out the discussion with a few miscellaneous cases involving procedural and evidentiary issues and a decision affirming an arbitration award.

INVALIDITY

In 2016, the District continued to invalidate computer-related patents based on the lack of subject matter eligibility under the Supreme Court's decision in *Alice Corp. v. CLS Bank Int'l*.[35] In each such case over the last year except part of one, the District disposed of the plaintiff's case based on a motion to dismiss and without holding a *Markman* hearing. Thus, over two consecutive years, the District has plainly demonstrated a clear pattern of taking an early and hard look at the subject matter eligibility of

[29] *Id.* at *3.
[30] *Id.* at *4.
[31] *Id.*
[32] No. 3:16-cv-248, 2016 WL 7422657 (E.D. Va. Dec. 22, 2016).

[33] *Id.* at *3.
[34] *LHF Productions, Inc. v. John Does 1-18*, No. 3:16-cv-274, 2016 WL 7422658 (E.D. Va. Dec. 22, 2016); *LHF Productions, Inc. v. John Does 1-24*, No. 3:16-cv-282, 2016 WL 7422659 (E.D. Va. Dec. 22, 2016); *LHF Productions, Inc. v. John Does 1-25*, No. 3:16-cv-283, 2016 WL 7422661 (E.D. Va. Dec. 22, 2016); *LHF Productions, Inc. v. John Does 1-20*, No. 3:16-cv-284, 2016 WL 7423094 (E.D. Va. Dec. 22, 2016); *Cell Film Holdings, LLC v. John Does 1-12*, 2016 WL 7494319 (E.D. Va. Dec. 30, 2016).
[35] 134 S. Ct. 2347 (2014).

patent cases that involve any computer functionality, especially if the patents claim protection of "business methods." And plaintiffs beware, because despite the principle that patents are presumed valid and can only be invalidated by "clear and cogent evidence,"[36] the District is strongly disposed to dismiss at an early stage of the litigation any computer-related patent case that fails to pass muster under the District's strict application of the *Alice* formulation of subject matter eligibility.

One of the most exceptional demonstrations of the District's intellectual flexibility to resolve such cases on the basis of a motion to dismiss arose in *Orbcomm Inc. v. CalAmp Corp*.[37] In that case, Judge Henry E. Hudson was confronted with five patents that broadly dealt with computer platforms for tracking and monitoring "widely dispersed" fleets and mobile assets.[38] Judge Hudson initially denied the defendant's motion to dismiss based upon ineligible subject matter and failure to state a "plausible" claim of patent infringement.[39] Reasoning that the initial record did not require the "level of granular particularity" urged by the defendant, Judge Hudson decided that the complaint passed muster under the patent eligibility standard established in *Alice* and the pleading requirements set forth in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

Upon a motion for reconsideration based on an intervening Federal Circuit decision, *Electric Power Group, LLC v. Alstom S.A.,*[40] Judge Hudson reversed himself and granted the motion to dismiss with respect to one of the patents, but not the other four.[41] In the *Alstom* case, the Federal Circuit invalidated several patents for failure to satisfy both steps of the *Alice* analysis. First, the patents in *Alstom* were directed to ineligible subject matter because they failed to claim anything more than the collection, analysis and display of information derived from "real-time performance monitoring of an electric power grid …."[42] Secondly, the patents in *Alstom* did not limit the claims to "technical means for performing the functions that are arguably an advance over conventional computer and network technology," thereby failing to satisfy step two of the *Alice* analysis (i.e., whether the patents contained an "inventive concept" sufficient to remove them from the class of ineligible subject matter).[43]

Judge Hudson found these holdings dispositive of the validity of the asserted claims of one of the patents-in-suit but not the other four. As to that one patent (US Patent No. 8,855,626), Judge Hudson found that the asserted claims did nothing more than what the Federal Circuit had held to be insufficient in *Alston*, namely, merely describe a process for the selection of information for analysis and display.[44] As to the first *Alice* step, Judge Hudson found that the claims were directed "to the wholly abstract idea of translation."[45] Turning to the second step of *Alice*, Judge Hudson read the Federal Circuit's decision in *Alstom* to confirm that simply identifying the "parameters" for monitoring information did not suffice to qualify as an inventive concept. Nor did the "format translation" called for by the claims do anything more than automate the process of manually inputting information into standardized freight messages. "Reformatting information," Judge Hudson concluded, did not provide the inventive concept essential to validity under the second step of the *Alice* test.[46]

Another example of the District's willingness to entertain early *Alice* motions was Judge Robert G. Doumar's decision in *Nader Asghari-Kamrani and Kamran Asghari-Kamrani v. United Services Automobile Association*.[47] The patent claims in that case involved a "system and method provided by a Central-Entity for centralized identification and authentication of users and their transactions to increase security in e-commerce."[48] Judge Doumar did not hesitate to grapple with the often-difficult distinction between patents that merely recite well-known business practices in computer terms versus those that are " 'necessarily rooted in computer technology in order to overcome a problem specifically arising in the realm of computer networks.' "[49] Judge Doumar found the claims of the patent-in-suit to fall within the former category, and he invalidated them on a motion to

[36] *Microsoft v. i4i Limited Partnership*, 564 U.S. 91, 101 (2011).
[37] No. 3:16-cv-208, 2016 WL 3965205 (E.D. Va. 2016), *reversed on reconsideration*, 2016 WL 6126941 (Oct. 19, 2016).
[38] *Id.* at *1.
[39] *Id.*
[40] 830 F. 3d 1350 (Fed. Cir. 2016).
[41] *Orbcomm Inc. v. Calamp Corp*, 2016 WL 6126941 (E.D. Va. Oct. 19, 2016).
[42] *Id.* at *3, *citing Alstom*, 830 F. 3d at 1353.
[43] *Id.* at *3, citing Alstom, 830 F. 3d at 1351.
[44] *Id.* at *4.
[45] *Id.*
[46] *Id.* at *5.
[47] No. 2:15-cv-478, 2016 WL 3670804 (E.D. Va. July 5, 2016).
[48] *Id.* at *1.
[49] *Id.* at *3, quoting, *DDR Holdings, LLC v. Hotels.com. L.P.,* 773 F. 3d 1245, 1257 (Fed Cir. 2014).

dismiss. In doing so, Judge Doumar reasoned that the claims did nothing more than recite an abstract idea in computer terms: the use of "a third party [intermediary] and a random, time-sensitive code to confirm the identity of a participant to a transaction."[50] This simply did not pass muster under the *Alice* standard.

Judge Liam O'Grady reached the same conclusion in another patent case involving a computer-based map and navigation system. In *Peschke Map Technologies LLC v. Rouse Properties Inc.*, Judge O'Grady granted the defendant's motion to dismiss under *Alice* without holding a claim construction hearing.[51] He found that the patent-in-suit addressed a problem " 'known from the pre-Internet world': navigating through maps and locating information about structures appearing on those maps."[52] Thus the court found that the patent claimed nothing more than an "abstract idea."[53] Moreover, Judge O'Grady did not find in the patent claims an "inventive concept" that would preserve patentability under the second prong of *Alice*. The argument presented by the plaintiff was that the "inventive concept" was "the improvement of computerized mapping through the use of layers and linking."[54] Judge O'Grady was not persuaded, finding instead that the alleged improvement was nothing more than "the computerization of a well-known practice" — namely, the use of a map to depict the shapes of stores as viewed from above to provide users with information about the location and spatial relationship of those stores.[55]

[50] *Id.* at *4.
[51] 168 F. Supp. 3d 881 (E.D. Va. 2016).
[52] *Id.* at 888-89, quoting, *DDR*, 773 F. 3d at 1257.
[53] *Id.* at 889.
[54] *Id.* at 890.
[55] *Id.*

These cases decided over the last year demonstrate the District's continued determination to weed out and invalidate computer-based patents that embody abstract ideas and "pre-Internet" business practices at an early stage of the litigation and without need for a claim construction hearing. Plaintiffs who are considering bringing such cases in the District should expect to face an early invalidity challenge and a rigorous application of the *Alice* standard by judges in the District.

CLAIM CONSTRUCTION

As in years past, the cases from the District in 2016 reaffirm the strong presumption in favor of construing claims based on ordinary and customary meaning without reading more into a claim than the terms expressly provide.

Claim construction begins with the words of the claims. It is a "bedrock principle" of patent law that the claims of a patent define the invention to which the patentee is granted the right to exclude.[56] Claim terms are generally given the ordinary and customary meaning according to a person of ordinary skill in the art at the time of the invention. In some instances, the claim terms are so simple that the ordinary meaning of claim language as understood by a person of skill in the art may be readily apparent even to lay persons, and claim construction in such cases involves little more than the application of the widely accepted meaning of commonly understood words.[57]

[56] *Aventis Pharmaceuticals Inc. v. Amino Chemicals Ltd.*, 715 F.3d 1363, 1373 (Fed. Cir. 2013).
[57] *Id.*

The claims should not be read alone, however, but rather should be considered within the context of the specification of which they are a part. Moreover, the court must not read in limitations from the specification without a clear intent to do so.[58]

In *Vir2us, Inc. v. Invincea, Inc.*, Judge Henry C. Morgan, Jr., declined to construe several disputed terms and instead relied upon the plain and ordinary meaning of the terms in question.[59] For "microprocessor," even though the patent did not define this term, the court found the meaning to be readily apparent to a person of ordinary skill in the art and found that the term did not need to be construed.[60] Similarly, Judge Morgan recognized that a lay person would understand "website address" and thus found that this term needed no further construction.[61] For other technical terms relating to computer storage devices, the court refused to limit these terms to a particular environment. The specification explained that the devices "can consist of hardware, and/or software, and/or a combination of both." Based on the specification's permissive language, the court found that it would be improper to limit these terms to only physical devices.[62] Judge Morgan, however, did limit the term "virtual browsing environment" to a specific application because the claim language itself unambiguously required "a web browser."[63]

In *Tissue Anchor Innovations LLC v. Astora Women's Health, LLC*, Judge Robert G. Doumar declined to construe claim terms that had an ordinary and customary meaning to a person of ordinary skill in the art.[64] Judge Doumar applied an agreed-upon construction to other terms for which a single ordinary and customary meaning was not ascertainable.[65]

In addressing the term "tissue anchor," Judge Doumar refused to include the descriptive term "rigid" in the claim construction because that term was itself not defined. The specification used the language "sufficiently" and "fairly" in connection with the rigidity of the tissue anchor, but offered no guidance on how to differentiate between the two. Judge Doumar found that this ambiguity failed to provide any guidance for a person with ordinary skill in the art to determine the appropriate level of rigidity in connection with the claim scope. Moreover, the specification described both a rigid tissue as well as a preferred flexible tissue anchor tip. Thus, Judge Doumar held that "the embodiments and descriptions describing a rigid tissue anchor should not be interpreted as universal limitations on the device, but rather as one or more embodiments of the device."[66]

INEQUITABLE CONDUCT

In *ORBCOMM Inc. v. CalAmp Corp.*,[67] Judge Hudson denied a motion to dismiss a counterclaim asserting that the patent-in-suit was unenforceable for inequitable conduct. In that case, the operative act was the filing of a certificate of correction with the US Patent and Trademark Office (USPTO) to alter claim language based on a district court's claim construction order, but without disclosing that the order had been vacated. The underlying litigation occurred in the Eastern District of Texas. Early in the litigation, the trial judge entered a claim construction order in which she

[58] *Hill-Rom Services, Inc. v. Stryker Corp.*, 755 F.3d 1367, 1371-1372 (Fed. Cir. 2014).
[59] No. 2:15-cv-162, 2016 WL 453486 (E.D. Va. Feb. 4, 2016).
[60] *Id.* at *5.
[61] *Id.* at *7.
[62] *Id.* at *5.
[63] *Id.* at *6.
[64] No. 2:15-cv-473, 2016 WL 3685079 (E.D. Va. July 6, 2016).
[65] *Id.* at *13.
[66] *Id.* at *6.
[67] No. 3:16-cv-208, 2016 WL 4726548 (E.D. Va. Sept. 9, 2016).

determined “the patent examiner had made an obvious clerical error in the ‘686 patent that could be corrected by the court.” She then construed the term “inputs to be controlled” to mean “inputs to be monitored.”[68] The case was then consolidated with another case asserting infringement of the same patent, and the court vacated the claim construction order to allow claim construction to start over.[69] As the litigation proceeded, ORBCOMM took the position that there was no obvious error, and that the court could not alter the claim terms. ORBCOMM was ultimately successful in this position.[70]

Subsequently, ORBCOMM became the patent owner via a stipulated motion to dismiss. ORBCOMM’s representative (the same attorney that represented ORBCOMM in the litigation) filed a certificate of correction to alter the claim language at issue in the litigation on the basis of an error by the patent examiner.[71] This was the opposite position than that ORBCOMM took in the consolidated case. Judge Hudson determined that the intent of ORBCOMM’s representative was inferable from the representative’s conduct, including expediting the request for the certificate of correction, attaching one claim construction order and not the other, and not including a complete record of the patent litigation.[72] Additionally, Judge Hudson determined that materiality was sufficiently alleged because the plaintiff had specifically identified an individual and the allegedly material documents, and “outlined how [the representative] potentially mis[led] the PTO by providing only the vacated [ ] Claim Construction Order and how that omission was material to the PTO’s decision to grant the certificate of correction.”[73]

In *Certusview Technologies, LLC v. S&N Locating Services, LLC*, Judge Mark S. Davis considered whether an earlier finding of patent ineligibility precluded a determination of inequitable conduct.[74] The court held that it did not, citing to Federal Court precedent, and went on to determine whether the defendant had proved its inequitable conduct counterclaim.[75] Judge Davis ultimately determined that the patent-at-issue was not unenforceable due to inequitable conduct.[76]

In *Asghari-Kamrani v. United Services Automobile Association*, Judge Doumar determined that the defendant had properly raised facts sufficient to survive a motion to dismiss an inequitable conduct affirmative defense.[77] The defendant alleged that the patent owner had engaged in inequitable conduct with the USPTO by providing false certifications in the form of nonpublication requests in two patents, and had misrepresented the priority claims of the patents.[78] Specifically, the defendant alleged that the patent owner had certified on the nonpublication request that the invention would not be the subject of an overseas application, but a PCT application had in fact been filed covering the same invention.[79] Additionally, the defendant alleged that the patent owner had claimed priority to prior applications as “continuations” when the applications should have been identified as

68 *Id.* at *1.
69 *Id.* at *2.
70 *Id.*
71 *Id.* at *2.
72 *Id.* at *4-5.

73 *Id.* at *5.
74 No. 2:13-cv-346, 2016 WL 4134643 (E.D. Va. Aug. 2, 2016).
75 *Id.* at *2-3.
76 *Id.* at *26-28, *33-40.
77 No. 2:15-cv-478, 2016 WL 7177617 (E.D. Va. Dec. 9, 2016).
78 *Id.* at *4.
79 *Id.* at *8-10.

"continuations-in-part."[80] Judge Doumar determined that the facts alleged by the defendant were sufficient to meet the standard for surviving a motion to dismiss.[81]

MISCELLANEOUS PATENT CASES

Motion to amend Final Pretrial Order denied

In *Samsung Elec. v. NVIDIA Corp.*, Judge Robert E. Payne addressed a request to amend the final pretrial order entered in the case.[82] A key issue in the case was whether the defendant controlled its supplier of the accused products.[83] The plaintiff had moved to amend the final pretrial order to include the defendant's response to an interrogatory, which included a document that plaintiff argued showed defendant's control over its supplier.[84] This motion was granted and in response, defendant filed a motion to amend the final pretrial order to add its executive vice president of operations as a witness to testify about the statements that were made in defendant's response to this interrogatory.

Judge Payne considered the four factors outlined in *Koch v. Koch Indus., Inc.*, in assessing the defendant's motion: "(1) prejudice or surprise to the party opposing trial of the issue; (2) the ability of that party to cure any prejudice; (3) disruption to the orderly and efficient trial of the case by inclusion of the new issue; and (4) bad faith by the party seeking to modify the order."[85]

Regarding the first factor, the court found that the record was clear that plaintiff was surprised by the addition of defendant's witness because the witness had never been disclosed, under Fed. R. Civ. P. 26(a), as a knowledgeable person on any issue.[86] Additionally, granting defendant's motion would prejudice plaintiff because it would require plaintiff to take a deposition on the eve of trial.[87] The court also found the second factor to weigh against defendant. While the court could allow a deposition of this additional witness, because discovery had closed, plaintiff would not be able to pursue additional paths of discovery that the witness's testimony might reveal.[88]

Additionally, given that commencement of the trial was only a few days away, allowing testimony of this additional witness would disrupt an orderly and efficient trial by requiring adjustment of the trial preparations. Thus the timing of the defendant's motion weighed in favor of denying it.[89] Regarding the fourth factor, the court determined that defendant had not acted in bad faith.[90]

Based on the *Koch* factors, the court held that the defendant had not shown that its requested amendment of the final pretrial order was necessary to prevent manifest injustice, and accordingly the defendant's motion to supplement its witness list was denied.[91] In reaching this conclusion, Judge Payne noted that defendant itself had acknowledged that there were four previously identified witnesses who could potentially provide testimony about the issue of control over the supplier.[92]

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80 *Id.* at *15-16.
81 *Id.* at *17.
82 No. 3:14-cv-757, 2016 WL 356083 (E.D. Va. Jan. 28, 2016).
83 *Id.* at *1.
84 *Id.*
85 *Id.* (quoting *Koch v. Koch Indus., Inc.*, 203 F.2d 1202, 1222 (10th Cir. 2000)).
86 *Id.* at *2.
87 *Id.*
88 *Id.*
89 *Id.*
90 *Id.*
91 *Id.* at *3.
92 *Id.*

Motive for filing suit is irrelevant

In *Samsung Elec. v. NVIDIA Corp.*, plaintiff filed a motion to exclude the testimony of its vice president regarding the plaintiff's motive for instituting the action.[93] The plaintiff also sought a curative instruction to address a "thinly veiled implication" in defendant's opening statement regarding plaintiff's motive, specifically that plaintiff brought this action as a means of retaliation against defendant.[94]

Judge Robert E. Payne relied on the general rule that "a plaintiff's motive for bringing suit is irrelevant, except in the face of certain equitable defenses, bad faith, or questions of witness bias," in finding that plaintiff's motive was irrelevant to the underlying questions of infringement and validity.[95] The court found that bringing an infringement action does not in itself raise any issue of bad faith that makes motive relevant.[96] As such, the court granted plaintiff's motion to exclude the testimony regarding plaintiff's motive for instituting the action, reasoning that the introduction of such testimony would be unfairly prejudicial, which would substantially outweigh any marginal relevance of the motive evidence.[97] The court also gave a curative instruction regarding defendant's opening statement implicating the plaintiff's motive for filing suit.[98]

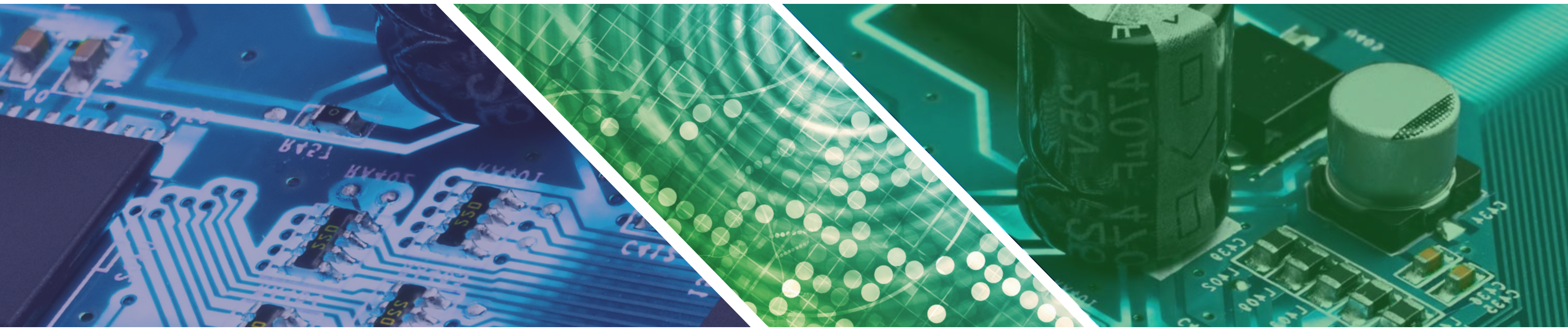
Mistrial declared as a sanction for failure to disclose information relied upon by expert

In *Samsung Elec. v. NVIDIA Corp.*, defendant moved to strike the expert testimony and reports offered by plaintiff after the expert testified at trial that he had relied on undisclosed images in forming his opinion.[99] The plaintiff's reverse engineering expert was asked to "tear down" the allegedly infringing chips and offer an opinion about the design of the accused chips and how defendant's supplier had made them.[100] During cross-examination at trial, plaintiff's reverse engineering expert testified that, in forming his opinions, he had relied on images that were not disclosed in discovery or in his expert reports provided to counsel for either side.[101]

The defendant moved for sanctions pursuant to Fed. R. Civ. P. 37(c)(1).[102] The process of deciding whether to impose such sanctions involves three steps: "(1) determining that a violation of a discovery order or one of the Federal Rules of Civil Procedure occurred; (2) determining whether that violation was harmless and substantially justified; and (3) fitting a sanction to the violation, if one is found."[103] In this case, the parties had agreed to a stipulated discovery order that provided: "all materials generated by a testifying expert with respect to that person's work are exempt from discovery rules unless relied upon by the expert in forming any opinions in this litigation."[104] As such, plaintiff's obligation was to disclose the documents relied upon by the expert, and by failing to disclose all of the materials relied upon by its expert, plaintiff violated the stipulated discovery order.[105]

Standing alone, nondisclosure does not require or justify corrective action, and a court only takes action if the failure to disclose was not "(1) substantially

93 No. 3:14-cv-757, 2016 WL 754547 (E.D. Va. Feb. 23, 2016).
94 *Id.*
95 *Id.* at *2.
96 *See Virginia Panel Corp. v. MAC Panel Co.*, 133 F.3d 860, 873 (Fed. Cir. 1997).
97 *Id.* at *4.
98 *Id.* at *1.
99 314 F.R.D. 190 (E.D. Va. 2016).
100 *Id.* at 194.
101 *Id.* at 195.
102 *Id.*
103 *Id.* at 195-96.
104 *Id.* at 196 (emphasis in original).
105 *Id.* at 196-97.



justified and (2) harmless."[106] In the Fourth Circuit, this standard requires consideration of five factors set forth in *Southern States*: "(1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the evidence; and (5) the nondisclosing party's explanation for its failure to disclose the evidence."[107] In applying the *Southern States* factors to this case, the court found that plaintiff's non-disclosure was neither harmless nor substantially justified.[108]

Specifically, the court found that even though the defendant may have been on notice that not all of the images had been disclosed when the witness testified in deposition, such notice was insufficient to cure a failure to disclose materials that ought to have been included in the expert report because "disclosure in the right form (complete) and at the right time (with the expert report, before the expert's deposition) is critical to an opposing party's ability to engage in meaningful expert discovery (critical analysis of the expert's report and taking of a targeted deposition)."[109] The only way to cure the surprise would be to give defendant an opportunity to engage in the full expert discovery to which it was entitled.[110]

Since the court found that a violation occurred and that the violation was not harmless or substantially justified, it was necessary to determine what sanction to impose. District courts enjoy broad discretion to select an appropriate remedy in light of the totality of the circumstances.[111] The Fourth Circuit employs a four-part test to guide the exercise of that discretion, determining: "(1) whether the non-complying party acted in bad faith, (2) the amount of prejudice that noncompliance caused the adversary, (3) the need for deterrence of the particular sort of noncompliance, and (4) whether less drastic sanctions would have been effective."[112] In assessing these factors, the court found that limited cost-shifting, in conjunction with a mistrial, best effectuated the need for deterrence of nondisclosure, while not granting defendant a windfall for plaintiff's inaction.[113]

Shortly after the mistrial was declared, defendant filed a motion renewing its request to supplement its witness list to add its executive vice president of operations as a witness to testify about defendant's control over its supplier. The court again denied this request, citing the cumulative nature of the testimony and that plaintiff could not take the type of discovery necessary to cure the surprise associated with defendant's addition of a new witness.[114]

Arbitration award affirmed

Bayer CropScience AG v. Dow AgroSciences LLC involved a dispute arising from a patent license agreement between the parties.[115] The plaintiff alleged that defendants violated the agreement, causing plaintiffs to terminate the agreement and sue for patent infringement.[116] The license agreement contained a mandatory arbitration clause that provided for final binding arbitration in accordance with the Rules of

[106] *Id.* at 197 (citing Fed. R. Civ. P. 37(c)(1); *Southern States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 595 (4th Cir. 2003)).
[107] *See Southern States*, 318 F.3d at 597.
[108] *Samsung Elec. Co.,* 314 F.R.D. at 197.
[109] *Id.* at 198.
[110] *Id.*

[111] *Id.* at 200.
[112] *Id.* (citations omitted).
[113] *Id.* at 201.
[114] *Samsung Elec. Co., Ltd. v. NVIDIA Corp.*, No. 3:14-cv-757, 2016 WL 1064535 (E.D. Va. Mar. 14, 2016).
[115] No. 2:12-cv-47, 2016 WL 205378 (E.D. Va. Jan. 15, 2016) (appeal filed).
[116] *Id.* at *1.

the International Chamber of Commerce (ICC).[117] The arbitration proceeding was commenced in August 2012, and it concluded with a final award issued in October 2015.[118] The plaintiffs filed a motion to confirm the final arbitration award, and defendants subsequently filed a motion to vacate the arbitration award.[119]

Arbitration agreements are favored in federal courts, as are those awards stemming from such agreements, and there is a presumption that courts should confirm the arbitration award.[120] The Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq*., applies to patent contracts including settlement and licensing agreements.[121] Pursuant to the Federal Arbitration Act, a district court may vacate an arbitration award if the court finds: "(1) fraud in procuring the award; (2) partiality on the part of the arbitrators; (3) gross misconduct by the arbitrators; or (4) failure of the arbitrators to render a mutual, final, and definite decision."[122]

Judge Raymond A. Jackson found the arbitration award at issue to be final and binding pursuant to the license agreement and that it had already been scrutinized and approved by the ICC.[123] The court evaluated the grounds for vacating an arbitration award enumerated by the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention, which establish a very heavy burden to vacate an arbitration award.[124] The court found that the record in no way supported a finding that defendants suffered from incapacity, lack of notice, a partial tribunal, or faced a nonbinding award. The court also rejected the defendant's arguments that the subject matter was not subject to arbitration and that the panel's award fell outside the scope of what was contemplated in the arbitration.[125] As such, the primary issue before the court was whether the arbitration award violated public policy.[126] In evaluating the public policy concerns raised by defendants, the court found no reason to vacate the award of contract damages that were clearly contemplated when the case was submitted to arbitration. The court also declined to find that the panel disregarded unambiguous contract provisions or that it failed to draw the essence from the applicable agreements.[127] As such, the court found that the arbitration was valid, and that the panel's award was final and binding.[128]

The defendants had alternatively moved for a stay of the proceedings until the USPTO issued final office actions in a pending reexamination proceeding of all the patents-at-issue.[129] A district court may exercise its discretion when ruling on a motion to stay proceedings pending reexamination of the patents-in-suit by the USPTO.[130] When considering a motion to stay pending USPTO reexamination, a court examines "(1) whether discovery is complete and a trial date is scheduled; (2) whether a stay would simplify the matters at issue; and (3) whether a stay would unduly prejudice or clearly disadvantage the non-moving party."[131] In determining

[117] *Id.* at *3.
[118] *Id.* at *2.
[119] *Id.*
[120] *Id.*
[121] *Id.* at *3.
[122] *Id.* (citing *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1370 (Fed. Cir. 2006); 9 U.S.C. § 10 (1994)).
[123] *Id.* at *4.
[124] *Id.* at *5.
[125] *Id.*
[126] *Id.*
[127] *Id.* at *6.
[128] *Id.* at *7.
[129] *Id.*
[130] *Id.* (citing *NTP, Inc. v. Research in Motion, Ltd.*, 397 F. Supp. 2d 785, 787 (E.D. Va. 2005).
[131] *Id.* (quoting *ePlus, Inc. v. Lawson Software*, 2012 WL 1279092, at *2 (E.D. Va. Mar. 31, 2010).

that a stay was not warranted, the court reasoned that plaintiffs would suffer serious potential harm because prolonging the litigation may make satisfying the judgment more difficult.[132] Furthermore, defendants had ample time to raise this issue well before the very end of the three-year binding arbitration process.[133]

CASES ORIGINATING IN THE USPTO

The District considered several cases originating in the USPTO. In these cases, the court considered such topics as the reviewability of Patent Trial and Appeal Board (PTAB or Board) institution decisions in postgrant proceedings, patent term adjustment, patent term extension, collateral estoppel, standing and the USPTO's recovery of attorneys' fees in § 145 actions.

No jurisdiction to review termination of IPR proceeding

In *Medtronic, Inc. v. Lee*, Judge Gerald Bruce Lee held that the court lacked jurisdiction to review the decision of the PTAB terminating an *inter partes* review (IPR).[134] Cardiocom, LLC (Cardiocom) had filed a petition requesting that the Board institute an IPR prior to Cardiocom's being acquired by Medtronic, Inc. (Medtronic). Cardiocom attempted to add Medtronic as a "Real Party in Interest" to the IPR, but shortly thereafter, the Board decided against instituting the IPR.[135] Subsequently, Medtronic filed new petitions requesting IPRs against the same patents, but did not name Cardiocom, Medtronic's wholly owned subsidiary, as a Real Party in Interest to the IPRs.[136] The Board instituted the petitions filed by Medtronic.[137]

The patent owner opposed the requests based on the failure to name Cardiocom as a Real Party in Interest, and requested that the Board terminate the proceedings based on this failure.[138] After briefing and additional discovery, the Board determined that, because Cardiocom "labeled *itself*" as the Real Party in Interest in the prior petitions, as well as other considerations, Cardiocom was a Real Party in Interest.[139] The Board terminated the proceedings.

Medtronic appealed the termination of the proceedings to the district court for review.[140] Under § 314(d) of the America Invents Act (AIA), the "determination by the Director whether to institute an *inter partes* review under this section shall be final and nonappealable."[141] Medtronic argued that the Administrative Procedures Act (APA) gives plaintiffs "who have no other remedy an action to challenge an agency's final action."[142] However, Judge Lee held that the APA does not provide review in this situation, as § 314(d) of AIA explicitly precludes review of the institution decision. It is "undoubtedly clear that Congress intended to rebut the presumption of judicial reviewability the APA assigns and through the AIA, preclude district courts from exercising jurisdiction over APA challenges on the PTAB's determination of whether to institute *inter partes* review."[143]

Patent term adjustment was a popular topic in the E.D. Va. in 2016

In *Singhal v. Lee*, the patent owner challenged the length of patent term adjustment awarded to

[132] *Id.* at *8.
[133] *Id.*
[134] 151 F.Supp.3d 665 (E.D. Va. Jan. 21, 2016).
[135] *Id.* at 669.
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.* at 670.
[140] *Id.*
[141] *Id.* at 674 (citing 35 U.S.C. § 314(d) (2011)).
[142] *Id.* at 673.
[143] *Id.* at 674.

two patents.[144] The patent owner argued that 35 U.S.C. § 154(b)(2)(B) is "impermissibly vague as a constitutional matter because it does not define the term 'request for continued examination.' "[145] Judge Claude M. Hilton rejected this argument, determining that the "void for vagueness" doctrine only applies to statutes that prohibit conduct, which § 154 does not.[146] Additionally, the statute is not vague because the use of the phrase "request for continued examination" is clear, and it contains a cross-reference to the statute creating the request for continued examination procedure.[147]

Maass v. Lee also involved constitutional challenges related to patent term adjustment.[148] In that case, the patent owner also challenged the amount of patent term adjustment awarded to one patent, arguing that the statute is "impermissibly vague," "overbroad" and an "impermissible restriction taking private property for public use with just compensation."[149] In keeping with the decision in *Singhal*, Judge T.S. Ellis, III, determined that the statute is not impermissibly vague or overbroad.[150] Additionally, Judge Ellis determined that the choice not to award "B-delay" under 35 U.S.C. § 154(b)(1)(B) is "not a taking of property, but rather a decision not to award additional property rights."[151]

Actelion Pharmaceuticals Ltd. v. Lee also presented an issue involving the calculation of a patent term adjustment.[152] Judge Liam O'Grady stayed the proceeding at the request of the USPTO in order to await a decision from the Federal Circuit in *Pfizer v. Lee*.[153] The court noted that "[b]oth cases present the question of whether a defective restriction requirement stops the A-Delay clock."[154] Judge O'Grady considered judicial economy and the impact on the parties of the requested stay, and determined that a stay was proper given the similarity of the legal issues involved.[155]

USPTO's error in denying patent term extension on erroneous interpretation of law is harmless

In *Angiotech Pharmaceuticals Inc. v. Lee*, Judge Ellis held that the USPTO's error in relying on the wrong definition of "medical device" in denying the request for patent term extension was harmless.[156] The USPTO relied upon the Federal Food, Drug, and Cosmetic Act's definition of "medical device" to deny the patent term extension request of the patent owner.[157] However, Judge Ellis determined that, while the USPTO should have relied upon the ordinary meaning of the phrase,[158] the error was harmless because the claims at issue would not qualify as a medical device under the properly construed term.[159]

Prior patent proceeding did not collaterally estop USPTO from challenging plaintiff's standing

In *Realvirt, LLC v. Lee,* the plaintiff sought summary judgment dismissing the USPTO's defense that the plaintiff lacked standing to pursue a § 145 action.[160] The plaintiff argued that the USPTO was collaterally estopped from raising this issue because the administrative proceeding in which the USPTO rejected the plaintiff's patent application already established plaintiff's ownership interest in the patent.[161] Judge Ellis denied plaintiff's motion, and held

144 No. 1:12-cv-708, 2016 WL 1305294 (E.D. Va. March 28, 2016).
145 *Id.* at *1.
146 *Id.* at *1-2.
147 *Id.* at *1-2.
148 No. 1:16-cv-66, 2016 WL 2899262 (E.D. Va. May 17, 2016).
149 *Id.* at *2.
150 *Id.* at *3.
151 *Id.* at *4.
152 No. 1:15-cv-1266, 2016 WL 205377 (E.D. Va. Jan. 13, 2016).
153 *Pfizer v. Lee*, 811 F.3d 466 (Fed. Cir. 2016).

154 *Actelion*, 2016 WL 205377 at *4.
155 *Id.* at *5.
156 No. 1:15-cv-1673, 2016 WL 3248352 (E.D. Va. June 8, 2016).
157 *Id.* at *3.
158 *Id.* at *11.
159 *Id.* at *15.
160 No. 1:15-cv-963, 2016 WL 1532236 (E.D. Va. Apr. 14, 2016).
161 *Id.* at *2.

that "where, as here, the underlying administrative proceedings were non-adversarial and wholly *ex parte* it is clear that the doctrine of collateral estoppel does not apply."[162] The court further held that the issues in the administrative proceeding were not identical to those presented in the court and were not fully resolved in the prior proceeding. Moreover, the USPTO did not have a full and fair opportunity to litigate the standing issue, and any determination that the plaintiff had standing in the administrative proceeding was a preliminary finding and not a final determination on the merits.[163]

Plaintiff had no standing to pursue claim of patent ownership

Subsequently, in *Realvirt, LLC v. Lee*, Judge Ellis had an opportunity to consider the merits of the USPTO's standing defense.[164] The plaintiff claimed ownership through an assignment from two of the inventors. The issue in the case turned on whether the inventors had an ownership interest in the patent at the time they allegedly assigned it to the plaintiff.[165] The court noted that the inventors had previously assigned their rights to an entity known as Clearpoint Research Corporation (Clearpoint). The plaintiff argued that Clearpoint had assigned the patent back to the inventors, but the evidence was insufficient to prove that had occurred. The court observed that state law generally governs contract issues in a patent case, but that certain federal law preempts state law.[166] Under federal law, an assignment of rights in a patent must be in writing, and an agreement to assign patent rights in the future is not a sufficient assignment.[167] The plaintiff was unable to present written evidence to support an assignment that satisfied federal law, and thus, the plaintiff lacked standing to bring a suit under § 145.[168]

Recovery by USPTO of attorney's fees

In the next installment in the *Realvirt* case, the USPTO filed a motion to recover its expenses, including attorney's fees.[169] The motion arose after the plaintiff filed an appeal of the court's resolution of the standing issue. In light of the appeal, plaintiff moved to stay any decision on the USPTO's motion. Judge Ellis denied the motion to stay because, under the statute, plaintiff was required to pay the expenses regardless of the substantive outcome of the case.[170] Judge Ellis then considered the merits of the USPTO's motion. He determined that the requirement that the plaintiff pay "all expenses" included the USPTO's attorney's fees. The court granted the motion, and awarded $48,455 in attorney and paralegal fees as well as expert witness fees.[171] The plaintiff then appealed this decision to the Federal Circuit, and argued that the statute did not permit the USPTO to recover attorney's fees. The plaintiff moved to stay the payment obligation in light of this appeal. Judge Ellis granted the motion to stay with respect to the attorney's fees portion of the award during the pendency of the appeal.[172]

In *Nankwest, Inc. v. Lee,* the court reached the opposite result concerning the USPTO's request for fees.[173] Judge Lee determined that § 145 did not include the recovery of attorney's fees because, while the statute uses the phrase "expenses," the "American Rule" that each party is responsible for their own attorneys' fees will only be deviated from if the statute is "specific and explicit."[174] Judge Lee concluded that § 145 is not specific or explicit about the recovery of attorneys' fees, and, thus, it does not displace the "American Rule." This decision was also appealed to the Federal Circuit.[175]

TRADEMARK CASES

INFRINGEMENT AND FALSE ADVERTISING

The District considered several trademark infringement and false advertising cases in 2016. The plaintiffs met with varying degrees of success. Some cases were dismissed, but at least one resulted in a bench trial with judgment in favor of the plaintiff, and another granted the plaintiff injunctive relief.

Injunction issued in false advertising case

In *Handsome Brook Farm, LLC v. Humane Farm Animal Care, Inc.*, Judge James C. Cacheris granted prohibitory and mandatory preliminary injunctions in a false advertising case.[176]

[162] *Id.* at *3.
[163] *Id.* at *4.
[164] No. 1:15-cv-963, 2016 WL 3912855 (E.D. Va. July 19, 2016) (appeal filed).
[165] *Id.* at *8.
[166] *Id.*
[167] *Id.* at *9.
[168] *Id.*
[169] No. 1:15-cv-963, 2016 WL 6471033 (E.D. Va. Oct. 27, 2016) (appeal filed).
[170] *Id.* at *4.
[171] *Id.* at *5.
[172] *Realvirt, LLC v. Lee*, No. 1:15-cv-963, 2016 WL 7325704 (E.D. Va. Nov. 22, 2016).
[173] 162 F.Supp.3d 540 (E.D. Va. Feb. 5, 2016) (appeal filed).
[174] *Id.* at 542.
[175] No. 16-1794 (Fed. Cir. Apr. 5, 2016).
[176] No. 1:16-cv-592, 2016 WL 3348431 (E.D. Va. June 15, 2016) (appeal filed).

Handsome Brook Farm (Handsome Brook), an egg producer, sued Humane Farm Animal Care (HFAC) for false advertising under Section 43(a) of the Lanham Act. Handsome Brook Farm produces eggs that it labels as “Certified Organic” (under a US Department of Agriculture program) and as “American Humane Certified” and “Pasture Raised” (under American Humane Association programs). HFAC, a nonprofit organization that promotes the humane treatment of animals, maintains a separate “Certified Humane®” standard, which egg producers can use if they meet HFAC standards and also pay application fees, inspection fees and licensing fees to HFAC. Handsome Brook’s eggs are not sold with the HFAC certification.[177]

This dispute arose when HFAC received a complaint and then a separate audit report suggesting that Handsome Brook was mislabeling its eggs at a certain egg packaging plant. Believing the audit report to be accurate and taking no independent steps to verify it, HFAC’s executive director responded by writing an email about Handsome Brook’s eggs entitled “Unverified Pasture Raised Label Claims.”[178] In the email, HFAC stated: (1) that it had inspected an egg packaging plant in response to a whistleblower complaint about Handsome Brook eggs; (2) that the Pasture Raised certifications on Handsome Brook’s eggs could not be verified and at least some of Handsome Brook’s eggs were not pasture raised; (3) that, although the Handsome Brook eggs displayed the Certified Organic label, this certification was not current; and (4) that the veracity of Handsome Brook’s American Humane Certified labeling could not be substantiated. The email asked recipients to consider changing suppliers and touted the benefits of eggs having HFAC’s Certified Humane® certification. HFAC sent the email to 69 individuals at 39 companies, including the top 10 conventional grocery chains in the United States.[179]

Handsome Brook sued HFAC for false advertising under Section 43(a), asserting that HFAC’s email had caused Handsome Brook to lose customers, revenue and goodwill. After obtaining a TRO, Handsome Brook sought a preliminary injunction against HFAC, which the court granted in part.[180]

First, the court found that Handsome Brook was likely to succeed on the merits of its false advertising claim against HFAC. As a threshold matter, the court noted that, to be actionable under Section 43(a), HFAC’s email had to be “commercial advertising or promotion.”[181] And, applying the four-part test set forth in *Gordon & Breach Science Publishers v. American Institute of Physics*, 859 F. Supp. 1521 (S.D.N.Y. 1994), the court held that the email was commercial advertising.[182] First, the email was *commercial speech*. Although HFAC asserted that it is a nonprofit organization promoting the humane treatment of animals, the court noted that HFAC pursues that objective through distinctly commercial means. Farmers seek HFAC’s Certified Humane® certification for commercial reasons, and they pay HFAC inspection fees, application fees and licensing fees for that certification. Against this backdrop, the primary purpose of HFAC’s email was commercial: to induce retailers to purchase HFAC-certified eggs rather than Handsome Brook’s eggs. Second, there was a *competitive relationship* between HFAC and Handsome Brook. Although HFAC and Handsome

177 *Id.* at *1.
178 *Id.* at *3.

179 *Id.*
180 *Id.* at *4.
181 *Id.* at *5.
182 *Id.* at *5-9.

Brook were not direct competitors, an indirect competitor has standing to pursue a Lanham Act false advertising claim, and competition at the same level of a distribution chain is not required. Third, the email was sent for a *promotional purpose*. HFAC asserted that the email was akin to a fundraising letter promoting a public purpose: the humane treatment of animals. But the court found that the true purpose of the letter was to communicate the value of HFAC's Certified Humane® certification and to induce retailers to purchase Certified Humane® eggs rather than Handsome Brook's eggs. Fourth, the email was *disseminated sufficiently* to constitute advertising. The court noted that whether a particular communication qualifies as advertising depends on the number of contacts made with the communication in relation to the total market at issue. Here, the email went to 36 companies, including national and regional grocers, including the top 10 conventional grocery chains in the country, and accounting for more than 16,000 grocery stores nationwide.[183]

Next, the court found that HFAC's email contained at least two *literally false* statements as well as one statement that was *false by necessary implication*. First, the email stated that HFAC's audit showed that eggs being packed into Handsome Brook cartons were not pasture raised, but Handsome Brook produced unrefuted documents showing that statement to be false. Second, the email stated that HFAC had obtained the audit of the egg packaging facility in response to a whistleblower complaint about Handsome Brook, when, in fact, the audit was conducted in response to the facility's request for an update of its HFAC certification, not in response to any complaint about Handsome Brook. Third, the email created the impression that Handsome Brook mislabeled at least some of its eggs as Certified Organic, when in fact those eggs were properly labeled Certified Organic.[184]

[183] *Id.*

Completing its analysis of Handsome Brook's likelihood of success on the merits, the court found no real dispute that the false and misleading statements in HFAC's emails: were *material*, in that they were likely to influence consumers' purchasing decisions; *actually deceived consumers*, since they were literally false and also caused some retailers to suspend sales of, or delay introduction of, Handsome Brook's eggs; and, for the same reason, *injured* Handsome Brook. Finally, the court found that HFAC's false statements were placed in *interstate commerce* because they were emailed to retailers throughout the country.[185]

As for the remaining preliminary injunction factors, the court found that Handsome Brook made a clear showing that it would be *irreparably harmed* absent a preliminary injunction against HFAC. HFAC's email had caused Handsome Brook to lose customers and goodwill, and it could cause a permanent loss of customers and goodwill unless enjoined. Moreover, because HFAC's email had "seeped even beyond the initial recipients" and created rumors at an industry trade show, the court found that mandatory preliminary injunctive relief, in the form of a corrective email from HFAC, was also required.[186]

The court also found that the *balance of the equities* favored both the prohibitory and mandatory preliminary injunctions. Any infringement on HFAC's right to express itself was trumped by the false and misleading nature of the email it had sent. And HFAC had brought the risk upon itself by disseminating

[184] *Id.* at *9-10.
[185] *Id.* at *11.
[186] *Id.* at *11-12.

an email that contained damaging statements after performing only a cursory investigation of the veracity of those statements.[187]

Finally, the court found that the *public interest* in fair competition and in avoiding consumer confusion and deception supported both the prohibitory and mandatory preliminary injunctions.[188]

Bench trial finds in favor of plaintiff in trademark infringement suit

In *Select Auto Imports Inc. v. Yates Select Auto Sales, LLC*, the court conducted a bench trial and found in favor of the plaintiff on a trademark infringement claim and granted injunctive relief.[189]

This case involved two used car dealerships located less than four miles away from each other in Alexandria, Virginia. Plaintiff Select Auto Imports (Select Auto), the owner of the federally registered SELECT AUTO IMPORTS mark, sued defendant Yates Select Auto Sales (Yates) for federal trademark infringement and unfair competition (and for related Virginia state law claims) based on Yates' adoption and use of the mark YATES SELECT AUTO SALES.[190]

After a two-day bench trial, Judge Gerald Bruce Lee applied the nine Fourth Circuit likelihood of confusion factors to the evidence, found that each factor weighed in favor of confusion or was neutral, and thus found that the YATES SELECT AUTO SALES mark was confusingly similar to the SELECT AUTO IMPORTS mark.[191]

[187] *Id.* at *12.
[188] *Id.* at *13.
[189] No. 1:15-cv-679, 2016 WL 3742312 (E.D. Va. July 7, 2016).
[190] *Id.* at *2-3.
[191] *Id.* at *1.

Strength of the Plaintiff's Mark. The court found that Select Auto's SELECT AUTO IMPORTS mark was both conceptually and commercially strong. Although the USPTO required Select Auto to disclaim the terms "AUTO IMPORTS," the fact that the USPTO registered the SELECT AUTO IMPORTS mark without a showing of secondary meaning was "powerful evidence" that the mark was suggestive and thus inherently distinctive. The SELECT AUTO IMPORTS mark had also acquired secondary meaning, and was commercially strong, because Select Auto had been the exclusive user of the mark in the Washington, DC metropolitan area for nearly three decades, had spent millions in advertising, and had enjoyed commercial success under the mark. Although there was evidence of other businesses using SELECT marks, including some in the automotive business in other areas in Virginia and Maryland, Select Auto's market was the Washington, DC metro area, and there was no evidence of any third party SELECT marks being used there.[192]

Similarity of the Marks. The court found that the SELECT AUTO IMPORTS and YATES SELECT AUTO SALES marks were similar in sight and sound, because they contained the identical terms SELECT and AUTO, and were similar in meaning because the terms SELECT and AUTO had the same connotation in both marks. In addition, the dominant portions of the two marks were SELECT and YATES SELECT, and the addition of a house mark (i.e., YATES) to two otherwise identical marks often will not avoid a likelihood of confusion and can even aggravate rather

[192] *Id.* at *9-11.

than mitigate confusion. The court also noted that the logos used with the two marks were "essentially mirror images of each other."[193]

Similarity of the Goods and Services. The court found significant overlap in the goods and services that Select Auto and Yates offered. Both parties sold only used cars, and most of the cars that both sold were luxury imports. The court also found that the geographic proximity between two businesses can play a significant role in the likelihood of confusion analysis, and that the close proximity between Select Auto and Yates made the similarity of their goods and services "even more prominent."[194]

Similarity of the Facilities. The court easily dispensed with this factor, noting that both plaintiff and defendant "sell used cars to the general public, have parking lots where the used cars are displayed for sale, and have offices where sale transactions are conducted."[195]

Similarity of Advertising. The court found that Yates' advertising channels were entirely or almost entirely subsumed within Select Auto's advertising channels. Each party employed its own website, Google+, Twitter, Facebook, a blog, store signage and merchandise, such as polo shirts and hats. And, again, the proximity of the two businesses increased the similarity of their advertising because that advertising targeted consumers in the same geographic area.[196]

Defendant's Intent. In finding bad faith intent on the part of Yates, the court noted that courts have often inferred bad faith where the defendant had prior knowledge of the plaintiff's mark and there was other circumstantial evidence of intent as well. Yates admittedly had knowledge of Select Auto's mark (Mr. Yates had bought a car from Select Auto), and the proximity between the two dealerships, the success and reputation of Select Auto, the similarity between the two marks, and the use of the marks on similar goods and services all pointed toward a finding of bad faith intent. In addition, the court found Mr. Yates's explanation as to why he chose the term SELECT — because he remembered the term being used in connection with "Safeway Select meats" — to be unpersuasive.[197]

Actual Confusion. The court noted that evidence of actual confusion is not required to find a likelihood of confusion, given the difficulty of obtaining such evidence, and that actual confusion "is such persuasive evidence of the likelihood of confusion that even a minimal demonstration of actual confusion may be significant." In this case, there was evidence of at least three instances of actual confusion between Select Auto and Yates. These three actual confusion incidents weighed in favor of a likelihood of confusion, particularly given the fact that Yates had been using its YATES SELECT AUTO SALES mark for only a year, Select Auto sold about 50 cars per month, and Yates sold only about 9 cars per month.[198]

Sophistication of Consumers. The court found this factor to be neutral because the relevant consumer population for the parties' used cars was the public at large, and the sophistication of consumers would vary and would include unsophisticated individuals.[199]

[193] *Id.* at *11-12
[194] *Id.* at *12-13.
[195] *Id.* at *13.
[196] *Id.* at *13-14.
[197] *Id.* at *14.
[198] *Id.* at *14-15.
[199] *Id.*

Having found a likelihood of confusion, the court entered a permanent injunction requiring Yates, among other things, to cease and desist from using the YATES SELECT AUTO SALES mark or any other mark confusingly similar to the SELECT AUTO IMPORTS mark.[200]

Trademark-related counterclaims dismissed

In *Evans v. Plusone Sports, LLC*, Judge Claude M. Hilton dismissed two trademark-related counterclaims.[201]

The parties in *Evans* both make and sell equipment for the game known as FlingGolf (or ThrowGolf). FlingGolf is played on standard golf courses with standard golf balls, and many of the usual rules of golf apply. Rather than using a traditional set of golf clubs, however, players use a “stick” to throw and putt the ball.[202]

When defendants learned that plaintiffs had filed a patent application for a FlingStick throwing apparatus used in FlingGolf, defendants reached out to plaintiffs to discuss a potential license agreement. The parties signed a term sheet, but they never entered into a final license agreement. The plaintiffs sued defendants for breach of contract in connection with the term sheet. The court granted summary judgment to defendants on the breach of contract claims, finding that the term sheet was an “agreement to agree” and not a binding contract.[203]

The defendants also asserted several counterclaims against plaintiffs, including a few unusual trademark-related counterclaims. First, defendants asserted a Virginia slander of title counterclaim against plaintiffs in connection with intent-to-use (ITU) applications that plaintiffs had filed with the USPTO to register FLING trademarks.[204] Specifically, defendants asserted that plaintiffs, in their ITU applications, had misled the USPTO when they declared that they had a bona fide intent to use the FLING marks and that no other person had the right to use the FLING marks in commerce.[205] The court recited the elements of a Virginia slander of title claim: (1) a false statement; (2) published by the defendant (or, in this case, by plaintiffs); (3) without justification or privilege; (4) made with malice; and (5) causing special damages to the plaintiff (or, in this case, to defendants).[206] The court granted summary judgment against defendants on the slander of title counterclaim, focusing on the first, fourth and fifth elements of the tort. There was *no evidence of a false statement* because the record showed that plaintiffs did have an intent to use the FLING marks in commerce when they filed the ITU applications with the USPTO. There was *no evidence of malice or special damages*, either. In finding no malice, the court found it important that plaintiffs had engaged two attorneys before filing their FLING trademark applications and that neither attorney advised against filing the applications.[207]

In another counterclaim, defendants sought a declaratory judgment that they did not *intentionally* abandon ITU applications that they had filed for certain FLING trademarks.[208] The court granted summary judgment to plaintiffs on this counterclaim because defendants’ subjective intent in abandoning their ITU applications was not relevant. Under the Lanham Act and the USPTO rules for ITU applications, the court reasoned, failure to timely show use of the applied-for

[200] *Id.*
[201] No. 1:15-cv-683, 2016 WL 2901553 (E.D. Va. May 16, 2016) (appeal filed).
[202] *Id.* at *1.
[203] *Id.* at *1-2.

[204] *Id.* at *3.
[205] *Id.*
[206] *Id.*
[207] *Id.*
[208] *Id.*

marks or to request extensions of time to show use results in abandonment of the applications, regardless of the applicant's intent.[209]

Motion to dismiss trademark infringement and false advertising claims denied

In *Software Consultants, Inc. v. Rachakonda*, Judge O'Grady denied a motion to dismiss trademark infringement and false advertising claims arising from the split of a technology consulting business.[210]

This case arose from the demise of a business relationship between two sets of individuals — Naveen Hota and the Rachakondas (Shankar and Rama) — who owned Software Consultants, Inc. (SCI), a IT consulting company based in Vienna, Virginia. The Rachakondas also owned two other companies, Radiant Creative Group (Radiant) and SCI IT Solutions (SCI IT). SCI IT was formed to hire individual consultants with L-1 visas and to make them available to SCI for use on SCI projects.[211]

When the relationship between Hota and the Rachakondas deteriorated and they began to explore options for dividing the SCI business, one of the Rachakondas unilaterally began to divide SCI's assets by assigning certain SCI contracts to the SCI IT and Radiant companies and by transferring several SCI employees and subcontractors to SC IT and Radiant. The Rachakondas also caused SCI IT and Radiant to begin competing against SCI.[212]

When the relationship deteriorated further, SCI IT copied the SCI logo and content from the SCI website and replicated it on a new SCI IT website. According to the amended complaint that SCI filed against the Rachakondas, Radiant and SCI IT, the new SCI IT website had a "strikingly similar look and feel" to the SCI website, and the SCI IT logo was "nearly identical" to the SCI logo. The amended complaint also alleged that SCI IT's website contained false and misleading representations: touting supposed SCI IT experience and accomplishments that were actually the experience and accomplishments of SCI (not SCI IT), stating that SCI IT worked closely with SCI and featuring the SCI logo (despite the fact that the affiliation between the two entities had ended).[213]

SCI sued defendants the Rachakondas, Radiant and SCI IT under the Lanham Act and state law. Assuming that SCI's Lanham Act claim was based solely on the alleged infringement of the SCI trademark, the defendants moved to dismiss that claim on two grounds: (1) that SCI IT was a *joint owner* of the allegedly infringed SCI trademark and that a joint owner's use of a jointly owned trademark could not give rise to liability under the Lanham Act; and (2) that the Lanham Act claim was *time-barred* because SCI IT had been using the SCI mark for more than two years.[214]

The court denied the defendants' motion to dismiss. The court acknowledged that one joint owner of a trademark cannot sue another joint owner for infringement of that trademark. But the court found no basis in SCI's amended complaint for finding that SCI IT was a joint owner of the SCI mark. Instead, the allegations of the amended complaint gave rise to a plausible claim that SCI was the senior user of the SCI mark, that SCI IT used the SCI mark with the

[209] *Id.*
[210] No. 1:15-cv-1145, 2016 WL 234845 (E.D. Va. Jan. 19, 2016).
[211] *Id.* at *1.
[212] *Id.*
[213] *Id.* at *2.
[214] *Id.*

permission of SCI and under an implied license from SCI, and that when the affiliation between SCI and SCI IT terminated, SCI IT's continued use of the SCI mark could constitute infringement of that mark.[215]

As for the statute of limitations defense, the court found that Virginia's analogous two-year statute of limitations applied to SCI's Lanham Act claim. But the court held that a ruling on this defense would be premature at the 12(b)(6) stage.[216]

The court also found that dismissal of SCI's Lanham Act claim was inappropriate given that SCI's amended complaint stated a claim for false advertising. The amended complaint alleged at least three misrepresentations by the defendants: claiming "SCI IT" experience and accomplishments that were actually SCI's; claiming that SCI IT worked closely with SCI when the affiliation had ended; and featuring the SCI logo when the affiliation with SCI was over.[217]

Summary judgment in favor of defendant

In *Wagner v. lindawagner.com*, Judge Leonie M. Brinkema granted summary judgment in favor of the defendant in an anti-cybersquatting claim filed by a pro se plaintiff.[218]

This Anticybersquatting Consumer Protection Act (ACPA) case involved Linda Wagner, a Tennessee real estate agent, and eWeb, a Canadian company that registers domain names containing generic terms and offers to sell the domain names to customers and develop websites for customers using the domain names.[219]

[215] *Id.* at *3-4.
[216] *Id.* at *4.
[217] *Id.* at *4-5.
[218] No. 1:16-cv-53, 2016 WL 4385844 (E.D. Va. Aug. 15, 2016) (appeal filed).
[219] *Id.* at *1.

Wagner used her name — Linda Wagner — in her real estate business and registered the domain name <lindawagner.com> in 2003, but she allowed the domain name registration to lapse on November 2, 2010. eWeb purchased the <lindawagner.com> domain name seven days later, on November 9, 2010. Wagner contacted eWeb and tried to buy the domain name, but the parties could not agree on a purchase price. Later, Wagner demanded that eWeb transfer the domain name to her, threatened to file suit and eventually filed this pro se ACPA lawsuit against the domain name.[220]

On cross-motions for summary judgment, the court ruled for eWeb, holding that Wagner did not have a *protectable trademark interest* in the name Linda Wagner and that eWeb did not have a *bad faith intent* to profit from the use of Wagner's name.

No Protectable Mark. In finding that Wagner had no protectable trademark rights in her Linda Wagner name, the court reasoned that "personal names are not *per se* protected as trademarks as a matter of course," that Wagner had no registration of her alleged mark, and that Wagner had no proof of secondary meaning in that alleged mark. Reciting the secondary meaning factors set forth in *Perini Corp. v. Perini Const., Inc.*, 915 F.2d 121 (4th Cir. 1990) — "(1) advertising expenditures; (2) consumer studies linking the mark to a source; (3) sales success; (4) unsolicited media coverage of the product; (5) attempts to plagiarize the mark; and (6) the length and exclusivity of the mark's use" — the court found that Wagner had presented no evidence on any of these factors. The court also found that Wagner had never conducted a real estate transaction outside of Tennessee, that she had referred

[220] *Id.* at *2.

to herself as a “small time realtor” when negotiating with eWeb, that she had allowed her <lindawagner.com> domain name registration to lapse, that she had not used the domain name for nearly six years, that she had not made consistent efforts to get the domain name back and that no one else had attempted to buy the domain name from eWeb in the nearly six years that eWeb had owned it.[221]

No Bad Faith Intent. Applying the nine bad faith factors set forth in the ACPA, the court also found that eWeb lacked the bad faith intent necessary for Wagner to succeed on her ACPA claim. While acknowledging that some of the ACPA factors weighed in favor of bad faith and that others were inapplicable, the court found that several of the factors weighed heavily against a finding of bad faith: (1) There was no evidence that eWeb acquired the <lindawagner.com> domain name with the intent of diverting any consumers from a <lindawagner.com> website or harming any goodwill associated with a Linda Wagner mark or domain name. In fact, eWeb had no specific knowledge of Wagner, her prior use of the <lindawagner.com> domain name or her real estate business in Tennessee. (2) eWeb never approached Wagner to sell her the <lindawagner.com> domain name. Instead, Wagner approached eWeb with offers to purchase the domain name. And eWeb did not put a time limit on Wagner’s purchasing the domain name or threaten to auction the domain name off if Wagner did not purchase it. Instead, when Wagner and eWeb could not agree on a price for the domain name, eWeb simply walked away from the negotiations. (3) There was no suggestion that eWeb provided false or misleading contact information when applying for registration of the <lindawagner.com> domain name or any other domain names. (4) Although eWeb had registered multiple domain names, there was no evidence it knew that any of those domain names were “identical or confusingly similar” to any others’ trademarks. (5) There was no evidence that Wagner’s purported mark was distinctive or “famous.”[222]

[221] *Id.* at *4-5.

No standing to pursue claim against Better Business Bureau

In *Wall & Associates, Inc. v. Better Business Bureau of Central Virginia, Inc.*, Judge O’Grady held that the plaintiff lacked standing to pursue a false advertising claim against better business bureaus.[223]

Wall & Associates (Wall), a tax settlement business, brought a Lanham Act false advertising claim against the Council of Better Business Bureaus (CBBB), the Better Business Bureau Serving Central Virginia (Virginia BBB) and the Better Business Bureau of Metropolitan Washington (Washington BBB).[224]

The CBBB, a nonprofit organization that purports to provide consumers with objective, unbiased assessments of local businesses, licenses its BETTER BUSINESS BUREAU mark and model to a network of not-for-profit regional BBBs, including the Virginia BBB and the Washington BBB. Each regional BBB provides a free database of reviews of local businesses, which contain background information on a business, an indication of whether the business is BBB accredited, and a grade for the business from A+ to F generated by the application of 13 different elements.[225]

[222] *Id.* at *5-9.
[223] No. 1:16-cv-119, 2016 WL 3087055 (E.D. Va. May 31, 2016).
[224] *Id.* at *1.
[225] *Id.*

When the Wall business was located in Washington, the Washington BBB assigned it a C- grade, and later lowered its grade to an F. When Wall later moved to Virginia, the Virginia BBB graded it a C- and later a D-, and also warned consumers of a "pattern of complaints" against Wall.[226]

Wall filed this federal false advertising action against the CBBB, the Virginia BBB and the Washington BBB, asserting that the websites contained misrepresentations that had injured it by causing customers and potential customers to stop doing business with it or to avoid doing business with it. The BBBs moved to dismiss, asserting that Wall lacked standing under the Lanham Act because its claimed injury was too attenuated from the BBBs' alleged misrepresentations.[227]

The court granted the BBBs' motion to dismiss. Quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), the court noted that "[t]o invoke the Lanham Act's cause of action for false advertising, a plaintiff must plead (and ultimately prove) [1] an injury to a commercial interest in sales or business reputation [2] proximately caused by the defendant's misrepresentations."[228] If Wall had suffered any direct injury, the court reasoned, it was from the low grades and the consumer warning on the Virginia BBB and Washington BBB websites. But Wall did not rely on those statements for his false advertising claim "because they are almost certainly non-actionable statements of opinion."[229]

Instead, Wall alleged that the BBBs falsely advertised their business rating system as a national, uniform and unbiased standard when, in reality, it was implemented by independent regional BBBs applying their own "subjective, biased, and personal criteria." And Wall alleged that it had been injured by this false advertising because consumers believed that Wall had been subjected to national, uniform and unbiased reviews when, in reality, Wall's ratings were the product of subjective, biased and arbitrary decisions made by the Virginia BBB and the Washington BBB. The court found this alleged injury too attenuated, noting that while the plaintiff and defendant need not be in direct competition with each other to support a Lanham Act false advertising claim, it may be more difficult for a plaintiff (like Wall) to establish proximate causation where it does not compete with the defendants (like the BBBs). The court therefore dismissed Wall's Section 43(a) claim for lack of standing.[230]

No personal jurisdiction in trademark infringement case

In *Zaletel v. Prism Labs, Inc.*, the defendant challenged the court's exercise of personal jurisdiction over it in a trademark infringement case.[231] The defendant was incorporated in Delaware but based in Moscow, Russia. Judge Ellis described plaintiff's theory of personal jurisdiction as follows: "(i) that defendant distributes its Prisma app to Virginia users via downloads through Apple and Google's on-line app store; (ii) that defendant distributes its Prisma app through defendant's website … which links individuals directly to the Apple and Google stores; and (iii) that defendant processes images on servers outside of Virginia and sends the processed images (via defendant's Prisma app) to a Virginia user's device."[232] The court held that this was insufficient to establish personal jurisdiction under existing case law.[233] However, rather than dismiss the case, Judge Ellis transferred it to Delaware, the defendant's state of incorporation. The court noted that in the Fourth Circuit, a court may transfer a case under § 1406 even if it lacks personal jurisdiction. Judge Ellis also cited 28 U.S.C. § 1631 to support transfer where jurisdiction is lacking.[234] The defendant had sought transfer to the Northern District of California, but the court held that the interests of justice favored transfer to Delaware for several reasons, including that it was a more convenient forum for the plaintiff.[235]

TTAB REVIEW

The District also considered several cases arising from the Trademark Trial and Appeal Board. We discuss three of these cases involving three distinct issues — the standard of review and likelihood of confusion in the registration context, the award of attorney's fees and issue preclusion.

[226] *Id.*
[227] *Id.*
[228] *Id.* at *2.
[229] *Id.* at *3.
[230] *Id.* at *2.
[231] No. 1:16-cv-1230, 2016 WL 7407424 (E.D. Va. Dec. 22, 2016).
[232] *Id.* at *5.
[233] *Id.* at *8.
[234] *Id.*
[235] *Id.* at *9.

In *Seacret Spa Int'l v. Lee,* the plaintiff appealed a TTAB decision rejecting registration of a mark. In affirming the TTAB, Judge Cacheris had the opportunity to reaffirm the standard of review applicable in such a case and to discuss the likelihood of confusion factors as applied in the registration context.[236]

Section 21 of the Lanham Act provides a dissatisfied trademark applicant with a choice: (i) rely solely upon the evidentiary record in an appeal to the Federal Circuit; or (ii) present new evidence in a civil action before a district court. In *Seacret Spa Int'l*, the plaintiff, Seacret Spa, sought district court review of the TTAB's decision rejecting its application for the mark SEACRET for "products containing ingredients from the Dead Sea, namely, non-medicated skin care preparations, namely moisturizers, facial cleaners, facial peels, mask, lotions, creams, scrubs, soaps, nail care preparations, hand creams, cuticle oils; [and] after shave" based on a likelihood of confusion with Procter and Gamble's prior registrations for the mark SECRET for body sprays and personal deodorant. After the completion of discovery, both parties moved for summary judgment. Judge Cacheris ruled in favor of the defendant and affirmed the ruling of the TTAB.

Judge Cacheris began by noting the difference in the standard of review between an action before the Federal Circuit and the district court. "The parties may not present new evidence bearing on the registrability in an appeal to the Federal Circuit, but they may present new evidence in a 'remedy by civil action' in a district court."[237] He then further noted where new evidence is submitted, a "*de novo* review of the entire record is required because the district court cannot meaningfully defer to the PTO's factual findings if the PTO considered a different set of facts."[238]

Judge Cacheris then considered the cross-motions for summary judgment. The court repeatedly emphasized the importance of the language in the applications in deciding whether there was a likelihood of confusion — rather than market usage which is the focus of a trademark infringement case. The court stated: (i) "the relevant inquiry in a registration proceeding involves the mark and usage described in the application rather than as they appear in the marketplace"[239]; (ii) "[b] ecause the tag line [minerals from the Dead Sea] does not appear in the applications, it is irrelevant, to the question of similarity at the registration stage"[240]; and (iii) "Plaintiff's application contains no limitations as to the specific channels of trade."[241]

Given this guiding principle, Judge Cacheris focused on four issues in affirming the rejection of the SEACRET application.

First, without expressly excluding the expert report of Dr. Thomas J. Maronick offered by the plaintiff, Judge Cacheris noted the limited usefulness of the report and testimony because of the expert's "reliance on marketplace usage and his failure to perform any kind of survey on the issue of potential confusion between the 'SECRET' and 'SEACRET' marks."[242]

Second, with respect to the similarity of the marks, Judge Cacheris stressed that Procter and Gamble owned a standard character registration for the mark SECRET. Accordingly, "its registration extends to

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[236] No. 1:15-cv-405, 2016 WL 880367 (E.D. Va. Mar. 8, 2016).
[237] *Id.* at *2.

[238] *Id.*
[239] *Id.*
[240] *Id.* at *4.
[241] *Id.* at *6.
[242] *Id.* at *2.

a rendition of the word 'secret' in the same font as the 'SEACRET' mark, complete with a wave design element in the middle of the 'E.' "[243]

Next, with respect to the similarity of the goods, the court pointed out the relatedness of the goods. Specifically, Judge Cacheris began by acknowledging the difference between the goods identified in the SEACRET application (i.e., skin care products) and the SECRET registrations (i.e., body spray and deodorants), but then noted the existence of abundant third-party registrations covering both goods. "As the abundance of trademark registrations covering both deodorant and skin care products suggests, Plaintiff's products and the goods covered by the 'SECRET' trademarks are related products, both being toiletries."[244]

Finally, the court noted the lack of limitations regarding the channels of trade in the plaintiff's applications. Accordingly, the fact that the plaintiff currently operates primarily through a direct marketing business model with additional sales through kiosks while the "SECRET" mark is primarily sold through major retail stores is of no value in assessing the likelihood of confusion under the application."[245]

Review barred by issue preclusion

In *Treadwell Original Drifters, LLC. v. Original Drifters, Inc.*, Judge Liam O'Grady dismissed a complaint seeking review of a TTAB decision regarding cancellation of the trademark BILL PINKNEY'S ORIGINAL DRIFTERS on the grounds of issue preclusion.[246] Though complicated, the facts centered upon the claim of two different parties — the Treadwell group and the Pinkney group — to exclusive ownership rights to the trademark THE DRIFTERS for a "doo wop" musical group.

Even though formed in 1953, the group is still in existence and performing due to the constantly changing members, including in total more than 60 members. But, because of this constant change, various parties have claimed exclusive ownership of the mark THE DRIFTERS as applied to the band.[247]

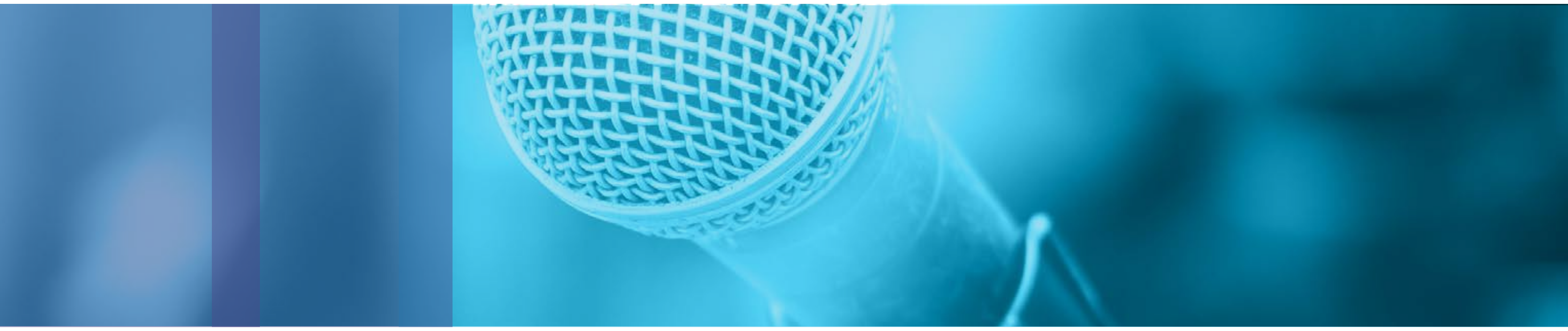
The Treadwell group traced its ownership of the mark to 1954, when The Drifters, Inc., formed "to serve as the corporate owners of 'The Drifters' trademark and to manage the group."[248] George Treadwell purchased his shares to this company in 1957. His family, through himself, his wife and then daughter, continued to manage the group to this day, through an entity called Treadwell Original Drifters, LLC.

The Pinkney group traced its ownership to Bill Pinkney, one of the earliest members of the group. He was fired from the group, and in or around 1958, he formed his own group using the name "The Drifters."[249]

Sometime between 1958 and 1960, Treadwell's group and Pinkney's group participated in arbitration before the American Guild of Variety Artists (AGVA). The AGVA ruled Treadwell's group could use the mark "The Drifters" while Pinkney's group could use the marks "The Original Drifters" and/or "Bill Pinkney's Original Drifters." Notably, however, neither party filed federal trademark applications at that time.[250]

[243] *Id.* at *4.
[244] *Id.* at *5.
[245] *Id.* at *6.
[246] No. 1:15-cv-580, 2016 WL 5899289 (E.D. Va. Jan. 28, 2016).

[247] *Id.* at *1.
[248] *Id.* at *1.
[249] *Id.*
[250] *Id.*



For the next three decades the two bands coexisted without much dispute. In June of 1989, Treadwell's group filed an application for the mark THE DRIFTERS. Pinkney's group eventually opposed. For reasons not made clear in the opinion, the opposition was delayed until 2004, when the TTAB finally sided with Pinkney and denied Treadwell's application for THE DRIFTERS.[251]

Equally important, during the pendency of the opposition, Pinkney's group filed a trademark application on April 16, 1998, for the mark BILL PINKNEY'S ORIGINAL DRIFTERS. The PTO issued a registration for this mark on July 7, 2009.[252]

Finally, in March of 2010, the Treadwell group applied to cancel the Pinkney group's registration for the mark BILL PINKNEY'S ORIGINAL DRIFTERS. The TTAB dismissed the petition to cancel on March 5, 2015, and this case resulted.[253]

After reviewing the facts, Judge O'Grady turned to whether issue preclusion required dismissal of the complaint. He summarized the issue as follows: "Plaintiff's Complaint calls on this Court to determine whether Plaintiff has demonstrated ownership rights in the mark 'The Drifters' that are prior to those of Defendant's in the mark 'Bill Pinkney's Original Drifters' "[254] The court explained that this issue was identical to that addressed by the TTAB in the opposition proceeding. There, the TTAB "concluded that Bill Pinkney had established, by a preponderance of the evidence, that he 'has continuously used the service marks The Original Drifters and Bill Pinkney and the Original Drifters since long prior to applicant's filing date, the earliest date to which applicant is entitled to rely.' "[255] The court further held that: (i) the Treadwell group never appealed the TTAB proceeding, meaning that proceeding "actually resolved" the matter and was a final and valid judgment[256]; (ii) the TTAB decision regarding priority of ownership was "critical and necessary" to the TTAB decision[257]; and (iii) even though the current plaintiff, Treadwell Original Drifters, LLC, was not a party to the prior TTAB proceeding, it was a successor-in-interest to the party that was. Thus, the complaint was dismissed as barred by issue preclusion.[258]

Award of attorney's fees upheld

In *Milo Shammas v. Lee,* Judge T.S. Ellis, III, addressed the award of attorney's fees and costs to the TTAB in a Section 21(b) action.[259]

Judge Ellis' opinion reviews what the court describes as a "litany of failures" by the plaintiff, Milo Shammas, throughout the litigation — foreshadowing the court's ultimate rejection of the plaintiff's post-judgment and post-appeal motion to vacate the award of attorney's fees and costs pursuant to Federal Rule of Civil Procedure 60(b). First, plaintiff's trademark application was rejected. Then, the TTAB affirmed that rejection. Next, the district court entered summary judgment against the plaintiff during Section 21 review and also awarded fees and costs under the provision that requires the plaintiff in a Section 21 review to pay "all the expenses of the proceeding … whether the final decision is in favor of such party or not." The plaintiff sought appellate review of the fee award. The Fourth

[251] *Id.* at *2.
[252] *Id.*
[253] *Id.*
[254] *Id.* at *4.
[255] *Id.*
[256] *Id.* at *5 and *6.
[257] *Id.* at *6.
[258] *Id.*
[259] 1:12-cv-1462, 2016 WL 2726639 (E.D. Va. May 9, 2016) (appeal filed).

Circuit affirmed the award. The plaintiff then sought review *en banc* and filed a petition for certiorari with the Supreme Court. These efforts also failed.[260]

Shammas then filed a motion with the district court under Fed. R. Civ. P. 60(b), requesting that the court vacate the fee award. The plaintiff argued that the Fourth Circuit's decision affirming the fee award in favor of the TTAB was overruled by the Supreme Court's decision in *Baker Botts LLP v. ASARCO LLC*.[261] The plaintiff argued that the ruling in *Baker Botts* prohibited a statutory award of attorney's fees unless the statute explicitly provides that fees may be recovered. After noting several procedural defects in Shammas' argument, Judge Ellis held: "*Baker Botts* is binding only for the proposition that § 330(a)(1) of the Bankruptcy Code does not permit a bankruptcy court to award attorney's fees for work performed in defending a fee application in court." [262] The court further stated that "plaintiff's argument … is an over-reading of *Baker Botts*, and there is simply no basis at all to conclude that a change in binding decisional authority has occurred."[263]

TRADE SECRET CASES

Lastly, we consider the trade secret cases from the District in 2016. We note that Congress recently passed the Defend Trade Secrets Act.[264] This statute provides a federal cause of action for misappropriation of trade secrets. The statute is similar to the state statutes around the country that address misappropriation of trade secrets, but it provides federal jurisdiction over such claims as well as some additional remedies. The trade secret cases we reviewed this year did not arise under the new federal statute, but rather invoked the Virginia Uniform Trade Secrets Act (VUTSA). We expect to see federal misappropriation claims in 2017.

In *Afilias PLC v. Architelos, Inc.,* the jury returned a $5 million verdict in favor of plaintiff on a claim for misappropriation of trade secrets under the VUTSA, and an additional $5 million for conversion and civil conspiracy.[265] The case includes an interesting discussion of the preemption provision of the VUTSA. The defendant argued post-trial that the conversion and civil conspiracy claims were barred by the preemption provision of VUTSA.[266] In response, the plaintiff argued that the additional claims included the defendant's alleged improper use of confidential information that did not rise to the level of a trade secret.[267] Judge Leonie Brinkema seemed to recognize that misappropriation of confidential information that was not a trade secret could exist outside of VUTSA. However, the court held that neither the evidence nor the jury's verdict made this distinction. Thus, the court set aside the jury's $5 million verdict on the conversion and civil conspiracy claims as preempted by the VUTSA.[268] The court also granted the defendant's request for remittitur of the trade secret verdict as excessive, and reduced the damages to $2 million.[269]

Kancor Americas, Inc. v. ATC Ingredients, Inc., is a case that resulted in summary judgment dismissing a trade secret claim.[270] The defendant asserted a

[260] *Id.* at *1.
[261] ___ U.S. ___, 135 S.Ct. 2158, 192 L.E.2d 208 (2015).
[262] *Shammas,* 2016 WL 2726639 at *4.
[263] *Id.* at *3.
[264] 18 U.S.C. §1831, *et seq.*

[265] No. 1:15-cv-14, 2016 WL 1245006 (E.D. Va. Mar. 23, 2016).
[266] *Id.* at *8.
[267] *Id.* at *9-10.
[268] *Id.*
[269] *Id.* at *11.
[270] No. 1:15-cv-589, 2016 WL 740061 (E.D. Va. Feb. 25, 2016).

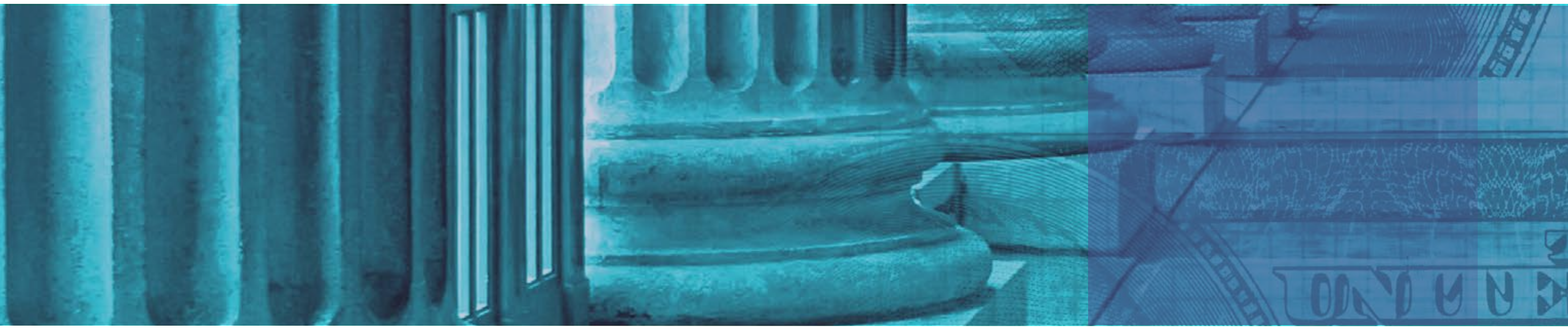
counterclaim against the plaintiff for misappropriation of trade secrets under the VUTSA. Judge Lee granted summary judgment in favor of the plaintiff and dismissed the claim because the defendant failed to come forward with evidence to show the existence of a trade secret, misappropriation or damages.[271] On the first element, the court noted that a mere list of categories of information that may constitute trade secrets is not sufficient. The court reiterated that a party asserting misappropriation of a trade secret must identify with "particularity" the trade secret at issue.[272]

T&B Equipment, Inc. v. RI, Inc., also resulted in summary judgment dismissing a trade secret claim brought under the VUTSA.[273] Seating Solutions provided certain information to T&B Equipment as part of a quote for T&B to purchase the "901 Box Seat." T&B later purchased the product from another company, and Seating Solutions accused it of using its trade secret information. Judge Hudson granted summary judgment to T&B because there was no evidence that the information provided to T&B was provided "under circumstances that impose a duty on a party to refrain from using that information."[274] Thus, Seating Solutions could not establish a critical element of its misappropriation claim.

In *Hair Club for Men, LLC v. Ehson*, Judge O'Grady denied a request for a preliminary injunction.[275] The plaintiff filed suit against a former employee and his new employer to enforce a noncompete and nonsolicitation provision and to prohibit the disclosure and use of its trade secrets. The plaintiff sought a preliminary injunction, which the court denied. The plaintiff identified several types of information that it contended were subject to trade secret protection, including pricing information, marketing information, client information and hair replacement techniques.[276] The court considered each of these in turn, and held that the plaintiff had failed to prove a likelihood of success on the merits based on the evidence presented. The court noted that pricing information may be a trade secret if it is "qualitatively different from a standard price list" and "was not even made available to customers."[277] For example, "a discount schedule used to develop quotes for customers using a blend" of factors could constitute a trade secret.[278] The court also noted that a customer list may be a trade secret.[279] However, the court recognized that a former employee may be able to "independent[ly] develop" a contact list without misappropriating a former employer's trade secrets.[280] Overall, the court determined that the plaintiff had not met its burden at the preliminary injunction stage of the proceedings. The court subsequently revisited these issues on cross-motions for summary judgment, and held that there were factual issues "as to whether these classes of information are trade secrets and whether Ehson misappropriated them." *Hair Club For Men, LLC v. Ehson.*[281]

The Hair Club case ultimately went to trial, and the jury returned a verdict in favor of the plaintiff in excess of $900,000. Upon consideration of the defendant's post-trial motions, Judge O'Grady reduced the damage awards because the amounts were duplicative.[282] The

[271] *Id.* at *14.
[272] *Id.* at *14-15.
[273] No. 3:15-cv-337, 2016 WL 3965208 (E.D. Va. July 22, 2016).
[274] *Id.* at *6.
[275] No. 1:16-cv-236, 2016 WL 3636851 (E.D. Va. May 6, 2016).
[276] *Id.* at *4.
[277] *Id.*
[278] *Id.*
[279] *Id.* at *5.
[280] *Id.*
[281] No. 1:16-cv-236, 2016 WL 4577019, *6 (E.D. Va. Aug. 31, 2016).
[282] No. 1:16-cv-236, 2016 WL 6780310 (E.D. Va. Nov. 14, 2016).



court then considered the scope of the injunctive relief to be awarded to the plaintiff. On the trade secrets claim, the plaintiff requested a permanent injunction prohibiting the defendant from using its "proprietary technological information concerning hair replacement techniques," client names and contact information, and "the requirements, hair specifications, and purchasing histories" of plaintiff's clients.[283] The defendant objected to the permanent nature of the injunction because the information may lose its trade secret protection over time.[284] The plaintiff argued that it would continue to derive independent economic value from the subject information not being known to the general public and that it intended to maintain the secrecy of the information.[285] The defendant presented no counter-evidence. Thus, Judge O'Grady granted the motion for permanent injunction, but noted that the defendant could petition for dissolution or modification if the information lost its trade secret status.[286]

[283] *Id.* at *3.

[284] *Id.* at *5.

[285] *Id.*

[286] *Id.*

CONCLUSION AND LOOKING AHEAD

Despite a lower volume of cases, the District continues to consider important intellectual property cases, some of which may wind their way to the Supreme Court. As in years past, the 2016 cases reveal a bench that holds the lawyers who practice before it to high standards, both in meeting deadlines and in the presentation of evidence. The judges in the District do not hesitate to grant dispositive motions where warranted, and in most instances, the docket continues to move at a fast pace, offering litigants a swifter resolution to their disputes than might otherwise be had in any different venue.

Going forward, the volume of patent cases filed in the District may be affected by the Supreme Court's decision in *TC Heartland, LLC D/B/A Heartland Group v. Kraft Foods Group Brands LLC*. In that case, in which certiorari was granted in December 2016,[287] the Supreme Court will again consider the interplay between the patent venue statute (28 U.S.C. 1400 (b)) and the general venue statute (28 U.S.C. 1391(c)). The case is of great interest because the Federal Circuit has held that venue is proper in patent cases wherever a corporate defendant is deemed to reside under 28 U.S.C. 1391 (c) — meaning, in any district in which personal jurisdiction could be exercised over a corporate defendant. *See,* e.g., *VE Holding Corp. v. Johnson Gas Appliance Co.,* 917 F. 2d 1574 (Fed. Cir. 1990).

The petitioner argued in *Heartland* that as a result of the Federal Circuit's erroneous interpretation of

[287] No. 16-341, 2016 WL 4944616 (Dec. 14, 2016).

the venue statutes, "[a]n enormous amount of forum shopping ensued, with the result being that in 2015 more than 43% of patent infringement cases were brought in a single district (E.D. Tex.) …." Petition for A Writ of Certiorari (Pet.), p. 5 (citation omitted). According to petitioner, proper interpretation of the patent venue statute should limit patent suits against corporate defendants to those jurisdictions in which they are incorporated — where they "reside" under the language of 28 U.S.C.1400 (b). Pet, pp. 8-9.

The Supreme Court has consistently rejected the Federal Circuit's patent jurisprudence in recent years. The *Heartland* case may prove to be another example of the Supreme Court's "reigning in" of wide-ranging Federal Circuit law that may not be viewed as consistent with Supreme Court precedents (in this case, one of those precedents is alleged to be *Fourco Glass Co v. Transmirra Products Corp.*, 353 U.S. 222 (1957)). If the Supreme Court rejects the Federal Circuit's expansive view of patent venue law in the *Heartland* case, it could result in the radical redistribution of patent filings in the United States — to the detriment of the Eastern District of Texas in particular as a popular forum for patent plaintiffs. The impact of the *Heartland* decision will likely resonate in this District as well, if indeed the Supreme Court once again parts ways with the Federal Circuit on fundamental questions of patent jurisprudence.

Beyond the *Heartland* case and its potential effect on patent cases, 2017 is likely to see a significant increase in the number and complexity of trade secret cases filed in the District, particularly those based upon the recently enacted Defend Trade Secrets Act, 18 U.S.C. § 1831, *et seq*. Trade secret cases are highly contentious and are replete with motions practice and procedural hurdles that this District is accustomed to dealing with swiftly and efficiently. The speed of the District's docket, its unwillingness to countenance delays, its early setting of firm trial dates and its culture of expeditious justice may lead many trade secret litigants to the doors of the courthouses throughout the District. If the past is prelude, both plaintiffs and defendants alike should strap on their seat belts before embarking upon what could be a very fast ride through a trade secret litigation in this District.

AUTHORS

Charles Ossola
Partner, Washington
202.955.1642
cossola@hunton.com

Wendy McGraw
Counsel, Norfolk
757.640.5336
wmcgraw@hunton.com

Stephen Demm
Partner, Richmond
804.788.8331
sdemm@hunton.com

John Gary Maynard
Partner, Richmond
804.788.8772
jgmaynard@hunton.com

Yisun Song
Partner, Washington
202.955.1966
ysong@hunton.com

Rose A. Zeck
Associate, Washington
202.955.1801
rzeck@hunton.com

Anne Pearlman
Associate, Washington
202.778.2205
apearlman@hunton.com

EDITORS

Charles Ossola
Partner, Washington
202.955.1642
cossola@hunton.com

Wendy McGraw
Counsel, Norfolk
757.640.5336
wmcgraw@hunton.com

SUPPLEMENTAL INFORMATION

The chart below summarizes the number of intellectual property cases filed in the E.D. Va. in 2016 by judge.

JUDGE	DIVISION	PATENT	TRADEMARK	COPYRIGHT	TOTAL
Rebecca Beach Smith (Chief)	Norfolk/ Newport News	0	0	0	0
Arenda Wright Allen	Norfolk/ Newport News	3	2	1	6
Leonie M. Brinkema	Alexandria	4	13	1	18
James C. Cacheris	Alexandria	0	0	1	1
Mark S. Davis	Norfolk/ Newport News	3	2	1	6
Robert G. Doumar	Norfolk/ Newport News	4	2	3	9
T.S. Ellis, III	Alexandria	0	5	12	17
John A. Gibney, Jr.	Richmond	2	3	2	7
Claude M. Hilton	Alexandria	4	5	9	18
Henry E. Hudson	Richmond	4	1	2	7
Raymond A. Jackson	Norfolk/ Newport News	4	2	0	6
M. Hannah Lauck	Richmond	3	1	12	16
Gerald Bruce Lee	Alexandria	3	7	8	18
Henry Coke Morgan, Jr.	Norfolk/ Newport News	2	2	1	5
Liam O'Grady	Alexandria	4	7	6	17
Robert E. Payne	Richmond	0	1	1	2
James R. Spencer	Richmond	0	0	0	0
Anthony J. Trenga	Alexandria	13	8	7	28
TOTAL		53	61	67	181