FRANKLIN PIERCE LAW CENTER
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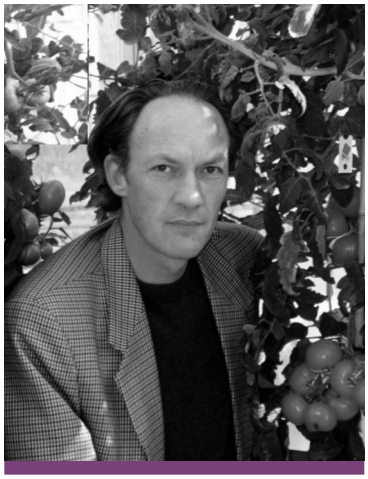
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PORTRAIT: ANATOLE KRATTIGER—INTELLECTUAL PROPERTY MANAGEMENT IN THE GLOBAL PUBLIC INTEREST

BY STANLEY KOWALSKI (JD '05)

AS A MEMBER OF THE FRANKLIN PIERCE LAW CENTER'S Advisory Council on Intellectual Property (ACIP), Dr. Anatole Krattiger brings a wealth of experience, knowledge, and international networking capacity to Pierce Law. These assets can contribute valuable insights for meeting the challenges and capturing the opportunities that have traditionally been among Pierce Law's greatest strengths—that is, teaching intellectual property (IP) law to professionals from the rapidly emerging developing nations of Africa, Asia, and Latin America. Pierce Law can tap this resource as it contemplates its continuing role in the exponentially growing and increasingly dynamic global IP landscape of the 21st century.

What do cows in green Alpine landscapes have in common with IP? Not much unless you ask Dr. Krattiger. As a young farmer in his native Switzerland, and later in the South of France where he cultivated vineyards, he developed a practical approach to solving problems. During these formative years as a farmer, Dr. Krattiger particularly enjoyed tending dairy herds in the green pastures of the Swiss Alps. There he learned and practiced the art of fine cheese making: an age-old and fundamental application of traditional biotechnology. Working in sight of the sublime peaks of the Alps must have spurred his mind to lofty goals, for Dr. Krattiger has since gone on to pursue a career focused on providing developing countries with access to new agricultural and health technologies. This idealism, however, remains rooted in a farmer's sensibility: his professional life has been grounded in a results-driven pragmatism.



ANATOLE KRATTIGER

Given his multidisciplinary, yet focused, career path, it is not surprising that Dr. Krattiger has many interests and pursuits (including a passion for music and cooking). Beginning with his study of the fundamentals of agriculture in Switzerland where he obtained his B.Sc. in Agronomy, his education spanned across applied genetics and molecular biology at the then Plant Breeding Institute at Cambridge University in England (where he earned his M.Phil and Ph.D.). He has focused his energy, however, on a single goal: extending the benefits of modern crop improvement and health research to those who need it most. Concentrating on strategies for institution building, and more recently on innovation management, he has been actively involved in building and managing public-private partnerships that seek to pursue dynamic IP management in the life sciences, both in agriculture and health.

Considering this broad outlook, it is easy to see Dr. Krattiger's lead and editorial hand at work in *IP Management in Health and Agricultural Innovation: A Handbook of Best Practices*. The premise of the *Handbook* is that IP management is about doing things and getting

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Created in 1985 through the generosity of Kenneth J. and Pauline Germeshausen, the Germeshausen Center is the umbrella organization for Pierce Law 's specialization and policy studies in the legal protection, management and transfer of intellectual property, especially relating to the commercialization of technology. The Germeshausen Center Newsletter is published two times a year for alumni/ae, students and friends of Pierce Law.

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IP FACULTY ACTIVITIES

BY CAROL RUH

Professor Kevin Carroll was a panel speaker at the XVI International Congress of the ASIPI (Inter-American Association of Industrial Property) in Rio de Janeiro November 26-30 on the topic "Business Systems: Patentability Requirements, Scope and Legal Protection."

* *

Professor Tom Field has an article in *Touch Briefings' Medical Device Manufacturing and Technology 2006*, an annual publication for professionals within the medical devices field. He is counsel of record for an amicus brief filed by the new Pierce Law IP Amicus Clinic in the KSR case and continues to write op-ed pieces for his ipFrontline column, "7+ on the IP Richter Scale." He was also flattered that the Institute of Chartered Financial Analysts of India plans to reprint one of his articles in a book tentatively entitled *Commercialization Aspects of Patents*.

* *

Professor Bill Hennessey lectured (in Chinese) on "Intellectual Property and National Development" at the Beijing College of Traditional Medicine in Beijing China on July 3, and on "Brand Equity" at the Luzhou International Trademark Symposium in Luzhou, China on July 25. He was a guest speaker in the U.S. State Department Visitors Program on July 29 at the American Center in Nagoya Japan on the topic of "Enforcing Your IP Rights in the BRIC Economies." **Professor Hennessey** was also the opening speaker at the U.S. Patent & Trademark Office "China Roadshow" on "China's Impact on Intellectual Property: Protecting Your Intellectual Property in China and the Global Marketplace" held in Boston, September 27-28.

* *

On June 2, **Visiting Professor Karen Hersey** presented "Copyrights and Licensing Wrongs: When Two Worlds Collide" at the American Library Association Annual Conference in New Orleans, LA. On June 7, **Professor Hersey** attended a Minority-Serving Institutions Workshop at Jackson State University on "Establishing and Maintaining an Effective and Efficient Technology Transfer Presence," where she offered presentations on "Technology Transfer and Intellectual Property: Fueling University Research and Commercialization" and "A Primer on Licensing." From June 14-16, **Professor Hersey** attended the Intellectual Property Workshop at the AALS Mid-Year Meeting in Vancouver, B.C. She also participated in site reviews on technology commercialization in Sweden at Chalmers University of Technology. **Professor Hersey** participated in the "IP Tour 2006, Linking Enterprises and Universities," from November 6–10 in Santiago, Chile. She also presented a lecture entitled "Inventors and Research Institutes: Forming Successful Partnerships" at the Danish Institute for Agricultural Science, Viborg, Denmark on November 15.

* *

Professor Karl Jorda lectured on "Technology Licensing: Dos & Don'ts" on June 29 at Siemens in Munich, Germany. **Professor Jorda**, on request from the Centre for the Management of Intellectual Property in Health Research & Development (MIHR) and The Public Intellectual Property Resource for Agriculture (PIPRA), is authoring a chapter on "Trade Secret Licensing" for MIHR/PIPRA's *Handbook of Best Practices for Management of Intellectual Property in Health and Agriculture* in development countries. **Professor Jorda** recently co–authored a chapter for a book, to be published by John Wiley & Sons, entitled *Innovate or Perish: Managing the Enduring Technology Company in the Global Market*. **Professor Jorda's** Chapter 3 is entitled "New Intellectual Assets: The Role of Business Method Patents and Trade Secrets in Strategic IP Management." Wayne Jaeschke, Of Counsel to Connolly Bove Lodge & Hutz, Wilmington, DE co–authored the chapter.

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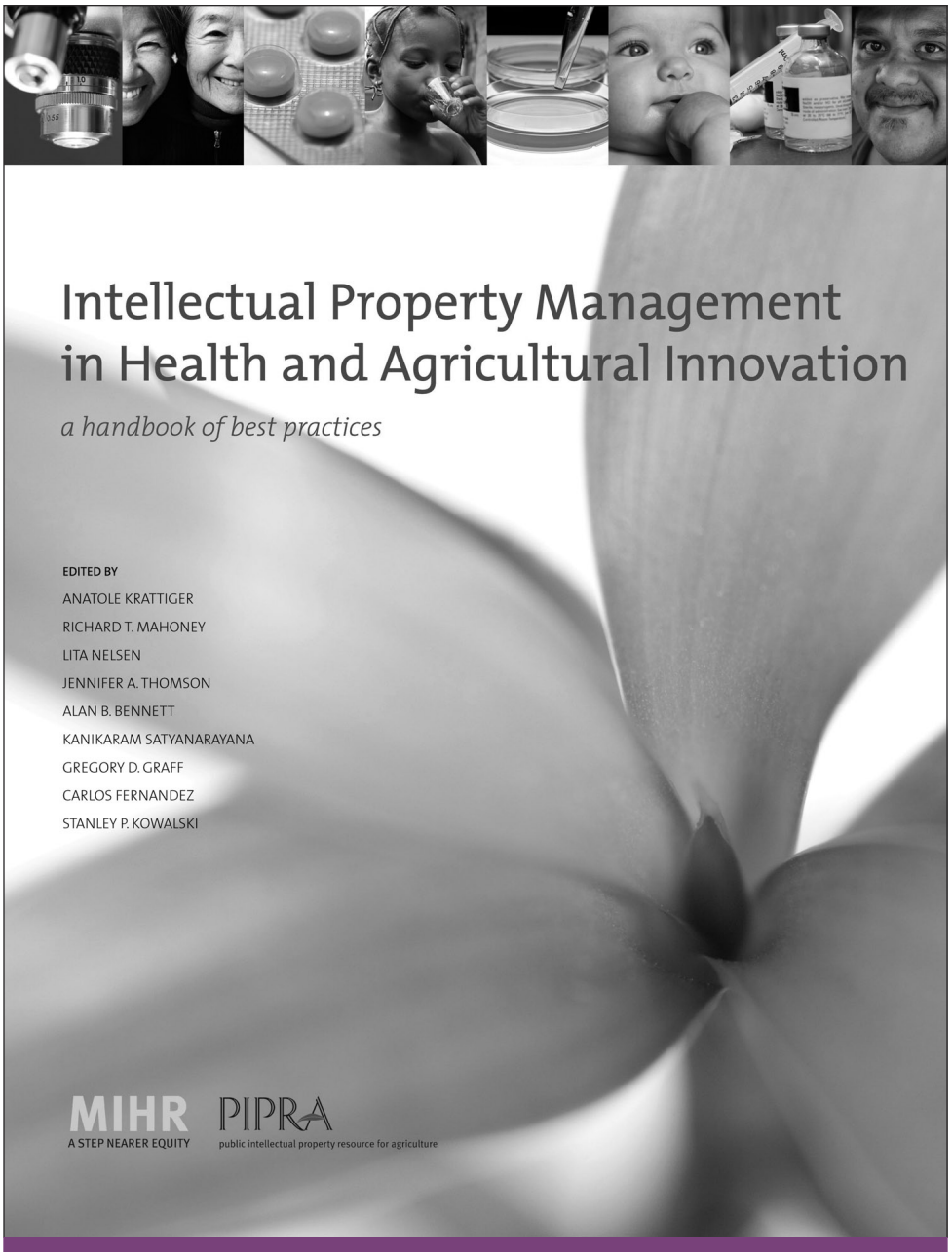
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results. These results include new crop varieties for farmers in developing countries, higher incomes, more sustainable agriculture, better drugs and vaccines for people all over the world but particularly the poor in developing countries; all of these can grow from seeds of hope, vision and hard work (cultivated with the proper application of IP management).

The *Handbook* has grown from an earlier version, focused on health, edited by Dr. Krattiger's colleague and friend Dr. Richard Mahoney. Originally, this new version of the *Handbook* was slated to also include agricultural elements, but in the course of development it has become even broader in its scope. Prepared for policy makers, leaders of public sector research establishments, technology transfer professionals, licensing executives, scientists, companies around the world, the legal community (lawyers, counsel, in house and general), and the philanthropic community, the *Handbook* offers information and strategies for utilizing the power of IP while remaining aware of how it relates to the public domain.

For the *Handbook*, Dr. Krattiger assembled an impressive group of well over 100 authors —all practitioners in their respective fields from respected institutions, experienced dealmakers, and lawyers from leading law firms—to produce a resource that is as comprehensive as possible on current IP management issues and approaches. Several members of the Pierce Law community are contributing authors: Professor Karl Jorda (*Licensing know-how and trade secrets*), Professor Karen Hersey (*Building professional networks: National and international experiences of AUTM*), and Dr. Stanley Kowalski (*Freedom to operate: The preparations*). A recently published small volume of five sample chapters provides a preview of the approximately 135 more to come (available free: www.ipHandbook.org).

The *Handbook* is being prepared under the auspices of two organizations recently created by the Rockefeller Foundation in response to the changing IP environment in health and agriculture: the Centre for Management of IP in Health Research & Development (MIHR, www.mihr.org) and the Public IP Resource for Agriculture (PIPRA, www.pipra.org). Both share the common goal of facilitating best practices in the management of public sector IP. As with Dr. Krattiger, these organizations



***HANDBOOK OF BEST PRACTICES (KRATTIGER ET AL, EDS.)* ISBN: 1-4243-2026-7**

view IP as a tool for fostering innovation, that should neither be unduly feared nor blindly embraced, but rather *managed* to maximize the benefits of innovation for *all* of society, and *especially* for the poor.

Like a verdant green pasture in the Swiss Alps, the chapters of the *Handbook* are rich in diversity, addressing modern IP management practices (including global access strategies and "humanitarian" licensing), technology transfer, and various aspects of IP law as they relate to equitable international development. Broadly put, the goal of the *Handbook* is to support the development of effective global health and agricultural innovation systems through a comprehensive IP management resource. Only by integrating IP management in a socially responsible manner can modern institutions achieve their goals and serve the developing world and the affluent alike.

Partly due to Dr. Krattiger's efforts, it is only now that the public sector is beginning to fully appreciate how it can use its own IP to help meet its social mission, including its responsibilities to the poor. He believes that, although there

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USING COMPULSORY LICENSING TO FIGHT THE AVIAN FLU

BY STEPHEN A. STRAUB (JD/MIP '07)

THROUGHOUT THE SUMMER OF 2005, concern began to grow across the globe as word of the H5N1 avian influenza became a matter of general discussion among world leaders. *See generally* IP L. Bull., *Bird Flu Prompts Calls for Compulsory Licensing*, **http://www.mhmlaw.com/media_coverage/Oct05_IPLaw_BirdFlu.pdf** (Oct. 13, 2005). The continued spread of the virus with an elevated fatality rate in humans caused all developed nations to pay close attention. *Id.* While the possibility of a serious pandemic still remains just that—a possibility—the concern about widespread loss of life appropriately draws a response from the public and media about the preparedness and defense for such a deadly scenario. *Id.* As of April 2006, the World Health Organization (WHO) reports surpass 100 confirmed human fatalities in nearly 200 cases, with the vast majority of them in Southeast Asia, even though the human occurrences are spreading westward into Eastern Europe. WHO, *Cumulative Number of Confirmed Human Cases of Avian Influenza A/(H5N1) Reported to WHO*, **http://www.who.int/csr/disease/avian_influenza/country/cases_table_2006_04_19/en/index.html** (last updated Apr. 19, 2006).

As the topic of preparedness was discussed by the Bush Administration, members of Congress, and nongovernmental bodies, the idea of stimulating production through compulsory licensing of Tamiflu, the only known drug capable of combating the virus, generated mixed reactions as to the appropriateness of such legal tool. *See e.g. House Democrats Press for Compulsory Licensing Authority*, FDA Week (newsletter of Inside Washington) 2005 WLNR 18263219 (Nov. 11, 2005). Roche Pharmaceuticals retains the patent rights of the anti-viral drug which has seen limited progress in being an effective means of fighting this flu. J. Matthew Buchanan, *Emotion Gives Way to Reason—Cries for Compulsory License Subside as Negotiated Deals on Tamiflu Begin to Appear*, **http://promotetheprogress.com/archives/2005/11/emotion_gives_w. html** (last updated Nov. 21, 2005). While not commonly used, compulsory licensing is a means by which patent rights can be circumvented in the interest of public health.

In 1994, the GATT-TRIPS Agreement was confirmed and the harmony among IP laws continued to take shape as Member States to the WTO could take advantage of the common standards. Specifically, Article 31 allows Members to authorize the use of patented subject matter without the right holder's consent, providing it is to alleviate an "extreme urgency" or "national emergency." *Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (TRIPS)*, pt. II, sec. 5, art. 31 (Apr. 15, 1994), **http://www.wto.org/ english/ docs_e/legal_e/27-trips.pdf** [hereinafter *TRIPS* art. 31]. Although there was general agreement as to what the article said, compulsory licensing continued to create a gorge in the policy of its application between those of the developed and the lesser developed countries. Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis* 50 (2d. ed., Sweet & Maxwell 2003). Nowhere is that more evident than the African nations' plea for licensing of drugs in the fight against AIDS. Erika Mullenbach, *The Influence of Disease on the Evolution of U.S. Patent Law and Policy Towards Foreign Patent Laws in the Late Twentieth to Early Twenty-First Century*, 7 Tul. J. Tech. & Intell. Prop. 227, 235 (Spring 2005). Yet the American administrations, among others, hold the firm position, using both economic and practical arguments in their support, that the AIDS epidemic is not a scenario in which the "extreme urgency" of public health should be remedied by compulsory licensing.

As a result of this strain of flu, Roche Pharmaceuticals became increasingly pressured to license Tamiflu in efforts to fight what could grow into a pandemic since, acting alone, Roche may not be able to produce enough to meet global demand. Buchanan, *Emotion Gives Way*. As the industries have shown in recent months, their efforts for licensing negotiations per Article 31 have been mildly successful in some Asian nations. *Id.* Faced with a potential national emergency, Roche is in the seemingly enviable position of having leverage to license at an abnormally high royalty rate compared to the subsequent standards for compulsory licensing.

While the economic and public policy considerations are important matters, the public health concerns remain. One of the major issues is determining just when and what that public interest really is. The provisions of the agreement identify "extreme urgency" as justification for the license, yet the definition of extreme urgency has not been commonly quantified. *TRIPS* art. 31. The members of the European Union demonstrate that the interpretations among them varied too much to be able to clearly define its scope. Friedrich-Karl Beier, *Exclusive Rights, Statutory Licenses and Compulsory Licenses in Patent and Utility Model Law*, 30 Intl. Rev. Indus. Prop. & Copy. L. 251, 261 (1999). Although inconsistencies are common, that does not prevent Member States from acting in accord with their own public health interest when such need arises.

In 2001, the Doha Ministerial Declaration provided an explanation as to the application of the compulsory licensing that Member States to the TRIPS Agreement should recognize. Although it is not a supplement to Article 31, it does expound on its provisions by stating that "each Member has the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted." *Declaration on the TRIPS Agreement and Public Health, Ministerial Conference, Fourth Session, Doha[Qatar]* par. 5, subsec. (a) (Nov. 9-14, 2001), **http://www.who.int/medicines/areas/policy/tripshealth.pdf**. It is understandable that national leaders would not want to subject their interests to the WTO's Dispute-Settlement Body in determining the validity of such a license.

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The Doha Declaration serves to reinforce the notion that Members are not surrendering their sovereignty to the WTO on such issues, but are empowered to decide the justification for licensing by themselves, providing there is compliance with the articles. *Id.* It is up to each nation "to determine what constitutes an extreme urgency" on a case-by-case basis. *Id.* When such decisions are made in adherence with Article 31, the licensing negotiation requirements are waived in the interest of public health. The Ministers agreed that "the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health." *Id.*

Canada provides an example of public interest use of compulsory licensing with pharmaceutical products. Until the early 1990s, Canada had authorized the licensing of various drugs with the intention of building a national stockpile that would be available if and when such a national emergency arose. Jerome H. Reichman, *Non-voluntary Licensing of Patented Inventions: Historical Perspective, Legal Framework under TRIPS, and an Overview of the Practice in Canada and the USA* 15 (Intl. Ctr. for Trade & Sustainable Dev. 2003). Their action drew sharp criticism as at the time, especially since their justification was weak due to a lack of urgency. Conversely, the American approach to public interest justification was confined more to licensing technology for the development of infrastructure, as well as for specialized military equipment. Lauren Keller, *Ciprofloxacin and Compulsory Licensing of Pharmaceutical Patents*, **http://leda.law.harvard.edu/leda/data/466/Keller.pdf** (last updated Apr. 23, 2002). The American policy surrounding this use is that the interests of the rights holder and that of the public need to be balanced, respecting the rights afforded by the patents and avoiding any WTO dispute settlement.

Barring a national emergency, consideration must be given to the impact such a license would make on the product market, and rightfully so. It is important to remember that despite the non-exclusive license, the

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A COMPULSORY LICENSE PROPOSAL FOR MUSIC SAMPLING

BY DAVID M. COOK (JD '07)

"GET A LICENSE OR DO NOT SAMPLE." *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 398 (6th Cir. 2004), *aff'd on reh'g*, 410 F.3d 792 (6th Cir. 2005). So said the U.S. Court of Appeals for the Sixth Circuit in its recent *Bridgeport* opinion, and so began a new day in the world of music sampling. For those who are not familiar with sampling, "sampling" takes place when a musical artist uses a segment of another artist's sound recording in his or her own musical work. The length of the segment sampled can vary greatly, and given the advanced audio engineering equipment on the market today, "samples are often altered in pitch, tone, and speed until they are virtually unrecognizable, and then woven into the fabric of the new song." Jennifer R.R. Mueller, Student Author, *All Mixed Up: Bridgeport Music v. Dimension Films and De Minimis Digital Sampling*, 81 Ind. L.J. 435 (2006). Sampling has been a common practice for many years, especially in the world of hip-hop music. But the sampling landscape is changing, as evidenced so jarringly by the Sixth Circuit's *Bridgeport* opinion.

Bridgeport involved the sampling of a two-second, three-note clip from the intro of *Get Off Your Ass and Jam* by George Clinton, Jr. and Funkadelic [hereinafter *Get Off*]. Mueller, 81 Ind. L.J. at 437. Legendary rap group N.W.A. had taken the sample and manipulated it by lowering its pitch and extending its duration. *Bridgeport Music*, 383 F.3d at 394. The manipulated sample, which was essentially unrecognizable when compared to the original sound recording, was then incorporated into N.W.A.'s song *100 Miles and Runnin'* [hereinafter *100 Miles*]. *Id.* No Limit Films, hip-hop artist Master P's film company, incorporated *100 Miles* into its film *I Got the Hook Up*. *Id.* at 393-394. On May 4, 2001, Bridgeport Music, which owns the sound recording copyrights in most of the works of George Clinton, as well as several other plaintiffs, filed suit in federal district court in Tennessee. *Bridgeport Music, Inc. v. Dimension Films, LLC*, 230 F.Supp. 2d 830 (M.D. Tenn. 2002). Among other things, Bridgeport Music claimed that No Limit Films was liable for infringing their copyright in the sound recording of *Get Off*. *Bridgeport Music, Inc.*, 230 F.Supp. 2d at 832-833.

The district court judge, applying traditional copyright infringement analysis, agreed with No Limit Films that, even if copying had occurred, such copying was *de minimis*. Alluding to copyright law's underpinnings in Article I, section 8, clause 8 of the U.S. Constitution, the district court judge noted that "the purposes of copyright law would not be served by punishing the borrower for his creative uses." *Id.* at 842. However, on appeal, the Sixth Circuit disagreed with the district court judge. *Bridgeport Music*, 410 F.3d at 795. Rather than affirm the district court's opinion, and thus endorse the application of longstanding copyright precedents, the Sixth Circuit chose to blaze a new trail.

The Sixth Circuit set forth a new rule, admittedly not based upon precedent: If you sample part of someone else's sound recording, but you do not get a license to do so, you are liable for copyright infringement—period. *Id.* at 801. This rule, of course, obliterates the defense of *de minimis* use in sampling cases. (It should be noted that the court left intact the defense of fair use. *Id.* at 805.) In arriving at its rule, the Sixth Circuit applied a strict reading of the relevant statutory provision, 17 U.S.C. § 114 (2000), and by reference therein, § 106. *Bridgeport Music, Inc.*, 410 F.3d at 799-801. The most relevant portions of these provisions vest in the owner of a sound recording copyright the exclusive rights to (1) "reproduce" the sound recording "in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording," and (2) prepare "derivative works" in which "the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or in quality." *Id.* One can see where a narrow reading could lead to the court's conclusion.

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THE LEGEND OF THE LONE RANGER

BY SARITA L. SIMON (JD '08)

WITH THE CONSTANT BUZZ about an upcoming Lone Ranger movie, one cannot help but think back to the original Lone Ranger. On both television and the silver screen Clayton Moore portrayed the fictional Old West hero. Wikipedia, *The Lone Ranger*, ***http://en.wikipedia.org/wiki/The_Lone_Ranger*** (accessed Mar. 3, 2006). Who is the Lone Ranger? The Lone Ranger is John Reid. *Id*. Reid is a 19th century Texas Ranger who, on assignment with fellow Rangers, pursues the murderous Butch Cavendish Gang. *Id*. The Rangers are caught in an ambush and all are left for dead. As fate would have it, Reid survives. His childhood friend, Tonto, finds him and nurses him back to health. *Id*. Reid takes his dead brother's Ranger vest and, for the purpose of concealing his identity, fashions a mask from it. *Id*. In completing his metamorphosis into the Lone Ranger, Reid decides to use only silver bullets and to never shoot to kill. *Id*. With his trusty sidekick Tonto and his white steed Silver, the Lone Ranger ventures forth into the West, fighting injustice whenever it is found. *Id*.

In 1957, when the Lone Ranger series and movies came to an end, Moore made a career out of making public appearances as the Lone Ranger. Clayton Moore, *I Was That Masked Man* 203 (Taylor Trade Publg. 1998). Moore would average 200 appearances a year. *Id*. He made paid appearances at malls and amusement parks but would donate his time when appearing at children's hospitals and orphanages. *Id*. The Wrather Corporation (hereinafter Corporation) via Jack Wrather owned the copyright to the Lone Ranger, which he bought in 1954 for $3 million. Moore, *I Was That Masked Man* at 204; Richard Goldstein, *Clayton Moore, Television's Lone Ranger and A Persistent Masked Man, Dies at 85*, N.Y. Times B8 (Dec. 29, 1999). Furthermore, each time that Moore appeared as the Lone Ranger, he paid the Corporation a fee. Moore, *I Was That Masked Man* at 204.

In 1975, the Corporation informed Moore that he would have to stop making appearances as the Lone Ranger. *Id*. at 205. He was reminded that the copyright to the Lone Ranger laid with the Corporation and any appearances by Moore would constitute infringement. *Id*. The next day Moore sent a letter to the Corporation stating that he would no longer appear as the actual Lone Ranger and that he would henceforth advertise himself as the man who had played the Lone Ranger. *Id*. The Corporation, however, asserted that Moore was in violation of their copyright. *Id*. The Corporation announced in 1978 that it was producing a new Lone Ranger movie entitled *The Legend of the Lone Ranger*. Mary Spooner, *Clayton Moore*, **http://www.celebhost.net/claytonmoore/** (accessed Mar. 3, 2006). In 1979, a California court issued a restraining order for the Corporation against Moore preventing him from wearing the mask of the Lone Ranger. Moore, *I Was That Masked Man* at 207. One of the Corporation's lawyers asserted that "In spite of what Mr. Moore feels in his heart, he is not the Lone Ranger. We own the Lone Ranger." *Id*. at 209.

On August 17, 1979, Moore appeared in court to fight the restraining order. In the Los Angeles Superior Court the Corporation claimed that Moore could no longer represent the Lone Ranger because he was "no longer an appropriate physical representative" of the hero. *Id*. at 208. The Corporation also argued that since it was producing a new Lone Ranger movie, Moore's personal appearances would confuse the public as to who portrayed the Lone Ranger. Spooner, *Clayton Moore*. After deliberating, the Judge excused himself citing that as a Lone Ranger fan he could not be impartial. Moore, *I Was That Masked Man* at 208. Another hearing was held on August 30, 1979. *Id*. at 209. Judge Vernon Foster ruled in favor of the Corporation and Moore was restrained from wearing the mask of the Lone Ranger in public and from representing himself as the Lone Ranger. *Id*.

Immediately after the court rendered its decision, Moore stated, "I am astonished that this would happen. But I'm a fighter. I believe in that which is right … and the truth is I have been the Lone Ranger for the past thirty years and I will not give up the fight and I love my public and I'll fight for you—I'll continue to make personal appearances for my thousands of fans." *Id*. at 209. True to his word, Moore continued to make appearances wearing sunglasses instead of a mask, so as not to violate the injunction. *SlangSite.com*,

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But despite the heavy reliance the court placed on the statute, it freely acknowledged that it was making new law, and it sought to further justify its opinion, noting that "we did not pull this interpretation out of thin air." *Id.* at 802-803. The court noted first that "several law review and text writers" had arrived at the same conclusion as the court. *Id.* at 803. Also, the court pointed out that "many artists and record companies have sought licenses as a matter of course," though the court acknowledged that the number of instances in which sampling is ignored or simply goes unnoticed, cannot be accurately measured. *Id.* at 804. Next, the court suggested that "the record industry …has the ability and know-how to work out guidelines, including a fixed schedule of license fees, if they so choose." *Id.* Then the court frankly admitted that "there is no Rosetta stone for the interpretation of the copyright statute," perhaps acknowledging implicitly that a degree of criticism was sure to follow the issuance of its opinion. *Id.* at 805. Finally, the court suggested that "Congress…is the best place for [change to be made in the application of copyright law to the field of digital sampling], rather than in the courts, because as this case demonstrates, the court is never aware of much more than the tip of the iceberg." *Id.* And it is this final point that I wish to pursue here. I agree that Congress should take up this issue, and I would further suggest that in doing so, Congress should consider implementation of a compulsory licensing regime for digital sampling.

The compulsory license proposal that follows is intended only as one solution to current digital licensing issues. The framework for the proposal discussed below was first developed by Dr. E. Michael Harrington, a professor of IP and music business at Belmont University, though additional considerations are also discussed. E-mail from Dr. E. Michael Harrington, Prof. of Intell. Prop. and Music Bus., Belmont U., to David M. Cook (March 17, 2006, 9:08 EST) (copy on file with Mr. Cook). Dr. Harrington humorously refers to this framework as the "10-10-254 Call." *Id.* For reference, the term "original owner" refers to the person or entity that owns the copyright in the sound recording that is being sampled, and the term "new user" refers to the artist or group

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original rights holder can still be a participant in the market. In doing so, the licensor may be at a financial advantage that the licensees cannot overcome. For example, supposing that Roche's Tamiflu was licensed to Pfizer and Merck, the know-how and experience of Roche in producing that drug may enable their retail cost to be substantially lower than the two licensees, in effect canceling part of the license's purpose. However, in the influenza scenario, demand could simply be far greater than supply, driving costs up or preventing Roche from really being much of a participant in the market at all if there are numerous licensees.

The provisions of Article 31 as to negotiations are designed to encourage licensing of products without any government intervention. *TRIPS* art. 31. When terms cannot be reached between competitors, the government's role is to create the license so the public need can be met while at the same time establishing compensation for the temporary suspension of the exclusive rights of the licensor. *Id.* However, a number of industries generally disfavor compulsory licensing because the potential for massive economic gains is lost. As such, knowing that the alternative is a compulsory license, licensees could gain bargaining power in negotiations. Commentary further suggests that such financial loss on the licensor hinders research and development, a policy which American administrations held to until recently. Emma Clark, *America's Anthrax Patent Dilemma*, **http://news.bbc.co.uk/1/hi/business/1613410.stm** (last updated Oct. 23, 2001).

In 2001, the Bush Administration was faced with similar circumstances due to persons being targeted with anthrax after the 9/11 attacks. Bayer Pharmaceuticals was the rights holder to Cipro, which was widely believed to be the most effective drug available to treat the symptoms. Keller, *Compulsory Licensing*. Given the terrorist circumstances of the time, and a lack of an effective stockpile of the drug, the Bush Administration actively threatened the compulsory license, justified by the

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WELL-KNOWN MARKS: PROTECTING INTERNATIONAL GOODWILL

BY JULEEN KONKEL (JD '07)

THE BASIC TENETS OF TRADEMARK LAW are to deter public confusion as to the source of goods and to reward the efforts of one's labor. J. Thomas McCarthy, *McCarthy on Trademarks* § 2.1 (4th ed.). The U.S. maintains a first in time, first in right system of protection and provides common law protection for unregistered marks. However, the Lanham Act does not specifically recognize protection for well-known marks. Well-known marks are those considered famous outside of their domestic market. In today's global economic environment, legal recognition for well-known marks is especially prudent where international travel, the internet, and media permit business goodwill to cross international borders, creating a situation where significant public confusion regarding the source of goods and free-riding on foreign goodwill are possible.

The "well-known marks" and "famous marks" doctrines are different legal principles. The "well-known mark" doctrine, codified in Article 6 *bis* of the Paris Convention and adopted by the GATT TRIPS Agreement, is a legal concept where a trademark or service mark is protected from potential infringers within the domestic market if it has acquired a certain level of fame regardless if it is used in commerce or registered within that domestic market. *Paris Convention for the Protection of Industrial Property* art.6bis (Mar. 20 1883), **http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html**; *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Annex 1C, Apr. 15, 1994, **http://www.wto.org/english/docs_e/egal_e/27-trips.pdf** [hereinafter TRIPS agreement]. The Paris Convention leaves the scope of protection and definition of a "well known" mark to the individual nations. As such, U.S. courts have not quantified the level of fame required to show that a mark is a well-known mark. *McCarthy on Trademarks* surmises that for a mark to be well-known it requires more than just secondary meaning in the relevant market, rather a "substantial percentage" of the population should be familiar with the mark. J. Thomas McCarthy, *McCarthy on Trademarks* § 29.4 (4th ed.) (citing *Grupo Gigante SA De CV v. Dallo & Co., Inc.*, 391 F.3d 1088 (9th Cir. 2004)). Compare this to the "famous mark" doctrine, codified in the Lanham Act, which provides federal protection against dilution of famous marks. 15 U.S.C. § 1125(c)(1) (2000).

The Paris Convention recognizes that a trademark exists only under the laws of the sovereign state; signatories to the Paris Convention must adopt its four basic principles, but are free to adopt other provisions. The four basic principles provide that: 1) foreigners are given national treatment; 2) each signatory gives a defined minimum level of protection for certain rights; 3) a priority filing date exists; and 4) an administrative framework is recognized. *Paris Convention for the Protection of Industrial Property* art. 6 *bis* (Mar. 20 1883) **http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html**. Though provisions of the Paris Convention are incorporated into the Lanham Act, international treaties do not create federal causes of action or provide foreign plaintiffs any substantive rights. *Grupo Gigante*, 391 F.3d at 1100. The U.S. incorporated provisions of the Paris Convention into Lanham Act § 44. 15 U.S.C. § 1126 (2000). Although the U.S. did not codify the "well-known marks" provision, circuit courts and legal scholars extend Lanham Act § 44(b) and Lanham Act § 44(h) to cover infringement suits of well-known marks. J. Thomas McCarthy, *McCarthy on Trademarks* §29.4 (4th ed.). Lanham Act § 44(b) incorporates the Paris Convention requirement of national treatment, and Lanham Act § 44(b) extends the benefits of the Lanham Act necessary to give effect to the treaties. 15 U.S.C. § 1126 (2000). In combination with Lanham Act § 43(a), providing protection for unregistered marks, a foreign national with an unregistered mark may have a cause of action to bring a trademark infringement suit for a "well-known" mark. 15 U.S.C. § 1125 (2000).

To bring a suit for infringement under Section 43(a) of the Lanham Act, one must show both priority and likelihood of confusion. Priority is established through: federal registration; the common law by use in commerce; and, in some jurisdictions, through the well-known mark doctrine. Priority traditionally contains a territoriality component requiring the particular use in commerce to be within the U.S. Congress regulatory power. Next, a

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http://www.slangsite.com/slang/C.html (accessed Mar. 3, 2006). Incidentally, this gave birth to the term Claytons, which are large black sunglasses that are worn over eyeglasses. *Id*.

Following the verdict, Moore's popularity soared and he appeared on more than 250 talk shows. Moore, *I Was That Masked Man* at 212. John T. Douglas even wrote a song entitled "Keep The Mask On The Lone Ranger." *The Lone Ranger—Song*, **http://www.geocities.com/TelevisionCity/7286/song.html?200616/** (accessed Mar. 3, 2006) (quoting John T. Douglas, *Keep the Mask on the Lone Ranger* (Meridian Records, 1979) (L.P.). The song includes the lines: "Well, it don't make no difference what that judge might have to say. Ain't nothing gonna make it right to take that mask away." *Id*.

Various IP issues are posed in the case between Moore and the Corporation. Many have heard of the case and the issues raised, despite the fact that the case was unpublished. It can safely be assumed that Judge Foster granted the Corporation the injunction based on the trademark principles of confusion and dilution. The Lanham Act dictates that any unauthorized use of a trademark constitutes an infringement if it creates a likelihood of consumer confusion as to the source, and the trademark infringer can be held liable in a civil action by the registered trademark owner for remedies, which include an injunction and monetary damages. 15 U.S.C. § 1114(1) (2000).

In examining the likelihood of confusion, Judge Foster would have examined the test laid forth in *Polaroid Corp. v. Polarad Electr. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961). In applying this test, the court must determine the similarity of the products by examining, among other elements, both style and appearance. *Id*. Therefore, since Moore was appearing as the Lone Ranger while the Corporation was in pre-production and production of a new Longer Ranger movie, the public could be confused as to who actually portrayed the Lone Ranger. Additionally, since the Lone Ranger is a famous trademark, the Corporation could bring forth a dilution claim. 15 U.S.C. § 1125(c) (2000). The court would examine California's anti-dilution statute, which grants an injunction when there is either dilution or tarnishment. Cal. Bus. & Prof. Code Ann. § 14330 (West 2003). Since Moore was making appearances as the Lone Ranger, the trademark was being diluted. Dilution occurred because the Corporation, in promoting their new movie, touted the Lone Ranger as a young, virile man. Moore, who was in his sixties, did not fit that image. The court granted the Corporation the injunction because the Corporation had the trademark rights to the Lone Ranger and Moore was diluting the mark. Judge Foster would have concluded that no reasonable person could find that there was not confusion as to the portrayal of the Lone Ranger.

Taking the mask away from Moore ended up being a public relations disaster for the Corporation. All of this could have been prevented from the start had the Corporation protected their trademark in the mask of the Lone Ranger. This is a classic example of poor IP management. From the very beginning, the Corporation needed to regulate Moore's appearances as the Lone Ranger. The Corporation's acquiescence and lack of regulation allowed for Moore and the Lone Ranger to be associated as one. This is evidenced by the fact that in 1987, when Moore was given a star on the Hollywood Walk of Fame, for the first time in history there was not only the star's name (Moore) on the icon, but that of the character he portrayed (the Lone Ranger), as well. Moore, *I Was That Masked Man* at 239.

On September 20, 1984, the Corporation lifted the restraining order. *Id*. at 216. This occurred just before Wrather Corporation dissolved. *Id*. Once the injunction had been lifted, Moore proclaimed, "It doesn't matter that I am Clayton Moore, an actor, and that the Lone Ranger is a legendary figure of folklore. In more ways than I can count, we have become one and the same. I have absorbed parts of him, and he has taken on

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public health concern, which was in stark contrast to the traditional American position of respecting patent's right to exclude. *Id*. As a result, Bayer licensed the drug, providing the needed relief in the event that widespread demand for it did develop, while also serving the public's interest since it had the effect of driving the retail cost downward due to the competition. Fortunately, the anthrax scare subsided and the need for further licensing dissolved, but the scenario provided an illustration of the issues compulsory licensing creates.

Since the fall of 2005, much commentary continues about the inadequacy of government response to the disaster on the gulf coast due to Hurricane Katrina. Even though that scenario is vastly different than avian flu, the role of preparation and response to impending disasters is strikingly similar. While at this time there is no certainty that the avian flu will mutate into a global pandemic, lessons have been learned which should lead us to be better prepared. The Doha Declaration reinforces the point that governments should act prudently as to the availability of needed pharmaceuticals. Knowing the amount of time it takes to produce the drugs, the time has come to act accordingly and mandate compulsory licensing to protect the American public. ■

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that is sampling the original owner's sound recording. The gist of the 10-10-254 Call is as follows: The new user would be entitled to employ this compulsory license only in regard to sound recordings that have been available to the public for at least ten years—the first "10." *Id.* The new user would be entitled to sample no more than the lesser of ten seconds or ten percent of the original owner's sound recording—the second "10." *Id.* The original owner would be entitled to twenty-five 25% of all monies generated from the new user's recording—the "25." *Id.* And the original owner would be entitled to quarterly payments, or four payments per year—the "4." *Id.*

There are several reasons for the ten-year provision. First, because the sampled work would have been publicly available for at least ten years, the new user's work would not undermine the market for the original owner's sound recording. *Id.* Second, in light of the fact that most commercial releases see a dramatic decrease in sales volume after just a few years, the new user's work would, in almost all cases, generate new income for the original owner. *Id.* Finally, it is quite likely that the new user's work would generate renewed interest in the original owner's sound recording, perhaps leading to increased sales of the original owner's sound recording. *Id.* One criticism of this ten-year provision is that it in no way addresses licensing issues concerning the thousands of commercial releases that are, at any given point in time, less than ten years old. In response to this criticism, one should bear in mind that Congress could also address this particular issue. But even in the absence of congressional action, this provision seems a rational compromise between free enterprise, government regulation, and the proliferation of artistic expression. It would allow for free market forces to control the market for sampling licenses for a full decade, at which point, in the interest of artistic expression, government regulation would assume a relatively restrained role.

Likewise, there are several reasons for the ten seconds/10% provision. By putting this cap on the quantity of the original owner's work which the new user may

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From the Editor

PATENTS COME AND GO — TRADE SECRETS ARE FOREVER

BY KARL F. JORDA

IN A RECENT WIPO EXECUTIVE PROGRAM on "Strategic Intellectual Property Management," Professor James Conley of the Kellog School of Management discussed in his lecture concepts and strategies of "value transference" and "intellectual property continuum of protection" in order to "make optimal use of each IP regime at every stage of the life-cycle." In particular, he touted the thesis that "trademarks are forever," while "patents come and go."

Professor Conley based his discussion on his published articles, titled "Snow White shows the way" (*Managing Intellectual Property*, June 2001), "Trademarks, Not Patents: The real competitive advantage of the Apple iPod" (Core 77, Dec. 2005) and "Patents Come & Go —Trademarks are Forever" (*Executive Counsel*, March/April 2005).

In the first of the above articles, he states that:

> …early in the product life cycle, there are numerous forms of protection including patents, copyrights and trademarks. As the product ages the value of the limited life intellectual property vehicle typically decreases unless the value is actively transferred to a longer life trademark. If this transference is properly managed, the value associated with that idea could be extended to the life of the trademark.

According to the second article:

> Value transference…is typically achieved by using patents early in the lifecycle to secure functional differentiations….But while…the functional differentiation remains unique at or near the launch of a new product, it is not sustainable. While a company has this advantage, however, they'll want to build an association between patented aspects of the offering, and a non-functional cognitive touch point of the user experience.

And in the "Patents Come & Go—Trademarks are Forever" article, he points out:

> Contemporary power brands that evolved from limited life, patent-protected regimes into infinite asset trademark estates include Dolby in consumer electronics, LEGO and Barbie in toys, The Purple Pill (Prilosec to Nexium) in pharmaceuticals, and Nutrasweet in food additives.

It is noteworthy that Professor Conley's focus is on trademarks, and particularly on "power brands," i.e. famous trademarks, inasmuch as trademarks can survive patents indefinitely. It is also remarkable that he totally ignores trade secrets, which also can survive patents indefinitely and have numerous additional advantages, as a consequence of which they fit a *fortiori* into a strategy of "intellectual property continuum of protection." When I spoke up after his lecture and suggested that trade secrets were a better medium for a "continuum of protection," he dismissed trade secrets out of hand, referring to "independent discovery" and "enablement" ("best mode") as militating against reliance on trade secrets. As will be clear from the following commentary, this is misguided reasoning.

While Professor Conley's strategy for extending IPRs via reliance on famous trademarks is certainly meritorious, it is very limited, because famous trademarks are a very narrow and exceptional species of trademarks and are only contemplated by him as replacements for expired patents. Why rely for added post-patent protection only on exceptional famous trademarks and why focus only on post-patent protection?

I submit that a broader and more useful alternative in an "intellectual property continuum" would be reliance on patents in conjunction with trade secrets. Thus, my prescription for a more effective and synergistic IP management strategy would be patents and trade secrets as well as trademarks and other IPRs at all times for concurrent dual or multiple protection.

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is growing interest in using IP for public benefit, there is a corresponding lack of knowledge and capability, hence, all the more, the critical role of the *Handbook*.

Having worked in the international development and public sectors for his entire career, along with consulting work for the private sector, Dr. Krattiger realized that the public sector was very slow in taking IP issues seriously. He has lived and worked in many parts of the world, including Mexico, where he worked in the late 1980s at the International Wheat and Maize Improvement Center (know by its Spanish acronym CIMMYT, a member of the Consultative Group on International Agricultural Research…the CGIAR). When with CIMMYT, he tried to collaborate with companies such as Monsanto, Ciba-Geigy and Sandoz (now Syngenta), but this was considered inappropriate, as CIMMYT sought to serve the "public domain." With all of the major and valuable biotechnology applications emerging from private companies, this struck Dr. Krattiger as myopic, and he looked elsewhere for the possibility of pursuing opportunities to team up with companies and begin the process of working out models for collaboration and sharing.

In 1991, Dr. Krattiger left CIMMYT and collaborated in the creation of an international biotechnology broker organization, the International Service for the Acquisition of Agri-biotech Applications (ISAAA), to facilitate agricultural biotechnology transfer from the private sector, via licensing and public-private partnerships, to developing countries. As executive director of ISAAA he carried many responsibilities and realized many accomplishments. For example, under his directorship, ISAAA expanded internationally, with centers and programs in Europe, Africa, and Southeast Asia. While at ISAAA he also led the preliminary freedom to operate analysis of a now famous food biotechnology product, pro-vitamin A rice (Golden Rice), and also led IP audit teams at several of the international agricultural centers of the CGIAR. He subsequently served as Executive to the Humanitarian Board for Golden Rice, working on patent pooling, licensing, technology transfer, and regulatory issues to set up the Golden Rice network in Asia.

In addition to being a member of the ACIP, Dr. Krattiger currently serves as a member of the Board of the Black Sea Biotechnology Association, as Editor-in-Chief of *Innovation Strategy Today*, and as a member of the Editorial Boards of the *International Journal of Biotechnology* and the *International Journal of Technology Transfer and Commercialization*. He also serves on the Advisory Board of CABI's online service AgBiotechNet, was a Distinguished Advisor to the Council for Biotechnology Information in Washington DC until the Council merged with BIO, and chairs bioDevelopments International Institute, a non-profit organization that brings people together for the joint development of solutions to problems that extend beyond geographic and cultural frontiers. He has also edited several books and has over 70 publications in refereed journals and book chapters. Working extensively around the world, he travels widely and often speaks at international meetings.

When he is not in motion, Dr. Krattiger is based in part at the Biodesign Institute at Arizona State University in Tempe where he focuses on *global access strategies* and related IP management aspects for plant-derived vaccines. In a graduate class he teaches at the Sandra Day O'Conner College of Law at ASU, innovation management from the perspective of IP management is the topic, that is, where *access strategies* and IP management converge with research and development, regulatory frameworks, manufacturing capabilities, trade aspects, and access to markets for the distribution of new vaccines to reach the poor in developing countries. He also serves as an adjunct professor at Cornell University, where he co-teaches a graduate course entitled *Patents, Plants and Profits: IP management in the life sciences*. And if you don't find Dr. Krattiger engaged in one of these many activities, then you might find him back in his beloved Swiss Alps, hiking in the spectacular alpine splendor, becoming reinvigorated and newly inspired to energetically pursue a new set of projects and tackle a new round of challenges. ■

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Assistant Clinical Professor – IP & Transaction Clinic Ashlyn Lembree participated in the 4th Annual Arts Day of Learning and Networking on September 16 in Exeter, NH. She also attended a meeting of IP clinic professors at Washington Law School on September 21-22.

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Associate Dean for Graduate Programs Susan Richey presented a paper entitled "Wages for the Sin of Omission in the Trademark Office: Should Applicants Be Under a Duty to Disclose?" at the Works in Progress Intellectual Property Colloquium 2006 held at the University of Pittsburgh School of Law, October 6-7. **Professor Richey** attended the November 8-11 International Trademark Association's (INTA) Leadership Meeting in Phoenix, AZ, as both the Chairman of the INTA Panel of Neutrals and as the Chair of the Neutrals Standards and Measurements Subcommittee.

* *

On August 18, **Pierce Law Trustee** and **Professor Gordon Smith** lectured at the Academy for Intellectual Property Studies, Mumbai, India. **Professor Smith** moderated a panel "Does Asia Value Its

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That calls for more detailed discussion of the role and value of trade secrets for the protection of innovation. However, I want to quote beforehand—for independent authoritative support for my theme—the following passage from Mark Halligan's fresh-off the press *Trade Secret Asset Management* book:

> …the vast bulk of the value of intangible assets is comprised of the company's trade secrets, not of its goodwill, branding, or other intangible assets. Trade secrets are what allowed Google to come out of nowhere to dominate the search engine business over competitive search technologies from companies with established goodwill and branding like Yahoo, AOL, and Microsoft. It is the trade secrets that drove their success, which in turn drove their goodwill and branding, not the other way around. (Emphasis added.)

My patent/trade secret strategy contemplates, first of all, not resting on a single, albeit perhaps basic, patent for new innovations, but obtaining, in addition, as many improvement or follow-up patents as possible on different aspects of a given innovative product or process for offensive as well as defensive purposes. Patentable improvements may reside, especially in fields of modern technology, in novel compositions and combinations, intermediate products and subassemblies, methods of use and methods of manufacturing, etc., which may be developed over time in ongoing R&D efforts to improve commercial embodiments and obtain growing patent portfolios for stronger protection. One patent may be a slender reed, inasmuch as three dozens of reasons exist for a patent to be invalid or unenforceable. A telling illustration of such an "evergreening" practice is Pitney Bowes' patent portfolio on their "Paragon Mail Processor." In a presentation on Pitney Bowes' "Patent Operations" at an ACPC (Association of Corporate Patent Counsel) meeting in February 2004, Chief IP Counsel Chuck Malandran called this mail processor a "simple machine," on which they had "over 100 patents."

Furthermore, on the trade secret side of my patent/trade secret paradigm, the importance of trade secrets is no longer in doubt. Trade secrets are the "crown jewels" of corporations. "Trade secrets are the IP of the new millennium and can no longer be treated as a stepchild," per Mark Halligan and James Pooley proclaimed recently: "Forget patents, trademarks and copyrights…trade secrets could be your company's most important and valuable assets." Indeed, trade secrets are now gaining greater reverence as a tool for protection of innovation. According to a 2003 IPO Survey on Strategic IP Management, patents are often not viewed as a panacea but as a side show inasmuch as patents have limits, such as, early publication, invent-around feasibility and patentability requirements but proprietary technology is highly rated as a key source of competitive advantage and the really important intellectual assets are skills and knowledge (88% of responses), i.e. trade secrets. Another finding of this Survey is that while some companies dominate an industry by controlling key patents, others do so by holding important technology as trade secrets.

And the stakes are getting higher. Injunctions have become a greater threat in trade secret misappropriation cases and damage awards have been in the hundreds of millions in recent years. For instance, in a trial in Orlando, in which two businessmen were seeking $1.4 billion in damages from Walt Disney Co., accusing the company of stealing trade secrets for the sports complex at Walt Disney World, the jury awarded them $240 million. And misappropriation of trade secrets of Pioneer Hi-Bred International on genetic corn seed materials by Cargill, Inc. cost the latter $300 million.

Moreover, patents are but the tips of icebergs in an ocean of trade secrets. Over 90% of all new technology is covered by trade secrets and over 80% of all license and technology transfer agreements cover proprietary know-how, i.e. trade secrets, or constitute hybrid agreements relating to patents and trade secrets. Bob Sherwood, an international IP consultant, calls trade secrets the "work horse of technology transfer." Trade secrets are also writ large in franchise agreements, constituting hybrid trademark/trade secret agreements. Trade secret protection is also exceedingly important because it operates without delay and without undue cost against the world. A trade secret kept by a company in the U.S. is not accessible in any other country and thus provides protection in all countries. Misappropriation of such a trade secret even by a foreign party is actionable under

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sample, the possibility that the new user's work would essentially be able to piggy-back on the original owner's work is largely alleviated. In essence, the operative reasoning here is analogous to that underlying the ten-year provision. Some may say, by contrast, that this provision is too restrictive of the new user's ability to sample, and thus, create new art. However, an important aspect of the 10-10-254 Call is that it would in no way preclude parties from setting up private, individualized licensing arrangements for samples. *Id.* Rather, the 10-10-254 Call would be a sort of fallback option for new users. So, if it were in the best interests of both parties for more than ten seconds or ten percent of the original owner's work to be sampled, the parties could take it upon themselves to reach an agreement to that effect. *Id.*

The reasoning behind the remaining provisions is more straightforward. The original owner would be entitled to 25% of the monies generated by the new user's work. Thus, a new user would not employ the 10-10-254 Call flippantly. Were he to sample several works on one track under the 10-10-254 Call, he could even lose money on that particular track. So, new users would have incentive to be restrained in their use of the compulsory license. And the quarterly payment provision simply reflects the commonplace practice of quarterly payments for various types of arrangements in today's music industry; it is workable and fair for all parties.

To reiterate, the 10-10-254 Call is just one partial solution to current digital sampling issues. Surely there are other productive approaches one could take to solve the same problem. Nevertheless, at the end of the day, at least one thing is certain: the digital sampling times are changing, and the law needs to follow suit. ■

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the EEA (Economic Espionage Act) of 1996, reaching beyond U.S. borders and making trade secret theft a federal felony). Patents and trademarks, on the other hand, are territorial and so expensive to obtain and maintain that they can be taken out only in selected countries. While famous trademarks enjoy broader protection they are few and far between and usually reach such a lofty status years later in the life cycle of a commercial product.

By contrast, trade secrets are the first and last line of defense: they come before patents, go with patents, and follow patents.

All patents are born as trade secrets and before patent applications are filed and while they are pending thereon, only trade secret protection is available. Thus, in the critical R&D stage before filing and before applications are published and patents issued, trade secret law particularly "dovetails" with patent law according to our Supreme Court (*Bonito Boats v. Thunder Craft Boats*, 1989). Provided an invention has been fully described so as to enable a person skilled in the art to make and use it and the best mode for carrying out the invention, if available, has been disclosed, as is requisite in a patent application, all associated or collateral know-how not divulged can and should be retained as a trade secret. All the massive R&D data, including data pertaining to better modes developed after filing, whether or not inventive, can and should also be maintained as trade secrets, to the extent some of the data are not disclosed in subsequent follow-up applications. Complementary patenting and padlocking throughout all stages of the product life cycle is tantamount to having the best of both worlds, especially with respect to complex technologies consisting of many patentable inventions and mountains of associated know-how.

Of course, it goes without saying that technical and commercial information and collateral know-how that can be protected via the trade secret route cannot include information and know-how, which is generally known, readily ascertainable or constitutes personal skill. But this exclusion still leaves masses of data and tons of know-how which are the grist for trade secrets and often also for additional improvement patents. In this regard GE's industrial diamond process technology comes to mind as an excellent illustration of the synergistic integration of patents and trade secrets to secure invulnerable exclusivity.

The artificial manufacture of diamonds for industrial uses was very big business for GE and GE also had the best proprietary technology for making such diamonds. GE patented much of its technology and some of the patents had already expired, so that much of the technology was in the technical literature and in the public domain. But GE also kept certain distinct inventions and developments secret. The Soviet Union and a Far Eastern country were very interested in obtaining licenses to this technology but GE refused to license anyone. Getting nowhere with GE, the Far Eastern interests resorted to industrial espionage and a trusted fast track star performer at GE—a national of that country—who was above suspicion, was enticed with million dollar payments to spirit away GE's crown jewels. But after a while the GE employee got caught, tried and jailed.

Since 1942 Wyeth has had an exclusive position on Premarin, the big-selling hormone-therapy drug. Their patents on the Premarin manufacturing process (starting with pregnant mares' urine) had expired decades ago, but they also had held closely guarded trade secrets. Apparently on behalf of Barr Laboratories, which had been trying to come out with a generic Premarin for 15 years, Natural Biologics stole the Wyeth trade secrets. Wyeth sued and prevailed, getting a total injunction, as it was an egregious case of trade secret misappropriation.

These cases illustrate so well the value of trade secrets and, more importantly, the merits of marrying patents with trade secrets, especially since it was trade secrets that provided invulnerable exclusivity, long after—and in the Wyeth case many decades—after the patents had expired.

Other recent decisions, such as *C&F Packing v. IBP* and *Pizza Hut* (Fed. Cir. 2000) and *Celeritas Technologies v. Rockwell International* (Fed. Cir. 1998) also demonstrate that it is now well established that dual or multiple IP protection is not only possible but essential to exploit the IP overlap and provide a fall back position.

In the Pizza Hut case, for instance, Pizza Hut was made to pay $10.9 million to C&F for misappropriation of trade secrets. After many years of research C&F had developed a process for making and freezing a precooked sausage for pizza toppings which had the characteristics of freshly cooked sausage and surpassed other precooked products in price, appearance and taste. C&F had obtained a patent on the equipment to make the sausage and also one on the process itself. It continued to improve the process, after submitting its patent applications, and kept its new developments as trade secrets.

Pizza Hut agreed to buy C&F's precooked sausage on the condition that C&F divulge its process to several other Pizza Hut suppliers, ostensibly to assure that backup suppliers were available to Pizza Hut. In exchange, Pizza Hut promised to purchase a large amount of precooked sausage from C&F. C&F disclosed the process to several Pizza Hut suppliers, entering into confidentiality agreements with them. Subsequently, Pizza Hut's other suppliers learned how to duplicate C&F's results and at that time Pizza Hut told C&F that it would no longer purchase any more sausage from it without drastic price reductions.

IBP was one of Pizza Hut's largest suppliers of meat products other than sausage. Pizza Hut furnished IBP with a specification and formulation of the sausage toppings and IBP signed a confidentiality agreement with Pizza Hut concerning this information. IBP also hired a former supervisor in C&F's sausage plant as its own production superintendent but fired this employee five months later after it had implemented its sausage making process, and Pizza Hut was buying the precooked sausage from IBP.

C&F then brought suit against IBP and Pizza Hut for patent infringement and misappropriation of trade secrets. The court found, 1) on summary judgment that the patents of C&F were invalid because the inventions had been on sale more than one year before the filing date and 2) after trial that C&F possessed valuable and enforceable trade secrets, which were indeed misappropriated.

What a great example of trades secrets serving as a fall back position where the patents fail to provide any protection!

Moreover, licenses under patents without access to associated or collateral know-how as a practical matter are often not enough for commercial use of the patented

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plaintiff must show that a likelihood of consumer confusion exists where trademarks on products are similar enough that consumers would confuse the origin of the product. Where a likelihood of confusion exists, a senior user may enjoin a junior user from using a mark in a geographical area where the senior user has established priority. U.S. trademark law protects unregistered marks in the geographic regions where goodwill has been established either through use or, in one case, where the mark is well-known to a substantial portion of consumers. *Grupo Gigante*, 391 F.3d at 1098. Application of the well-known marks doctrine requires the courts to find an exception to the domestic territoriality requirement and recognize infringement where the product's goodwill, developed in a foreign market, transplants to the U.S. by consumers with extraterritorial connections.

Circuit courts disagree on whether infringement of an unregistered well-known mark is possible under the Lanham Act § 43(a) where the territoriality and use in commerce provisions are not met. While § 43(a) of the Lanham Act only specifies that a defendant's use be "in commerce," it is a legal presumption that the Lanham Act requires a plaintiff's goods to be used in commerce. The common law recognizes the territoriality component because of the trademark right does not exist but for each sovereign's statutory scheme. *Grupo Gigante*, 391 F.3d at 1093. Judge Rakoff opined that the "territorial principle" is long established and based in the common law so it may be presumed implied in the Lanham Act. *Almacenes Exito S.A. v. El Gallo Meat Market, Inc.*, 381 F.Supp.2d 324, 327 (S.D.N.Y. 2005). The rationale is that if a business does not have goods in the marketplace, there business does not have standing for an infringement suit under U.S. law. *Grupo Gigante*, 391 F.3d at 1093. Maintaining an absolute territoriality principle ignores modern channels of commerce and the speed with which both people and products cross borders. Furthermore, this principles does not account for consumers confusing an association between a foreign senior user and domestic junior user where the senior user has not or cannot establish use in the U.S. *Empresa Cubana v. Culbro Corp.*, 399 F.3d 462, 466 (2d. Cir. 2005). This policy permits domestic companies to free-ride on the goodwill of foreign businesses.

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STUDENT PROFILE: YANFENG XIONG (MIP '06)

BY ERIK MOSKOWITZ (JD/MIP '08)

YANFENG XIONG was born and raised in Beijing, China. After earning his technology degree in opto-electronics from the Beijing Institute of Technology, Mr. Xiong began his career at the Shenzhen ZTE Corporation as a telecom engineer. One year later, he joined the Beijing office of China Patent Agent (H.K.) Ltd. (CPA), one of the most prestigious IP law firms in China.

In the three years with CPA's electrical and electronics department, Mr. Xiong prosecuted hundreds of patent applications for world-leading electronics companies, including IBM, Philips, and Seiko. Working with patent attorneys in each of these companies allowed Yanfeng to gather a great deal of experience that has only helped his studies at Pierce Law.



YANFENG XIONG

In 2005, while working in Beijing, Mr. Xiong became interested in international IP law after attending a seminar on "Patent Litigation Strategies in the United States for Asian Companies," given by the Honorable Randall R. Rader and patent attorneys from Finnegan, Henderson, Farabow, Garrett & Dunner, L.L.P.

Unlike many countries, patent law in China is still in its infancy, only being in effect for twenty years. Although many academics have dedicated themselves to IP research, lack of public awareness and a short litigation history still slow the development of the IP system in China today. Recently, the booming Chinese market for foreign high-tech companies has created a need for both strong IP enforcement and IP professionals to develop it. Mr. Xiong looks forward to playing a key role in the development of this IP system while acting as a bridge between China and the U.S.

Mr. Xiong does not seek any special recognition for the patent work he produces. As a patent practitioner, he files new applications, responds to office actions, and requests re-examinations every work day. He sees no special success in his daily actions because they are part of his normal tasks. However, he says he always keeps in mind that even a small mistake could mean disaster for a client, destroying a start up company whose only hope is a patent right or losing billions of dollars of investment for a large client. In this sense, Mr. Xiong sees his greatest challenge in avoiding costly mistakes and paying close attention to detail. Mr. Xiong believes that the most important asset any patent attorney can develop is a strong language accuracy, as language is what attorneys rely upon most to make money. As an old Chinese saying goes, "a tiny deviation may result in a tremendous difference." Accuracy of language is vital to a patent attorney and Mr. Xiong takes great care with everything he writes. A deliberate, considerate person is more likely to succeed in the legal field in China, and Mr. Xiong strives hard to be that person. His ideal hope for all lawyers is one he has already achieved: to enjoy the work he does and to try to do it well.

Mr. Xiong has not seen any cultural impact on the IP practice in China. Instead he sees the difference in practices among countries more as a result of the patent law differences rather than a clash of cultures. Mr. Xiong doesn't think the huge cultural contrast between America and China makes their work much different. He feels personality plays an important role.

Taking a one year break to receive his MIP at Pierce Law, Mr. Xiong plans to return to CPA after taking a two-month internship at Finnegan, Henderson, Farabow, Garrett & Dunner, L.L.P. in 2007. He doesn't think he'll acquire nor need any further degrees besides the MIP in supporting his future IP career. An MIP degree from Pierce Law is a

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universal pass in the international IP field, especially in most of the Asian countries, as Pierce Law is seen as a premiere IP institute across the globe. No matter which country one practices in after graduation, the MIP degree is very rewarding. Mr. Xiong feel that the in-depth knowledge he has received from the IP-focused courses at Pierce Law have furthered his interests. The powerful alumni network made up of countless active IP decision-makers around the world has inspired Mr. Xiong to succeed. He looks forward to refining his professional skills upon his return to CPA, working with experienced colleagues and foreign attorneys in obtaining more practical knowledge than one could ever receive solely from books.

Though excited to get back to his career track with the advanced degree, Mr. Xiong is sad to leave Pierce Law at the end of the year. The one feature of the MIP program he finds most rewarding and will sorely miss is his fellow MIP classmates. The diversity of the student body is a great resource many other schools cannot provide. Mr. Xiong has learned as much from discussions with fellow patent practitioners from all over the world as he has from his textbooks and class lectures. Most valuable to his understanding and learning is the Brown Bag Lunch program founded by Professor Bill Hennessey. This unique Pierce Law tradition brought Mr. Xiong a splendid mixture of world culture. He was most impressed with the fascinating videos and speeches from students from many countries. This overview of foreign culture and history is rewarding for every student, both in their own careers as well as their personal lives. But school is not just "all work and no play." Yanfeng will very much miss watching the Super Bowl, giving China presentations to non-natives and competing on the basketball court with his classmates.

Yanfeng Xiong looks forward to dedicating himself to furthering the patent system cooperation between China and the U.S.. His time at Pierce Law can only serve him well in his endeavors. And in between founding IP organizations and improving IP awareness in China, Yanfeng hopes to one day start a healthy family of young IP attorneys all his own. ■



Erik Moskowitz (JD/MIP '08) received a BA in English from Tufts University. Upon graduation he plans to practice law in NH with an emphasis on civil litigation.

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Intellectual Property?" on August 21 at the Global Forum on Intellectual Property 2006, sponsored by IP Academy, Singapore. **Professor Smith** also participated on a panel entitled "Leveraging Intellectual Assets as a Source of Sustainable Competitive Advantage" on August 22.

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Professor Mary Wong presented a paper titled "Towards a Normative Framework for Copyright & Access to Knowledge" at the 6th Annual IP Scholars' Conference at the University of Berkeley, California, August 10-11. **Professor Wong** was the co-chair and moderator for two sessions on Copyright & Designs, and IP & Information Communications Technology, at the 2006 Global Forum on Intellectual Property in Singapore, August 21-22. **Professor Wong** spoke about IP and anti-circumvention laws at a workshop on "Free Expression and Access to Knowledge," at the United Nations Internet Governance Forum in Athens, Greece, October 30-November 2. ■

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Other circuits satisfied the Section 43(a) presumption where foreign sales of famous services abroad to U.S. citizens combined with substantial domestic advertising established "use in commerce." *International Bancorp, LLC v. Societe des Bains de Mer et du Cercle des Estrangers a Monaco*, 329 F.3d 359, 363-364 (4th Cir. 2003); *Vaudable v. Montmartre, Inc.*, 193 N.Y.S.2d 332 (1959) (finding established priority in the U.S. where a famous restaurant's services abroad were coupled with advertising in the U.S.). Furthermore, the well-known mark rule was applied in an *inter-partes* dispute where the promoter of the famous Wimbledon tennis championships successfully opposed the U.S. registration of a Wimbledon cologne with a picture of a tennis player because there was a great likelihood a consumer would identify the cologne with the famous tennis match. *All England Lawn Tennis Club, Ltd. v. Creations Aromatiques, Inc.*, 220 U.S.P.Q. 1069 (T.T.A.B. 1983). In each of these cases, the service marks were owned by foreign plaintiffs and the services provided were not available within the U. S.; however, the marks were protected because of the level of fame they had acquired in both the foreign and U.S. markets and use abroad by U.S. citizens.

The U.S. trademark law's application of a first in time, first in right principle becomes convoluted where marks establish a reputation beyond international and political boundaries. A well-known marks exception is needed where business goodwill transcends borders. Maintaining an inflexible territoriality rule with well-known marks violates the basic tenets of trademark law by providing a means to confuse consumers into believing they are purchasing the same goods and services as they enjoyed abroad. *Grupo Gigante*, 391 F.3d at 1094. Historically, the well-known mark exception was used to protect famous European-based marks; in a nation of immigrants from around the world, it is important to protect goodwill of goods and services made famous on all continents. ■



Juleen Konkol (JD '07) received a BS in Biochemistry from California State University Hayward. Upon graduation, she plans on practicing IP law.

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technology, because patents rarely disclose the ultimate scaled-up commercial embodiments. Hence, such know-how is immensely important. In this regard, let me cite the following persuasive comments:

- "In many cases, particularly in chemical technology, the know-how is the most important part of a technology transfer agreement." (Homer Blair, Professor Emeritus of Franklin Pierce Law Center).
- "Acquire not just the patents but the rights to the know-how. Access to experts and records, lab notebooks, and reports on pilot-scale operations, including data on markets and potential users of the technology are crucial." (Robert Ebish, a free lance writer).
- "It is common practice in industry to seek and obtain patents on that part of a technology that is amenable to patent protection, while maintaining related technological data and other information in confidence. Some regard a patent as little more than an advertisement for the sale of accompanying know-how." (Peter Rosenberg, author of "Patent Law Fundamentals").
- In technology licensing "related patent rights generally are mentioned late in the discussion and are perceived to have 'insignificant' value relative to the know-how." (Michael Ward, Honeywell VP Licensing).
- "Trade secrets are a component of almost every technology license…(and) can increase the value of a license up to 3 to 10 times the value of the deal if no trade secrets are involved." (Melvin Jager, former LES and LESI president).
- Patents and trade secrets are not mutually exclusive but actually highly complementary and mutually reinforcing; in fact, they dovetail. In this context it should be kept in mind that our Supreme Court has recognized trade secrets as perfectly viable alternatives to patents: "The extension of trade secret protection to clearly patentable inventions does not conflict with the patent policy of disclosure" (*Kewanee Oil v. Bicron*,1974). Thus, it is clear that patents and trade secrets can not only coexist, but are in harmony rather than in conflict with each other. "(T)rade secret-patent coexistence is well-established, and the two are in harmony because they serve different economic and ethical functions." (Prof. Donald Chisum). In fact, they are inextricably intertwined, because the bulk of R&D data and results or associated, collateral know-how for any commercially important innovation cannot and need not be included in a patent application but deserves and requires, protection which trade secrets can provide.

The conventional wisdom that because of the "best mode" and "enablement" requirements, trade secret protection cannot coexist with patent protection, is a serious misconception. These requirements apply only at the time of filing and only to the knowledge of the inventor(s) and only to the claimed invention.

Patent applications are filed early in the R&D stage to get the earliest possible filing or priority date, and the patent claims tend to be narrow for distance from prior art. Therefore, the specification normally describes in but a few pages only rudimentary lab experiments or prototypes, and the best mode for commercial manufacture and use remains to be developed later. The best mode and the enablement requirements are thus no impediments to maintaining the mountains of collateral know-how developed after filing as trade secrets.

In Peter Rosenberg's opinion, "(p)atents protect only a very small portion of the total technology involved in the commercial exploitation of an invention….Considerable expenditure of time, effort, and capital is necessary to transform an (inventive concept) into a marketable product." In this process, he adds, valuable know-how is generated, which even if inventive and protectable by patents, can be maintained as trade secrets, there being "nothing improper in patenting some inventions and keeping others trade secrets." And Tom Arnold asserted that it is "flat wrong" to assume, as "many courts and even many patent lawyers seem prone" to do, that "because the patent statute requires a best mode disclosure, patents necessarily disclose or preempt all the trade secrets that are useful in the practice of the invention." (1988 Licensing Law Handbook).

Gale Peterson also emphasizes that "the patent statute only requires a written description of the claimed invention and how to make and use the claimed invention." He advises, therefore, that inasmuch as allowed claims on a patentable system cover:

> usually much less than the entire scope of the system, that the disclosure in the application be limited to that disclosure necessary to 'support' the claims in a § 112 sense, and that every effort be taken to maintain the remainder of the system as a trade secret.

Besides, as shown by case law, manufacturing process details, even if available, are not a part of the statutorily required best mode and enablement disclosure of a patent. And it is in this process area where best modes very often lie.

With patents and trade secrets it is clearly possible to cover additional subject matter, strengthen exclusivity, invoke different remedies in litigation, and have one standup when the other becomes invalid or unenforceable. Exploiting the overlap between patents and trade secrets and utilizing both routes for optimal protection is a most important and practical, profitable, and rational IP management strategy.

In conclusion, it bears reiteration that trade secrets are a viable mode of protection in the intellectual property field. They can be used in lieu of patents but, more importantly, they can and should be relied on side by side with patents to protect any given invention as well as the volumes of collateral know-how associated with it; because far from being irreconcilable, patents and trade secrets in fact make for a happy marriage as equal partners. Hence, it is patents and (not "or") trade secrets—and trademarks, of course. ■

Karl F. Jorda, David Rines Professor of Intellectual Property Law & Industrial Innovation, Director, Kenneth J. Germeshausen Center for the Law of Innovation & Entrepreneurship, Franklin Pierce Law Center, Concord, NH.



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the best elements of my personality. Until the day I am taken to that big ranch in the sky, I will continue to wear the mask proudly and to try my best to live up to the standards of honesty, decency, respect, and patriotism that have defined the Lone Ranger since 1933." *Id*. at 240-1.

One of the creeds of the Lone Ranger is "That all things change but truth, and that truth alone lives on forever." Fran Striker, *The Lone Ranger Creed*, **http://www.endeavorcomics.com/largent/ranger/creed.html** (accessed Mar. 3, 2006). A truth that was brought forth in the battle of the right to wear the Lone Ranger mask is that IP management is absolutely essential. In order to successfully protect IP rights, once the IP is brought forth to the public, the protection must begin. When Moore initially donned the mask of the Lone Ranger, the Corporation should have informed him that, although he has IP rights pertaining to how he portrays the Lone Ranger, he has no IP rights to the character of the Lone Ranger. J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 4.72 (2d ed., Thomson West 2004).

Sarita L. Simon (JD '08) received a BS in politics with a focus in international law from Earlham College. She plans on practicing international law with a focus on immigration and soft IP upon graduation.



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April 27–28, 2007	**9TH COMPREHENSIVE PATENT COOPERATION TREATY (PCT) SEMINAR** Concord Courtyard Marriott, Concord,NH ***www.piercelaw.edu/pct***
May 25–June 29, 2007	**21ST ANNUAL INTELLECTUAL PROPERTY SUMMER INSTITUTE (IPSI)** Franklin Pierce Law Center, Concord,NH ***www.piercelaw.edu/ipsi***
June 25-July 27, 2007	**5TH ANNUAL INTELLECTUAL PROPERTY SUMMER INSTITUTE (CHIPSI)** Tsinghua University School of Law, Beijing, China ***www.piercelaw.edu/chipsi***
July 9-August 9, 2007	**3RD ANNUAL eLAW SUMMER INSTITUTE (eLSI)** University College Cork, Cork, Ireland ***www.piercelaw.edu/elsi***
January 2008	**16TH ANNUAL ADVANCED LICENSING INSTITUTE (ALI)** ***www.piercelaw.edu/ali*** **NOTE: No ALI 2007**

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