

# LITIGATORS CORNER: Some of My Pet Peeves



BY JOSEPH N. HOSTENY,  
OF NIRO, SCAVONE,  
HALLER & NIRO

*Regular IP Today columnist Joseph N. Hosteny is an intellectual property litigation attorney*

*with the Chicago law firm of Niro, Scavone, Haller & Niro. A Registered Professional Engineer and former Assistant US Attorney, his articles have also appeared in Corporate Counsel Magazine, The Docket (American Corporate Counsel Association), American Medical News, Inventors' Digest, Litigation Magazine and Assembly Engineering Magazine. Mr. Hosteny can be reached at (312) 236-0733, or by e-mail at [jhosteny@hosteny.com](mailto:jhosteny@hosteny.com), or by visiting his web site at <http://www.hosteny.com>.*

*This month, I am going to vent about a few of my pet peeves.*

## HYPOCRISY ABOUT PATENT PLAINTIFFS

When the money is good, complaints about someone being a “troll” seem to melt away. One recent example of this is a case involving Cornell University and Hewlett-Packard. Cornell makes no products, and owns no factories. Its employees make inventions, which the University does not dedicate to the public. Hewlett-Packard manufactures computers, printers, servers, and many other products. It markets and sells those products in the United States, where millions of customers and users employ the products in the course of their businesses. By any current definition in either the real world or the blogosphere, Cornell is a “troll.” Hewlett-Packard is not.

As I wrote in “Stanford University — A Patent Troll?” in March, 2006, universities have been exploiting patents since at least 1912. But, they are not considered to be “trolls.” The Bayh-Dole Act, 35 U.S.C. §§ 200-212, was passed to encourage universities to exploit their technology. Stanford’s annual licensing income grew from \$180,000 in 1970 to \$36,000,000 in 1995.

Cornell recently won a big jury verdict against Hewlett-Packard for patent infringement: \$184,000,000. See “Jury awards Cornell \$184M in case against Hewlett-Packard,” reported in the “Syracuse Post-Standard,” on May 30, 2008. The plaintiffs were the university and its patent-holding entity, Cornell Research Foundation, Inc. The latter entity is even “trollier” than the university itself: it has no purpose for its existence except as a means to exploit intellectual property by licensing it. There was only one patent involved, a 1989 patent for an invention to speed up processing in computers. Cornell sought \$900 million in damages.

The suit was a feast for lawyers. (I am reminded of the joke to the effect that if two dogs are fighting over a bone and a third dog comes along and runs off with the bone, the third dog is the lawyer.) The suit went on for seven years. Cornell was represented by six lawyers from Sidley & Austin, and HP was represented by eleven lawyers from DLA Piper and Fish & Richardson. It would not surprise me if the attorneys’ fees exceeded twenty million dollars. One nice touch was that the trial judge was Circuit Judge Randall Rader from the CAFC. I wish more CAFC judges would do jury trials, because they need to see more trials first hand.

But there’s no hue and cry, even from HP, that this is a “troll strike suit.” Not even Cisco’s Director of IP, “Trolltracker” Rick Frenkel, is telling Cornell, “Shame on you!” Apparently, the same acts, when performed by an organization, are acceptable — but are not acceptable, and are even illegal or immoral, when carried out by an individual. The hypocrisy is stunning.

## USE OF ELECTRONIC DISCOVERY AS A WEAPON

Electronic discovery was supposed to make things easier. What has gotten easier is the abuse of discovery. The newest stunt is to bury your opponent in electronic discovery. Ethics play no part in this. In two recent cases, we were presented with over one million documents at the end of discovery, and six million documents in all. The amendments to the Federal Rules, designed

to insure fair discovery of materials in electronic form, are being perverted by this unethical practice of deliberate over-production and obfuscation. *Qualcomm Inc. v. Broadcom Corp.*, 2008 U.S. Dist. LEXIS 911 (S.D. Cal. January 7, 2008) held: “Producing 1.2 million pages of marginally relevant documents while hiding 46,000 critically important ones does not constitute good faith and does not satisfy either the client’s or attorney’s discovery obligations.” Dumping millions of documents on your adversary is about the same as dropping a pyramid on him along with a note that the answer is there somewhere, under one of the two million or so stones making up the pyramid.

In another of our cases, the defendant produced numerous marginally relevant documents. Our attorneys prepared for depositions, including analyzing the produced documents and preparing questions based on those documents. However, at each of several depositions, the defendant’s witness showed up with a new stack of documents that had not been produced before. Our attorneys were expected to question these witnesses with no chance to review the new documents beforehand, using questions that were therefore based on earlier documents, which were by now irrelevant. Of course, deliberately withholding the most pertinent documents, and producing them only at a deposition, thus denying your adversary a reasonable chance to prepare, is at odds with the Federal Rules, as well as with professional courtesy, ethics and common sense.

## USE OF PROTECTIVE ORDERS TO INFLICT COST

Causing your opponents’ costs to increase for the sake of inflicting expense is unfair. Yet too many parties insist on provisions in protective orders that are intended to increase the cost of litigation for plaintiffs whose resources are limited. Some defendants insist that a plaintiff who is an inventor should be precluded from access to confidential documents because the information might wind up in one of the plaintiff’s patent applications. Some defendants insist that the plaintiff should not, as a condition of access, be able to file any patent application for a period of up to five years. They may also insist that the plaintiff’s counsel not be involved in any

patent prosecution, even a reexamination of the patent in the lawsuit requested by the defendant.

I have yet to see a concrete example of such harm. In all the motions made for such orders, I have not seen a single defendant offer even one document that might be misused by a plaintiff.

## REEXAMINATIONS

Reexaminations cause so many problems: first, the interminable delay, coupled with courts' unwillingness to accept the concept of a patent as a wasting asset; and second, the courts' failure to impose conditions on stays for reexaminations — for instance, requiring defendants to fork over the prior art they know about so that it can be considered in the reexamination.

## THE UNCERTAINTY RESULTING FROM CLAIM CONSTRUCTION

The benefits envisioned by *Markman* are an illusion because of the erratic results and high reversal rate. The newest tactic is to use claim construction, but not to accomplish the first of the two steps in determining whether there is infringement. The new use of claim construction is to invalidate means plus function claims. In three recent cases, we have seen this strategy; evidently, there's been a seminar somewhere on claim construction for defense attorneys.

As we have seen it, the tactic is to argue that the specification of a patent fails to show structure for carrying out the function recited in the claim. A variant is the argument that any structure in the specification is not linked to the function in the claim. In either case, the claim is invalid, so the argument goes, because it is indefinite in violation of 35 U.S.C. § 112.

The argument ignores the presumption of validity, as well as the work of the examiners. In one of our cases, the patent had been through a reissue, and a parent of the same patent had been reexamined. The examiners in these various examinations, and in the reexamination and the reissue, did not reject any of the claims as indefinite, even though they made some § 112 rejections in other respects.

The work of examiners results in a presumption of validity. *Datamize, LLC v. Plumtree Software, Inc.*, 417 F.3d 1342, 1347-48 (Fed. Cir. 2005) held:

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In this regard it is important to note that an issued patent is entitled to a statutory presumption of validity. See 35 U.S.C. § 282 (2000). “By finding claims indefinite only if reasonable efforts at claim construction prove futile, we accord respect to the statutory presumption of validity and we protect the inventive contribution of patentees, even when the drafting of their patents has been less than ideal.” . . . . In this way we also follow the requirement that clear and convincing evidence be shown to invalidate a patent.

*S3 Inc. v. Nvidia Corp.*, 259 F.3d 1364, 1367 (Fed.Cir. 2001) is similar: “The claims as granted are accompanied by a presumption of validity based on compliance with, inter alia, § 112 ¶2.”

The examiners are presumed to do their jobs, too. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 986 (Fed.Cir. 1995), affirmed, 517 U.S. 370 (1996) (“Patent applications, unlike contracts, are reviewed by patent examiners, quasi-judicial officials trained in the law and presumed to ‘have some expertise in interpreting the

[prior art] references and to be familiar from their work with the level of skill in the art and whose duty it is to issue only valid patents.’ *American Hoist & Derrick Co. v. Sowa & Sons, Inc.*, 725 F.2d 1350, 1359, 220 U.S.P.Q. (BNA) 763, 770 (Fed. Cir. 1984).”) Nor may an examiner’s work be challenged without evidence. *Genzyme Corp. v. Transkaryotic Therapies, Inc.*, 346 F.3d 1094, 1103 n.3 (Fed.Cir. 2003) (the examiner is presumed to have done his job unless there is evidence to the contrary).

In my view, unless the argument is buttressed with evidence that the examiners erred, and how they erred, an argument that a claim is indefinite on grounds like these is made without a reasonable factual basis, and should be treated like any argument made in bad faith — that is, beyond the bounds of reasonable advocacy.

All of my pet peeves have in common the exploitation, rather than the use, of our judicial system. All of them reflect the willingness to use or warp procedure in order to win, rather than to resolve a suit on its merits. That was not the spirit which caused enactment of the Federal Rules of Civil Procedure, nor is it reasonable advocacy. 