

# LITIGATORS CORNER:

## Does *The Wall Street Journal* Understand Intellectual Property Law?



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>.*

**T**he *Wall Street Journal* had an interesting opinion article (I refuse to say “piece”) by Gordon Crovitz on July 14. One of his laments is the cost of patent litigation for corporations. Mr. Crovitz says: “Litigation costs, driven by uncertainty about who owns what rights, are now so huge that they outweigh the profits earned from patents.”

Mr. Crovitz might pay some attention to **how** corporations litigate. I was looking at a docket today for a patent case. The single defendant, a large company, was represented by nineteen — that’s right, nineteen — lawyers. The plaintiff in the same case had fifteen lawyers. Another defendant had ten lawyers. Two more defendants, with seven and six lawyers respectively, approached but did not achieve fiscal sanity. My goodness. Dwight Eisenhower had five or eight people in the room with him when he launched the invasion of Normandy. Even Christianity only needed

eleven apostles to help Jesus to get the ball rolling.

Some of these lawyers had to be doubling up, I figured. Nope. I counted fifty-seven different names, all lawyers, or at least people with law degrees. There’s a joke that applies here: when two dogs are fighting over a bone, and you see a third dog dash in, grab the bone and run away, that’s the lawyer. Everybody but Elmer Fudd appeared in this case.

Astounding. What kind of company has so much money to smoke — I mean, spend?

This isn’t an isolated instance, either. I’ve written about some of the following situations in previous columns, but they bear repeating here. In one of my cases, which I described in my August 2006 column, “Are Alternative Fee Arrangements Better for the Plaintiff Than Contingent Fee Litigation?”, we conducted a claim construction hearing regarding three claims of one patent. There were two defendants. On the day of the hearing, my partner and I went to court for the hearing. The judge had just returned from taking his son or daughter to college. There were a lot of lawyers there, and even some people. The judge apologized, and patiently cleared his call. He got to the end of his list, and asked, “Now is there anyone here, other than the claim construction hearing, whose case I didn’t call? If so, put up your hand.”

No one put up his hand. The judge’s jaw dropped. In disbelief, he asked: “Are you all here for the claim construction hearing?” He started to count. He got to twenty lawyers before he stopped. We had two lawyers there; the defendants had eighteen. I handled the argument of the three claims, with help from my partner. The other side used three lawyers to argue, one for each claim. The remaining fifteen kept the room warm.

I’ve often wondered what that cost. The hearing lasted two hours. Many of the defendants’ lawyers were from out of town and all, except for some in-house lawyers, were from mega-firms. At eighteen lawyers, each billing at \$500 per hour for the day of the hearing, and assuming one day of travel and preparation, the hearing cost the defendants over one hundred thousand dollars. Then toss in travel costs for fifteen lawyers, for another twenty or thirty thousand dollars.

Our cost? About nine thousand dollars.

Oh, by the way, we won. In fact, the court ruled that the defendants had waived some issues by failing to provide a proposed claim construction.

I’ve also described in previous columns how, in another of our cases a few years ago, a big, expensive firm moved in to represent a defendant. We’re in for it now, I thought: they have squadrons of lawyers, and they will have teams assigned to each issue and coming at us from every direction. But they didn’t. They tripped over each other, and one read a book during a deposition. I hope he didn’t bill his client. The only coordinated thing they did happened when their client got smart and fired them. They all signed the motion for leave to withdraw.

In still another case, I conducted a telephonic conference. The parties were required to discuss their views of claim construction, and resolve differences if possible. One end of the phone conference was me, in my office. The other end was seven lawyers from — you guessed it — another big firm in California.

*The Wall Street Journal* Law Blog reported on July 22 that two large firms were being sued by their clients. In one case, the firm is accused of churning the client by putting more than one hundred people on the case, all of whom charged for their time. A spokesman for the firm said that the case had been handled by two partners and a handful of associates. The rest of the people used on the case were needed to review 1,200,000 documents. If the rest includes ninety people, each only had to review thirteen thousand documents. That is about a box or two. The fees charged probably amounted to about twelve million “bones,” referring back to my comment

about the lawyer grabbing the bone the two dogs are fighting over!

My December, 2006 column, “Mega-Firms: The Mega-Headache,” commented on a number of abuses by lawyers in large firms. Lawyers can be dishonest in any size firm, but the cost of the dishonesty is amplified when the firm is larger. The financial pressures can be enormous. *Bloomberg News* recently reported that partners from big firms are taking out loans of \$250,000 per partner to tide them over until the profits roll in. What if they don’t roll in? According to the same article, the median share of earnings per partner for the one hundred leading law firms, measured by revenue, was \$1.2 million.

*The Wall Street Journal* article does not mention the enormously wasteful approach to litigation. It lays blame everywhere else. It says that Congress has, for the third time, “given up on passing a law reforming how patents are awarded and litigated.” The article blames Congress, the trolls, litigation costs and exorbitant settlements like the one paid by Research in Motion. He claims that patents for pharmaceutical drugs “require great specificity to earn a patent, whereas patents are often granted to broad, thus vague, innovations in software, communications and other technologies.” If that is his complaint, perhaps he should look at IBM’s patent No. 6,886,129, “Method and System for Trawling the World-Wide Web to Identify Implicitly-Defined Communities of Web Pages.” It describes a method for figuring out communities on the internet having shared interests by analyzing hyperlinks between pages used by persons communicating on the web. You won’t hear *The Wall Street Journal* calling IBM a troll for licensing a software patent it does not practice.

Mr. Crovitz should pay some closer attention to a few other things, too. My first guess is that he’s never seen what years of struggle an inventor goes through to get a patent, followed by years of trying to license it, more years litigating it, and still more years reexamining it. We have any number of examples. I’d like him to actually meet one of these so-called trolls. Or perhaps he could read my January, 2001 column, “The Long Walk From the Gobi Desert to the River Styx.” Or perhaps he should con-

sider whether Stanford University or IBM are trolls, as I discussed in my columns of April and May, 2006, respectively. He makes no mention of Judge Michel’s letters to Congress about the Patent Reform Act, or of criticism of some provisions of the act by some members of Congress and the administration.

Mr. Crovitz should also recognize the remarkable combination of hubris and stupidity demonstrated by RIM’s CEO, Jim Balsillie, who could have settled his case for one-tenth the money had he used his noggin. My column of June, 2006, “Earth Calling Corporate Executives,” pointed out how that CEO, like a child, blamed everyone but himself for his predicament, pointing to Congress, the judge, the trolls, the Patent Office — everyone but himself. But Mr. Crovitz shows no sign that he knows about how RIM stole defeat from the jaws of victory, or the patience of the federal judge who urged the parties to settle and refrained from entering an injunction. In fact, Mr. Crovitz sounds like he has read nothing but Mr. Balsillie’s whining to Congress.

Mr. Crovitz could also pay some attention to those who have said the PTO isn’t doing its job, because of lack of funding and some bureaucrats who ought to be working, but aren’t. *The Wall Street Journal* is great about pointing out how government doesn’t always work. Mr. Crovitz and the *Journal* could consider talking to some individual inventors, or examining how many hundreds of millions of dollars — paid to the Patent Office by those needing its services — were diverted. They could consider asking why the legislation to end diversion has not been passed. But instead, the *Journal* and Mr. Crovitz give the appearance of being allied with corporations, rather than living up to their reputation as a fine newspaper and journalist interested in reporting fairly. In fact, his whole article sounds like a press release put out by the Coalition for Patent Fairness, which I humorously dubbed “the Coalition for Fairness to Foxes in the Henhouse,” in my April 2008 column.

Maybe Mr. Crovitz should read the June 10, 2002 edition of *The U.S. News and World Report*, with its article, “Patents Pending.” It said:

Since George Washington signed the Patent Act of 1790, the office has



struggled to keep up with the ever increasing pace of invention. Now part of the Department of Commerce, the USPTO is a \$1.4 billion agency employing a staff of more than 6,000. In 1991, the office was overhauled, and a fee system was established to allow the agency to be self-supporting. But the very next year, Congress took one look at the juicy fees and withheld \$8 million, putting it to other purposes. The diversion continued unabated, totaling \$700 million in a decade. . . .

In his *Journal* article, Mr. Crovitz says the “growing evidence” is that “today’s patent system causes more harm than good.” But we have no idea what his evidence is, or where it came from, because he does not identify any of it. I can make a good guess that it comes from those supposedly impartial companies in the Coalition for Fairness to Foxes in the Henhouse, who are shilling the Patent Reform Act. The “biggest companies,” says Mr. Crovitz, are taking “desperate measures.” By this he means that they have formed a group to buy key patents. If they are as dumb at picking patents to buy as they have been at identifying ones to license, I predict a lot of money will be wasted.

There is a quote I like, which is attributed to an anecdote told by Adlai Stevenson, commenting on the inaccurate comments of his adversary: “These are the conclusions on which I base my facts.”

We could use some better reporting from *The Wall Street Journal*. **IP**