

Sunday, February 25, 2018

6:00 — 8:00 **Welcome Reception**

Monday, February 26, 2018

7:30 — 8:30 **Breakfast & Registration**

8:30 — 8:45 **Welcome and Introductions**
(Cooper, Rea, Weinlein)

8:45 — 10:00 **[Panel 1] Global Patent Litigation: The Corporate Perspective**
(Coletti, Finocchio, Hadad, Johnson, Scott)*

U.S. and foreign companies face a major dilemma. Given that IP is enforced in multiple domestic venues (including the ITC and multi-district litigation (MDL)) and multiple European and Asian courts with jurisdiction over IP litigation, where should companies elect to enforce patent, copyright, and other IP cases? How do these same concerns affect how companies manage defenses to patent infringement? What can U.S. companies and courts learn from the practices abroad in enforcement of IP, and what can international courts learn from U.S. domestic litigation? What advantages exist in terms of the remedies available for infringement of IP in the United States, Canada, Europe, Asia, or South America? How do the vastly different approaches to discovery taken in prominent IP venues around the world affect strategic decisions in formulating a global litigation strategy, and how does this impact in-house and corporate decision-making on where to bring actions for patent infringement? Meanwhile, will Revocation proceedings in the new European Unified Patent Court prove to be as popular in challenging patents as IPR and CBM proceedings in the United States? What advantages do other forms of patent challenge proceedings already in existence in Europe and elsewhere present to parties seeking to defend against patent infringement claims, and how do they integrate with companies' global patent litigation strategies?

Materials

1.1 WG10 & WG9 Executive Summary of Commentary Publications (Feb. 2018)

10:00 — 10:15 **Morning Break**

10:15 — 11:15 **[Panel 2] Getting Ready For The New Paradigm For European Patent Litigation: The Introduction Of The Unified Patent Court**
(Goddar, Grizmek, Rea, Treichel, Trenton)*

The introduction of the Unified Patent Court (UPC) will represent a seismic change to the European patent system. Yet, simultaneous with the introduction of the UPC, influential nations like the U.K. are withdrawing, or threatening to withdraw, from the European Union, leaving questions about how effective the UPC will be, and how it will be administered in conjunction with non-EU

members. What are the major changes, and what

Monday, February 26, 2018 (Cont.)

strategies should patent holders adopt now to prepare themselves for these forthcoming changes? What is the transitional period and opt-out? How will the UPC affect how patents are litigated in Europe and will forum shopping be a problem? How will this affect obtaining global licenses to resolve disputes?

Materials

2.1 Trenton, *Introduction to the Unified Patent Court and the Unitary Patent* (2018)

2.2 European Patent Office, *Unitary Patent Guide* (2017)

11:15 — 12:30 [Panel 3] Valuing And Enforcing SEPs Globally: Is There An International Consensus As To What "FRAND" Is?

(Delgado, Hutz, Long, Selwyn, Waterland)*

FRAND-committed SEPs are subject to multiple regulatory and enforcement schemes both domestically and world-wide. The FTC has shown it is willing to enforce FRAND obligations against patent holders, while recent SEP rulings from the U.K. and China have confirmed patentees' rights to enforce and even receive injunctions covering FRAND-encumbered patents. However, the way FRAND has been calculated in the U.K. does not conform to the mechanisms used by U.S. courts. These recent developments underscore that determining what FRAND is, and what obligations it carries, will continue to be a contentious and highly significant area of IP law. How then should companies and courts evaluate and calculate the value of their global patent portfolios for licensing and enforcement given the uncertainty that already exists in this area of law? How can FRAND patents be evaluated across international boundaries in a way that is consistent with basic patent principles, but with an understanding that it may not be feasible or practical to adjudicate the merits of large numbers of patents, including whether they are, in fact, necessary to practice international standards? And can the disparate rulings in the U.S., European, and Asian courts be reconciled, so that companies have assurances that they know what a FRAND royalty actually is, and what rights it carries?

Materials

3.1 WG9 *Patent Damages and Remedies: Framework for Analysis of Standard Essential Patent/FRAND Issues* (Feb. 2018 public comment ver.)

3.2 Layne-Farrar and Wong-Ervin, *Methodologies for Calculating FRAND Damages: An Economic and Comparative Analysis of the Case Law from China, the European Union, India, and the United States* (July 2017).

12:30 — 1:45 Lunch

Monday, February 26, 2018 (Cont.)

1:45— 3:00

[Panel 4] What Is The Future for Domestic Enforcement Of IP Activities Occurring Abroad?

(Busey, Cooper, Holleyman, Lehman, Powers, Rosenzweig)*

In the U.S., the Defend Trade Secrets Act appears to permit U.S. district courts to entertain jurisdiction over civil cases involving misappropriation of trade secrets that occurs entirely extraterritorially, although much remains to be determined about how broad that reach is. To some extent, such a result already is permissible through ITC enforcement actions. Anti-piracy enforcement regularly involves activities that occur overseas. *Kirtsaeng* addressed the issue of second sale of products from the copyright perspective in the U.S. *Lexmark* directly addressed a host of issues related to patent infringement and extraterritorial damages, and reached conclusions similar to those in *Kirtsaeng*. Meanwhile, *T.C. Heartland* appeared to leave the door open to patentees to sue foreign corporations in any venue where they can be found, while restricting the permissible venues that all other defendants can be sued in. Given this landscape, what issues do U.S. courts now face in enforcing extraterritorial remedies in IP law, what reforms are necessary, and what lessons can courts already take from the existing state of the law? In Europe, how can the availability of extraterritorial relief be a useful tool in global litigation, and what steps can a defendant take to mitigate potential exposure?

Materials

4.1 Brody, *et al.*, *Extraterritorial Application of Patent Laws* (2016)

4.2 WG10 *Commentary on Patent Litigation Best Practices: International Trade Commission Section 337 Investigations Chapter* (Feb. 2018 public comment ver.)

3:00 — 4:00

[Panel 5] The World After T.C. Heartland: Effective Management of Multidistrict Litigations (MDLs) And “Pseudo-MDLs” From The Court’s And The Parties’ Perspectives

(Arenz, Keller, Lindinger, Lynn (J), Richardson, Wine)*

T.C. Heartland profoundly changed the decision-making for U.S. patent holders as to what venues to choose for patent litigation, and may force many plaintiffs to sue multiple defendants for infringement of the same patent(s) in different venues. Does this incentivize parties to consider Multidistrict Litigation (MDL) as a means to consolidate these disparate cases in one court, at least for pretrial purposes. Regardless, when and how should parties seek MDLs? How does the process work, and under what circumstances has the MDL panel shown either a willingness or reluctance to use this procedural device in patent litigation? What parts of a patent litigation can or will be consolidated? What if the various litigations already have different schedules? Can individual judges agree to and force the cases before them to be consolidated for certain activities, i.e. “pseudo-MDLs”? How can the MDL process be simplified for the plaintiff patent owner? How can the various defendants better coordinate their activities?

Monday, February 26, 2018 (Cont.)

Materials

5.1 Arenz, *et al.*, *The Application of MDLs in Patent Litigation* (2018)

4:00 — 4:15 **Afternoon Break**

4:15 — 5:30 **[Panel 6] The Defend Trade Secrets Act After Two Years—What Have We Learned About Trade Secrets Litigation In The U.S. And Foreign Courts?**

(Chatterjee, Cooper, Cundiff, Jordan (J), Pooley*)

The Defend Trade Secrets Act was enacted into law in 2016, after receiving massive bi-lateral support. After two years, what are the key novel issues and problems it has been proven to present for federal courts? Is there consensus on whether the Act permits a misappropriation of trade secrets that occurs entirely on foreign soil to be prosecuted as a civil action in the U.S. district courts? How are damages calculated, and can they include extraterritorial calculations? In what venues are parties bringing DTSA actions, and what jurisdictional issues have arisen in these cases? What mechanisms are the courts using to marshal discovery in DTSA cases? Is there consensus on whether the plaintiff must first define the trade secrets with particularity before discovery begins? Have the new *ex parte* seizure processes been employed and, if so, when? How have the district courts ensured that foreign companies produce adequate discovery related to the misappropriation? Has the availability of the new remedies under the DTSA, which include unjust enrichment, impacted other areas of IP litigation, including copyright, trademark, and patent litigation, not to mention cybersecurity legislation like the Computer Fraud and Abuse Act? And how has the DTSA impacted the choice of foreign companies to use foreign trade secrets remedies, or has it produced a rush to the United States courts instead?

Materials

6.1 Rowe, *Unpacking Trade Secret Damages* (2016)

6.2 Chanin, *et al.*, *Cross Border Investigations, Litigation and Enforcement Considerations* (2017)

6.3 Pade and Counts, *Trade Secrets Litigation Concerning Foreign Acts* (2018)

6.4 Bohrer, *Why Aren't There More Cases Applying the Defend Trade Secrets Act to Foreign Theft?* (2017)

Tuesday, February 27, 2018

7:30 — 8:30 **Breakfast & Registration**

8:30 — 10:00 **[Panel 7] The Patent Systems In Asia And Their Importance For International IP Enforcement**

(Cohen, Harris, Moga, Robinson, Zhu)*

The number of patent applications filed in China and throughout Asia has surged in recent years. What is behind the increase, and what strategies should corporate counsel consider now given the growing impact of patent litigation outside the U.S.? What changes have countries introduced in recent years in IP enforcement, and how effective have they been? How does enforcement of patents in China compare to other jurisdictions? Where will the focus be on patent litigation in Asia?

Materials

7.1 Cohen, *et al.*, Panel 7 Hypothetical and Background Paper (2018)

7.2 Table: Survey of the Approaches in China, the European Union, India, Japan, Korea, and the United States, from Ginsburg, *et al.*, *Antitrust Analysis Involving Intellectual Property and Standards: Implications from Economics* (Feb. 2018)

7.3 Moga, *China's Utility Model Patent System: Innovation Driver or Deterrent* (2012) (exec. summary)

10:00 — 10:15 **Morning Break**

10:15 — 11:45 **[Panel 8] Patentable Subject Matter: An International Perspective**

(Bahr, Keyack, Powers, Sterne, Stoll)*

The United States has historically been the leader in developing and protecting patent rights. However, as a result of recent interpretations from the Courts and the USPTO of what constitutes eligible subject matter in areas that include biological processes, software, hardware, and business method applications, eligible patentable subject matter in the United States arguably may be diverging from its historic progressive roots. Meanwhile, the actions of Patent Agencies and the Courts of other nations may reflect that patent eligibility is broadening at the international level. Given these trends, what key differences exist between patent eligibility in the United States and other foreign countries? Has there actually been a trend where countries other than the United States have embraced a broader perspective on patentable subject matter than the United States and, if so, will this trend continue? Or, perhaps, will foreign governments follow the lead of recent decisions in the United States and limit the scope of patent eligibility? What is the best balance for all nations, and an international IP regime?

Materials

8.1 WG10 *Commentary on Patent Litigation Best Practices: Section 101 Motions on Patentable Subject Matter Chapter* (Sept. 2016 public comment ver.)

8.2 Lefstin, *et al.*, *Addressing Patent Eligibility Challenges* (2017)

Tuesday, February 27, 2018 (Cont.)

11:45 — 1:00 [Panel 9] Legislative And Administrative Efforts To Make United States Patent Protection Effective For All Industry Sectors)

(Hoffman*, Matal, O'Malley (J), Ruschke (J), Stroud)

A new era of patent law has emerged in the wake of the 2011 American Invents Act (AIA) and recent rulings from the United States Supreme Court on intellectual property, particularly with respect to patent litigation. The AIA introduced popular new procedures such as *inter partes* review (IPR) and covered business method patent review (CBM) to challenge the validity of patents outside the historic confines of the district courts. Meanwhile, the Supreme Court in the past decade has simultaneously issued a number of decisions that have limited the scope of patent eligibility, while also narrowing under what circumstances (and where) a patent owner can obtain injunctions, recover damages, or claim infringement. International rulings in the field of IP, including rulings from the U.K., Germany, and China, likewise have had a profound impact on how and where IP rights are enforced, and under what circumstances. Taken together, these rapid developments in IP law have prompted U.S. and foreign powers to reevaluate how IP legislation and administrative regulation should be structured, producing actual and proposed changes like the Defend Trade Secrets Act and STRONGER Patent Act, calls for reform by influential patent owners to the definitions of patent eligibility, and the exploration by the White House of novel ways of enforcing international trade agreements in the area of IP. However, tensions exist between proponents of strong patents, particularly in the pharmaceutical and biological sciences, and representatives of industries that have been subject to arguably abusive litigation, such as the computer, Internet, and semiconductor fields. Various nations do not all agree on how IP rights should be enforced internationally. Given this tension, what changes, if any, should our legislative leaders actually consider to improve the domestic and foreign patent, copyright and related IP systems? Why are any changes necessary, and which ones would be most critical? And how can any change ensure that patents and other IP rights are effective, while also ensuring that abusive litigation and enforcement practices will be contained?

Materials

9.1 WG10 Commentary on Patent Litigation Best Practices: Introductory Chapter (July 2015 Ed.)

9.2 WG10 Commentary on Patent Litigation Best Practices: Parallel USPTO Proceedings Chapter, Stage One (Oct. 2016 Ed.)

9.3 WG10 Commentary on Patent Litigation Best Practices: Parallel USPTO Proceedings Chapter, Stage Two (July 2017 public comment ver.)

1:00 — 1:05 Closing Statements

(Weinlein)

1:05 — 2:00 Grab and Go Lunch (provided)