MVS BRIEFS

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PATENT DATA

Author: Luke T. Mohrhauser

Did you know, the USPTO provides a Dashboard (located at https://www.uspto.gov/dashboards/patents/main.dashxml) that includes statistical information related to patents and patent filings? Such information includes pendency data, backlog information, and more, and is broken down by various steps of the patenting process, e.g., Pendency Data, Quality Data, Design Data, After Final Response Data, Production Data, Central Reexamination Unit Data, Amendment Turnaround Data, Patent Term Adjustment Data, Special Program Data, and Petition Data.

The Dashboard is updated often, with the latest information being as current as December 2017. The following includes some highlights taken from the Dashboard:

- The current wait time from filing to receive an Action from the USPTO is 15.7 months on average
- The total pendency from filing to finish for patents currently 24.2 months (average)
- There are currently 546,286 patents that have been filed, but not yet examined
- As of December 2017, there were 7,896 Patent Examiners, which accounts to approximately 70 applications per Examiner that has yet to be examined!

As can be understood from this information, the number of applications versus the number of Examiners is the #1 reason that it the patenting process takes so long.

If you have any questions or if you would like to learn more about the process or options to speed up the examination process, please contact an MVS attorney.

JUDICIAL QUOTES ON PATENTS

Author: Kirk M. Hartung

Over the years, I have collected quotes from judges and justices regarding the patents involved in litigation. Some are philosophical, some are poignant, and some are simply amusing. Here are my favorites:

"Some persons seem to suppose that a claim in a patent is like a nose of wax, which may be turned and twisted in any direction, by merely referring to the specification, so as to make it include something more than, or something different from, what its words express."
~ *White v. Dunbar,* 119 U.S. 47 (1986).

"Appeals in patent cases should not be mere games played with pieces of paper called references and the patent in suit. Lawsuits arise out of the affairs of people, real people facing real problems."
~ *Rosemount v. Beckman Industries, Inc.,* 727 F.2d 1540 (Fed. Cir. 1984).

"Patent validity is an issue that is as vague, impalpable, wayward and vague a phantom as exists in the whole paraphernalia of legal concepts."
~ *Harries v. Air King Products Co.* 183 F.2d 158 (2d Circuit 1950) (Judge Learned Hand).

"This case… is a tribute to the ant-like resistance of patent solicitors."
~ *Bros Inc. v. W.E. Grace Mfg. Co.* 351 F.2d 208, 209 (CA 5, 1965)
(Quoting Judge Learned Hand, Lyon v. Boh, 1 F.2d 48 (S.D. N.Y. 1924)).

"The court is treating design as a mysterious black art it cannot understand, and will not learn, so cosmic significance may lurk in variations that would be irrelevant and immaterial to a tutored eye. If design is thus unknowable, design patents should not be litigated in judicial tribunals."
~ *In re Salmon,* 5 F.2d 1570 (Fed. Cir. 1983) (Dissent by Judge Nichols, discussing the difference between square and round in a design patent application).

"The proceedings below and these appeals would play better in a tragicomic theatre of the bizarre. Trial council succeeded in creating a muddled procedural puddle in the trial court...The law is not a sport where winning has been called everything, and neither a trial or appeal should be only an exercise in gamesmanship."
~ *Glarous v. H. H. Robinson Co.,* 797 F 2.d 1564 (Fed. Cir. 1986).

"The concept of joint inventorship is one of the muddiest concepts in the muddy metaphysics of the patent law."
~ *Mueller Brass Co. v. Reading Industries, Inc.,* 352 F. 2d Supp. 1357 (E.D. PA 1972).

"The public generally, and in particular, the patentees' competitors, are entitled to a clear and specific notice of what the inventor claims as his invention. That is not an easy assignment for those who draft claims, but the law requires it…"
~ *Exxon Chemical Patents, Inc. v. Lubrizol Corp.,* 64 F.3d 1553 (Fed. Cir 1995).

"The complexities of patent claim writing are notorious. There are few, if any, legal documents more different to craft, more fought with pitfalls, than patent applications."
~ *Energizer Holdings v. ITC,* Case No. 1197 (Fed. Cir. 2008) (Judge Newman, dissent).

"This is another bizarre appeal in which this court is asked to undo the tangles, twist, and turns created by appellant's counsel in the proceedings before the trial court. When a witch's brew has been stirred in the crucible of litigation, it is not our role in this court to strain concoction for chestnuts left to burn through the invincible ignorance of the law. Nor is it our role to conduct a review de novo of rulings on motions or to order entry of judgements on issues never presented to the jury or to the trial court."
~ *Devices for Medicine, Inc. v. Boehl,* 822 F.2d 1062 (Fed. Cir. 1987) (Opinion by Chief Judge Markey).

MEET OUR TEACHER

Brandon W. Clark

1. How long have you been teaching and what inspired you to teach?
This is my 3rd year teaching at Drake. Teaching isn't something that I ever really anticipated or envisioned myself doing, but when the opportunity presented itself it seemed like an interesting challenge and a way for me to engage with the next group of young lawyers.

2. What is the most rewarding aspect of teaching?
I really enjoy the interaction with the students. It's great to watch students gain an understanding and comprehend something, but it's also an opportunity for me to challenge my own thoughts and assumptions. Most of my classes are very open discussions and I think I get as much value out of those discussions as the students do. It's valuable for me to hear other perspectives and question/analyze my own assumptions. These areas of law are evolving, and I think it's valuable to get input and feedback on how these issues might be at issue in the future.

3. What is your teaching philosophy?
Openness and practical experience. I think it's very important for students to have a good foundation and understanding of copyright issues, but I also think it's very valuable for students to gain practical experience.

4. How do you feel you are shaping the future generation of lawyers?
Hopefully I'm reinforcing that they can do whatever they want with their legal education. It may not be easy, and they might have to take some detours, but there's a lot of different paths to get "there".

5. What is the one thing you want your students to remember forever from your class?
I'm not sure there is one thing. But very generally, I want them to care. In whatever they're doing, if it's important enough to do, it's important enough to care. Ask that question, think a little longer. It's easy to tell if someone cares about what they're doing or not.

DESIGN PATENTS: AN ANALOGY

Author: Gregory Lars Gunnerson

A design patent is a form of legal protection granted to the ornamental design for an article of manufacture. Ornamental designs of jewelry, furniture, beverage containers, and computer icons are examples of objects that are covered by design patents.

Our experience prosecuting design patent applications indicates most design patent applications issue as design patents within 12 to 18 months, which is much less time than the 2+ years it typically takes for a utility patent application to issue. Design patents are also much cheaper to obtain than utility patents.

Design patents offer important protection for many clients whose inventions are mechanical in nature and are uniquely useful in preventing competitors from knocking off the aesthetic look of a company's tangible product.

While there are unique situations that warrant filing solely for design patent protection, more often we encourage our clients to consider filing for *both* design patent protection and utility patent protection.

The decreased pendency time it takes for a design patent to issue offers our clients a seemingly immediate means to assert a valid patent right against infringers while examination of any utility patent applications is still ongoing. We find a design patent simply gives our clients more leverage when negotiating with knock-off artists and infringers.

A recent Webinar moderated by Gene Quinn of IPWatchdog.com titled "Strategic Use of Design Patents" analogized a design patent to a tool in a tool box. This analogy is intriguing. For example, a utility patent could be considered a hammer, as it is useful in a wide array of applications and delivers *a devastating impact* when swung effectively. A design patent then, is more like a chisel. The chisel is useful in a narrower array of applications but is uniquely useful in delivering *an accurate impact* when leveraged properly. Thus, it follows, if one seeks to deliver *an accurate and devastating impact,* all one needs to do is to **combine the hammer with the chisel.**

Are you looking to add more tools to your intellectual property toolbox? Ask us about whether pursuing design patent protection is right for your invention by calling (515) 288-3667. Initial consultations are free.

Gregory "Lars" Gunnerson is a Patent Attorney in the Mechanical and Electrical Patent Practice Group at McKee, Voorhees & Sease, PLC. For additional information please visit www.ipmvs.com or contact Lars directly via email at gregory.gunnerson@ipmvs.com.

PROTECTING YOUR COMPANY'S INNOVATIONS

Author: Kirk M. Hartung

In 2017, over 600,000 patent applications were filed with the U.S. Patent Office, the most in its history. Clearly, a business plan for intellectual property may provide substantial value to your company, or you may be leaving substantial value on the table. Failure to plan is, in essence, a plan to fail. A thorough plan, properly executed, can provide protection for innovations, payback for research and development costs, competitive advantage, and a revenue stream.

Whether innovation derives from sweat of the brow or a flash of genus, a strategic plan can maximize the value of newly developed or discovered inventions. Without a plan, opportunities may be lost, and competitors may encroach without recourse.

Therefore, the following is a brief summary of steps and factors to consider for protecting your intellectual property.

1. Every employee and officer of a company should sign an employment agreement that assures that any inventions relating to the company business will be owned by the company. There also should be a policy regarding submission of ideas and developments, and a procedure to evaluate the submissions in a timely manner. An invention submission form can be useful in capturing key information, such as a brief description of the invention, the problems in the prior art, the structural and functional features, the benefits, etc. The American Invents Act, which began in March of 2013, created a race to the Patent Office because it states that the first application on an invention will have priority over later applications. Therefore, delay in filing an application may result in loss of patent rights. Time is of the essence!

2. Although not required, a patent search is often useful in determining the potential likelihood of obtaining a patent. A patent search will also help in writing the patent application by focusing on differences between the invention and the prior art. The search should cover issued patents and published patent applications. Other technical literature and information on commercially available products can also be helpful in evaluating patentability of an invention.

3. It is also important to consider, early on, whether foreign patent protection will be sought. Most foreign countries preclude a patent if there is any commercialization of the invention before the first patent application is filed. A U.S. patent will cover making, using and selling the invention in the United States. Thus, imports and exports will be covered. However, if another party makes and sells the invention outside the U.S., you don't have protection unless you get foreign patents.

4. In the United States, there is several filing options. An initial provisional application may be filed, to establish your place in line at the Patent Office, and to "buy" another 12 months of time before filing a utility patent application. Both a provisional and a utility application need to be as complete as possible. Filing of the utility application starts the examination process. Expedited examination may be obtained by paying an additional government fee at the time the utility application is filed. A design application may be appropriate to protect the appearance of a product, if the appearance is ornamental, rather than functional. Sometimes, both a utility application and a design application maybe be obtained on a new and non-obvious product. Foreign patent applications should be filed within one year of the provisional or utility application filing date, or within six months after a design application. Before any patent application is prepared, it is important to give your patent attorney all the details of the invention.

5. Once a patent issues, the patent number should be used on the product, on marketing materials, or alternatively, on a company website dedicated to your patent portfolio.

6. After the patent issues, you should regularly police the conduct of your competitors to be sure no one is infringing on your patent rights. If so, a plan of action to deal with the potential infringer should be determined and pursued as quickly as possible.

Patents are complex, timing is critical, and delay or incomplete information may be detrimental. Therefore, develop a business plan, implement the plan, and be sure that everyone understands the plan.

For more information on this topic, contact Kirk M. Hartung by calling our office at (515-288-3667).

GMO REGULATION IN THE UNITED KINGDOM POST-BREXIT

Author: Sarah M. Dickhut

On March 29, 2017, the United Kingdom (UK) formally began the process to leave the European Union (EU).[1] The British Exit from the European Union (Brexit) provides the UK with the opportunity to develop its own, distinct regulatory policies as compared to the European Union (EU). Although the United Kingdom has indicted it will maintain much of the intellectual property law set in place by the EU, the UK still has the freedom to modify regulations overlapping with intellectual property. Genetically modified organisms (GMOs) are one such regulatory body. In the wake of Brexit, the UK government has confirmed that it will review the existing regulations on genetically modified (GM) products. Agriculture minister George Eustice stated in a parliamentary answer that "the Government is considering possible future arrangements for the regulation of genetically modified organisms."[2] He further added that "policy and regulation in this area should be science-based and proportionate."[3]

GMOs bring the promise of increased productivity and greater environmental stability.[4] However, critics argue GMOs could pose food safety concerns, could lead to antibiotic resistance, and may have other unforeseeable effects.[5] In response to these concerns, the European Union adopted extremely stringent regulations regarding the production and use of GMOs. In one of the first regulations the EU adopted a precautionary principle preventing the release of a GM product if there was *any* evidence of a risk.[6] The threshold for triggering the precautionary principle is extremely low; it has been criticized as being triggered too early and on too little proof.[7] Although the authorization and labeling requirements have developed further since the initial regulations, the precautionary principle has still played a fundamental role in determining whether a GM product can be produced and/or released.[8] With such strict virtually no GM products are approved for human consumption in the EU.

Although GM crops are not currently grown commercially in the UK, the UK does willingly import GM commodities, and has been cautiously open to the use of GM products-at least compared to other EU countries.[9] If the UK chooses to modify its GMO regulations from those of the EU, the UK would have the opportunity to enter the international cereal market on a larger, and more competitive scale.[10] The UK wheat industry has already experienced an uplift since the Brexit referendum.[11] The UK can capitalize on this momentum by commercializing GM wheat as soon as is feasible, and establish a market foothold post-Brexit. Additional modifications to regulations may be subsequently made allowing GM products for human consumption where such products determined to be safe based on a "science-based and proportionate" assessment.

Although GMOs are a hotly contested issue, the modest deregulation of GM products presents a significant opportunity for the United Kingdom post-Brexit. The modified regulations should certainly be based in science and proportionate to the issue. Moderate regulations could expand the evidentiary threshold for the precautionary rule to a threshold based on more concrete evidence, allowing the UK to take advantage of the benefits GMOs offer, while still maintaining public safety.

For more information on this topic, contact Sarah M. Dickhut by calling our office at (515) 288-3667.

[1] Angela Dewan & Bryony Jones, *Brexit Begins: UK Triggers Article 50 to Begin EU Divorce,* CNN (Mar. 29, 2017, 2:42 PM), https://perma.cc/Y95M-ZN28.

[2] Genetically Modified Organisms: Written Question – 48641, Parliament.uk (Oct. 13, 2016), http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2016-10-13/48641.

[3] *Id.*

[4] Michael Stebbins, *How GMOs Can Help the Environment,* BIOTECHNOW (Dec. 9, 2016), https://perma.cc/49D4-C4HE.

[5] *See* Harry A. Kuiper et al., *Assessment of the Food Safety Issues Related to Genetically Modified Foods,* 27 PLANT J. 503 (2001).

[6] *See generally* Council Directive 90/220/EEC of 23 April 1990 on the Deliberate Release Into the Environment of Genetically Modified Organisms, 1990 O.J. (L 117) (EC) [hereinafter Council Directive on the Deliberate Release of Genetically Modified Organisms].

[7] *See* John N. Hathcock, *The Precautionary Principle—An Impossible Burden of Proof for New Products,* 3 AGBIOFORUM 255, 256 (2000).

[8] In the time since the 1990 Council Directive, the EU has adopted additional labeling requirements, approval processes, and conditions of use (e.g. animal feed versus human consumption), to name a few.

[9] DEP'T FOR ENV'T FOOD & RURAL AFFAIRS, 2010–2015 GOVERNMENT POLICY: FOOD AND FARMING INDUSTRY (2015), Appendix 7 [hereinafter FOOD AND FARMING INDUSTRY] (citation omitted); Dante Figueroa, *Restrictions on Genetically Modified Organisms: Italy,* LIBRARY CONG. (Mar. 2014), https://perma.cc/A33B-EVGD.

[10] Cereals, especially wheat, comprise a large portion of the UK's exports. The UK currently exports to the Netherlands, Spain, and Germany, and potential future markets could include Argentina, India, Canada, and China. *See* INT'L SERV. FOR THE ACQUISITION OF AGRI-BIOTECH APPLICATIONS, ISAAA BRIEF 51-2015: EXECUTIVE SUMMARY 10 (2015); AGRIC. & HORTICULTURAL DEV. BD., THE UNITED KINGDOM CEREALS INDUSTRY (June 2012).

[11] *See* Emiko Terazono, *UK's Wheat Industry Enjoys Brexit Glow*, FIN. TIMES (July 21, 2016), https://www.ft.com/content/e961c72c-4e7b-11e6-88c5-db83e98a590a.

CASSIE J. EDGAR JOINS MCKEE, VOORHEES & SEASE PLC

Cassie J. Edgar

MVS is excited to announce that Cassie J. Edgar joined the firm as a member, effective February 1, 2018. Cassie is heading up a Regulatory practice group. The group, led by Cassie, will help MVS clients obtain approvals through federal agencies such as the FDA, USDA, and EPA, for product development and commercialization. Cassie is a registered patent attorney and has a nationwide reputation as a leader in managing regulatory issues in the areas of biotechnology and bioengineering including gene editing and CRISPRs from plants to animals, across agricultural and pharmaceutical applications.

Cassie is a creative connector; integrating people, science and legal solutions to drive business growth. She is a scientist and an attorney with over a decade of legal experience in intellectual property; regulatory law; licensing and corporate law, as well as intellectual property (IP) due diligence.

Cassie is able to advise clients on matters from initial discovery through post-product launch including intellectual property, communications, crisis management, compliance, stewardship, regulatory data package generation, lobbying, and obtaining regulatory permits and approvals with USDA, FDA, EPA and other global agencies.

"The MVS team is very excited to welcome Cassie and utilize her expertise to offer a broader range of services to our technology clients. MVS intends to offer cradle to grave experience in all facets of IP protection for our clients, from patent protection, to licensing, to commercial regulatory approval and to enforcement and litigation." - Heidi S. Nebel, Managing Member at MVS.

To learn more about Cassie, visit her online MVS attorney profile. To learn more about Regulatory Law and the new services we offer, visit the MVS Regulatory Law webpage.

Your Worldwide IP Partner Since 1924™

WE'RE THERE

December 14 - 16, 2017

Brandon W. Clark attended The Midwest Clinic in Chicago, IL. The Clinic focused on music band and orchestra and has been an established conference for over 70 years. Musicians, educators and people passionate about music education attend. Contact Brandon for more details about the conference and the latest in music band and orchestra.

December 19, 2017

R. Scott Johnson presented at the NBI seminar, Legal Ethics: Top Mistakes that Lead to Malpractice CLE in Des Moines, Iowa. Scott specifically spoke on Key Substantive and Procedural Errors & Client Communication Errors. Contact Scott for more details on what his presentation entailed during this CLE seminar.

January 12, 2018

MVS was the sponsor of the Technology Association of Iowa (TAI) January TechBrew. The event, held monthly at West End Salvage in downtown Des Moines, is a morning networking event for entrepreneurs, technologists, government officials, business leaders and funders to connect over coffee and learn about a local technology executive. The January TechBrew featured an exclusive interview with Terry Rich, CEO of the Iowa Lottery. R. Scott Johnson serves on the Board Counsel for TAI.

January 25, 2018

Bruce W. McKee attended the Business Record 2018 Economic Forecast Luncheon in Des Moines. The event covered topics from "how will the market fare?" to "How will federal changes in tax reform and trade policies affect Iowa and the markets?" Contact Bruce for more details on this very informative event.

February 5, 2018

The Licensing Executives Society, Iowa Chapter hosted their first event of 2018 in Johnston, Iowa. The event featured a mock negotiation as well as networking. R. Scott Johnson is the Sponsorship Chair for the Iowa LES Leadership Board Chapter and Jill N. Link, Pharm.D., is the Chair Elect for the Iowa LES Leadership Board Chapter.

February 18 - 21, 2018

Patricia A. Sweeney and Heidi S. Nebel attended the AUTM National meeting in Phoenix, AZ. More than 1,700 technology transfer professionals from around the world gathered for networking, professional development and sessions on technology transfer trends and industry updates. Contact Pat or Heidi to find out how the conference was and interesting details they may have.

March 3 - 4, 2018

Brian D. Keppler, Ph.D., is attending the American Society of Plant Biology Midwest Section meeting. The meeting will feature speakers from Kansas State University to the University of Florida, and Iowa State University. Contact Brian to find out more about the meeting and his insight into what he learned.

If you're interested to learn about what our MVS attorneys attend and learn, please contact them through www.ipmvs.com or by calling 515-288-3667.