

When Should I Reach Out to Discuss My Potential IP?



LUKE T. MOHRHAUSER

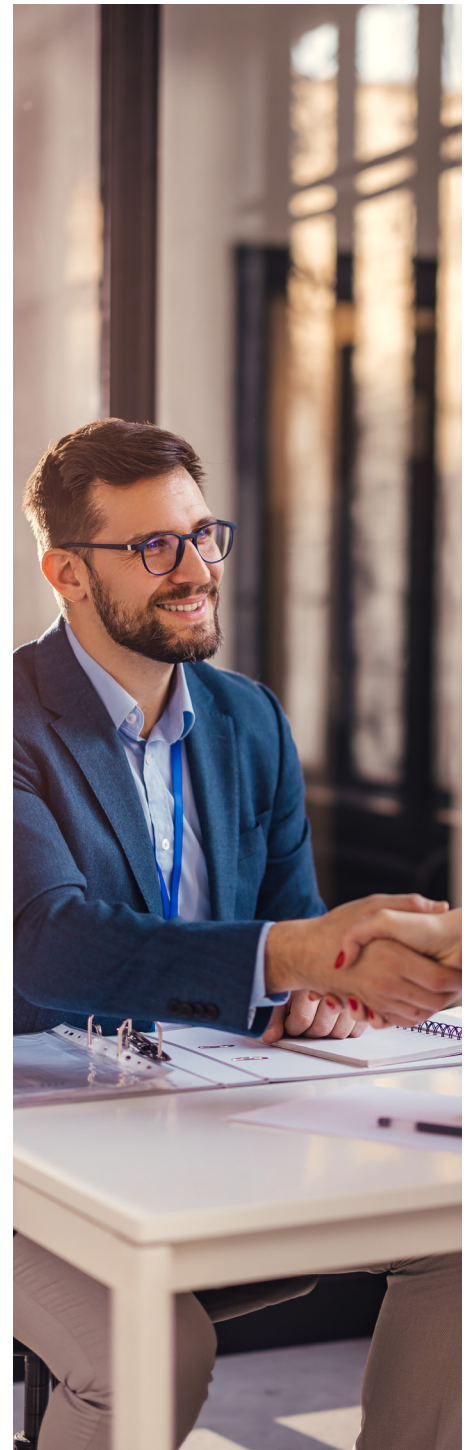
Managing Partner, Chair Of The
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One question that comes up when working with both new and existing clients is, how do I/we know when we are at a good spot to reach out to an attorney to discuss my potential IP? The short answer is, if you have gotten this far, you should probably reach out immediately. A good rule of thumb is to reach out early and often, but that does not fully explain anything.

Keep in mind that there are different issues related to publicly disclosing different types of IP. For example, trademarks can become acquired by the commercial use (i.e., public disclosure) of the marks. Naming a good or service and offering the same in commerce grants the user rights and also begins strengthening the IP. However, this does not mean you should not register the mark with the USPTO. Doing so can give you additional coverage and benefits. In addition, if the mark is not wholly distinctive, you may want to discuss with an IP attorney before moving forward with the mark. Too often businesses have to rebrand or start new due to not doing research and realizing there is already a product, service, or business with the same or similar name, and rebranding can be a pain.

Similarly, copyrights are automatically obtained upon a creative work being fixed in a tangible medium. Think taking a picture, writing a creative work, creating a piece of art or music, etc. Again, there are benefits to talking to an attorney to facilitate registering a copyright within 3-months of such a creation, but you do not “lose” the right to the copyright by publicly disclosing the same.

Patents have a different issue with disclosures. A key patent statute states that an inventor is not entitled to apply for a patent if the invention was



“described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention” (see 35 U.S.C. § 102(a)). Any such disclosure starts a 1-year clock in the U.S. where a patent application must be filed or the inventor loses the ability to obtain a patent. Compare this to much of the world, where any disclosure before filing a patent application is an absolute bar to obtaining a patent.

It is not uncommon for patent counsel to have an initial consultation with a client and during the conversation it comes up that the inventor has been working on their invention for years and has taken the invention to shows or has otherwise used the invention in public. There are few things as painful as having to tell someone excited about their invention that we cannot file a patent application due to their own public disclosure.

Therefore, consider these steps to mitigate the risk of losing your ability to file a patent application covering your invention. First, try to keep good records of the progress leading up to the invention. This includes iterations to the solution (invention) and any testing that may be included. There is an understandable need to test inventions, and some testing may need to be done in a manner that could be considered in a public space. There are certain permitted exceptions for experimental use and testing, but the facts may be the ultimate determination, and having good records can help.

Second, keep in mind that there is no requirement to have a working prototype or model of any invention to obtain a patent. The main requirements are that an inventor “show” that they have an invention, they know how to make and/or use the invention, and if there is a best mode of doing so, that is also included. This can be done by way of writing and figures, and is the common way inventions are captured. Much of the consultation with attorneys involves questions to get the application written in a manner that constructively reduces the invention to practice (i.e., provides written description and figures to show that they inventor actually had an invention).

Third, be honest. If there has been a potential disclosure, let the attorney know. There may be ways to still maintain some protection, or there may be other protections not obviously known. This could include patent protection on certain improvements, keeping the manufacturing aspects a trade secret, determining that an exception applies, or seeing if

another type of protection (trademark, copyright, etc.) could apply. This also includes letting an attorney know of any upcoming disclosure. Again, it is not uncommon for clients to give us short turnarounds related to upcoming trade shows, pitches, product announcements, or other drivers that could count as a disclosure. While not preferred, we are usually able to ensure that your rights and protections are maintained, but this needs to be known ahead of time (even if a day).

Therefore, there are certainly risks with disclosing a creation and/or invention. That said, do not think that every meeting with an attorney to discuss is going to be costly. Any good attorney will work with you to provide guidance and advice. This may include simply listening and saying, “You have a good idea, but I think you need to develop it more.” Or, it could be giving options for consideration for next steps. Ultimately, the decision is up to the client, but options and advice are much better when there is time to consider and the client and attorney can work together to come up with a plan, instead of needing to react.

While it is best to talk to an attorney before any disclosure of any IP, we know that it is difficult and something that is sometimes fluid. Keep in mind that we are here to help guide and advise, and therefore, it is to your benefit to use us as a resource to help you identify and protect your IP for any need.





Artificial Intelligence and Global Patent Discussions



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“Artificial Intelligence” was coined as a word in 1956 by an American, John McCarthy. Today, it is commonly called “AI,” and is generally defined as a discipline of computer science directed to the development of machines and systems that can carry out tasks that are considered to require human intelligence, but with little or no human intervention.

This technology is expected to grow in value to \$15 trillion by 2040. AI is impacting all aspects of IP, including patents, trademarks, and copyrights. Of course, the patent, trademark, and copyright laws were written long before the existence of computers. In the United States, in the most recent revisions to the patent statutes, the American Invents Act, which became law on September 16, 2011, the term “artificial intelligence” is nowhere to be found.

The U.S. Patent and Trademark Office requested public comments about artificial intelligence and patents in 2019, and held its first meeting on AI in June 2022. In October 2022, U.S. Congressmen Tillis and Coons requested the USPTO and the U.S. Copyright Office to create a national commission to consider changes to the law regarding AI innovations and creations. More recently, in a notice published in the Federal Register on February 14, 2023, the USPTO is again seeking comments from stakeholders regarding the current state of the law on AI, and how to incentivize and protect AI innovation.

The World Intellectual Property Organization (WIPO) has held a series of 6 “Conversations” on AI, beginning in 2019, with over 2000 people attending from over 130 countries, including those from government,



academia, IP professionals, and the private sector. AI developments in technology and business continue to grow, as AI costs continue to decline, and as AI is applied to many industries, including manufacturing, agriculture, and health care. Thus, AI and IP intersect in numerous ways. The WIPO Conversations broadly looked at questions raised by AI, and are formulating questions for policymakers to consider.

The most recent WIPO Conversation was held on September 21-22, 2022, and focused on AI inventions and sharing information about patent examination practices in IP Offices around the world. WIPO notes that there are 3 types of AI inventions: 1) novel AI models; 2) AI based inventions; and 3) AI assisted inventions; and each has different IP questions.

The Conversation acknowledged that AI is being fueled by improvements in computer power, data availability, and algorithmic models. In 2019, WIPO formed the AI & IP Strategy Clearing House, to collect policy updates from various countries. WIPO's vision is a world that supports IP innovation and creativity from anywhere for the benefit of all. In view of the broad and diverse nature of various stakeholders, continued dialog is needed to provide policy makers with potential options for their IP systems.

Two more Conversations are planned by WIPO for 2023, to expand discussions to AI, IP and the metaverse, and the digitization of information from around the world. The 7th session is scheduled for March 29 & 30, and will focus on the Metaverse, which is transforming everything everywhere.

In the U.S. Constitution, at Article 8, Clause 8, our Founding Fathers expressly acknowledge the need to promote science and the useful arts, similar to IP systems in other countries. Historically, innovation and creativity were unique characteristics of the human species. Now, AI is emerging as a general purpose technology having widespread applications in many industries with immense economic and societal impact. The bottom line may be the basic question of how AI fits into existing IP laws, and whether changes are needed to accommodate this new world of AI inventions and creations.

“Failure to Function” Rejections on the Rise



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One fundamental requirement for establishing trademark rights is that the term, phrase, or symbol must function as a trademark, as opposed to functioning as ornamentation or merely describing the product. While this has always been the case, the Trademark Office in recent years has been more vigorous in applying this basis to reject trademark registrations. A few types of trademarks and products are most susceptible to this rejection. Several flavors of the “failure to function” rejection are discussed below.

Arguably Descriptive Words

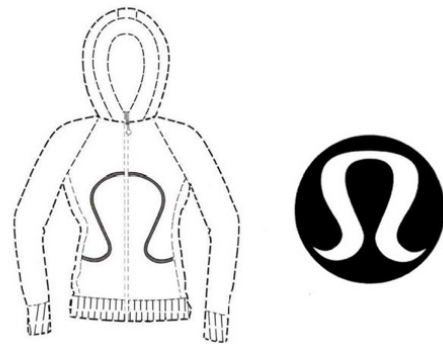
In order to function as a trademark, the mark must be presented in a manner that conveys to consumers that it is indicating a source for the product. This can be accomplished in a variety of ways, but the Trademark Office typically considers whether the words are set off from other text in way that makes it appear to be a trademark in terms of placement, size, font, color, and capitalization.

If you are attempting to protect words that are or maybe considered descriptive of your goods or services it is important to draw attention to the words in a way that lets consumers know these words are indicating a unique source for the goods or services. Helpful practices include prominent placement of the words, not using them descriptively in a contextual sentence, capitalizing the words, using a different font for the trademark words, using a different color of the trademark words, and using the TM or SM symbol (or the ® symbol if registered) in close proximity to the words.

Words or Logos on Clothing

The Trademark Office often takes that position that words or logos on clothing, especially T-shirts, are

ornamental rather than functioning as trademarks. For example, Lululemon sought to have a shirt design that incorporated its wave logo registered as a trademark:



The Trademark Office found the design to be merely ornamental rather than being a source identifier. Some factors that weigh toward finding logos or wording to be ornamental rather than source indicating include the size and placement of the mark. Unlike most products where larger and more prominent usages are helpful, for clothing larger representations are more likely to be viewed as ornamentation rather than trademark usage. Placement of the mark on the chest or shoulder, where logos have traditionally been used is helpful, as opposed to front and center or back. Best of all to show trademark usage is on a tag, especially on the back of the neck hole.

Additionally, it can be helpful to show that the purported mark has been used by the applicant as a mark on other products such that consumers will recognize it as a mark when they see it on the shirt. Lululemon tried to rely on its extensive use of the wave logo on other products, but the Trademark Office found that the shirt design did not employ the standard Lululemon wave logo because the wavy

line on the shirt has a uniform thickness whereas the standard logo varies in width.

Universal Phrases or Symbols

The Trademark Office takes the position that universal phrases or symbols do not typically function as trademarks. For example, boxer Floyd Mayweather, through his promotion company, sought to register the phrase PAST PRESENT FUTURE as a trademark for T-shirts.



However, the Trademark Office found that consumers would view the phrase as common place expression of a familiar concept, and not as something that indicates the source of the product. Other cases where the Trademark Office has found phrases to be too common and universal to be subject to seen as being used as a trademark include ONCE A MARINE ALWAYS A MARINE for clothing times, DRIVE SAFELY for automobiles, and the peace symbol for T-shirts and bumper stickers.

Curse Words

Traditionally, the Trademark Office would reject registrations that included curse words as comprising "scandalous or immoral" matter under section 2(a) of the Lanham Act. However, in *Iancu v. Brunetti*, 139 S.

Ct. 2294 (2019) the Supreme Court ruled that this bar to registering scandalous and immoral marks (e.g., FUCT) violated the First Amendment. The applicant from the Brunetti case then tried to register the F word in its proper spelling as a trademark for a variety of goods and services. However, this time around the Trademark Office rejected the mark for failure to function as a trademark. The Trademark Office found that the F word is in such widespread and ubiquitous use (including as ornamentation on many consumer goods), that it cannot function as a trademark.

However, all is not lost for the profanity-inclined. The entertainer Lizzo, through her production company, sought to register 100% THAT B**** for clothing. The Examiner initially rejected the application for failure to function as a mark because the phrase is a commonplace expression "used to convey an ordinary, familiar, well-recognized sentiment." In a precedential ruling from February, the Trademark Trial and Appeal Board (TTAB) found that while the expression was not originated by Lizzo, it was made common and popular by Lizzo as a song lyric. It further found that much of the Examiner's evidence of the widespread common usage of the phrase in some way related to Lizzo. Accordingly, the TTAB permitted registration of the mark.

Conclusion

Certain products and types of marks are susceptible to a failure to function rejection. Extra care should be used when attempting to secure trademark rights for marks associated with clothing, especially T-shirts and with common phrases or symbols. Best practices include displaying the mark in a format and location traditionally associated with trademarks and using the TM, SM, or ® symbol as applicable.



Federal Circuit Offers Insight into the Inquiry of Patent Eligible Subject Matter



JOSEPH M. HALLMAN
Intellectual Property Attorney

On February 13, 2023, in [ChromaDex, Inc., Trustees of Dartmouth College v. Elysium Health, Inc.](#) (“ChromaDex v. Elysium”), the Court of Appeals for the Federal Circuit (“Federal Circuit”) affirmed the holding of the District Court for the District of Delaware that claims of U.S. Patent No. 8,197,807 (“the ‘807 patent”) were invalid under 35 U.S.C. § 101. In its decision, the Federal Circuit noted that the claims at issue were directed to a “product of nature” and are not directed to patent-eligible subject matter. Thus, ChromaDex v. Elysium represents another case in the ongoing issue of patent eligibility under § 101.

As noted by the Federal Circuit, the ‘807 patent “is directed to dietary supplements containing isolated nicotinamide riboside (“NR”), a form of vitamin B3 naturally present—in non-isolated form—in cow’s milk and other products.” Claims 1-3 of the ‘807 patent are at issue in ChromaDex v. Elysium, wherein claim 1 is representative and claims a composition comprising NR.

ChromaDex, Inc. (“ChromaDex”) is a licensee of the ‘807 patent, which is owned by the Trustees of Dartmouth College (“Dartmouth”). As a licensee, ChromaDex sells dietary supplements that are pharmaceutical compositions of NR covered by the ‘807 patent. In 2018 ChromaDex sued Elysium Health, Inc. (“Elysium”) for patent infringement related to the ‘807 patent. During the district court proceedings, Elysium moved for summary judgment arguing that the claims of the ‘807 patent that were at issue were not directed to patent-eligible subject matter under § 101. The district court granted Elysium’s summary judgment motion concluding that the claims were directed to a natural phenomenon, namely “compositions comprising isolated [NR], a naturally occurring vitamin present in cow milk”, and thus were invalid under § 101. ChromaDex argued that isolated NR had different characteristics in terms of stability, bioavailability, sufficient purity, and therapeutic efficacy than naturally occurring NR, but the district court rejected this argument noting that none of those characteristics were included in the claims at issue. ChromaDex and Dartmouth (collectively “Appellants”) appealed the district court’s decision.

The Federal Circuit’s opinion noted that §101 allows a patent to be obtained for a “new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof”, subject to statutory requirements. The Federal Circuit further noted that “[l]aws of nature,



natural phenomena, and abstract ideas” are not patent-eligible. Additionally, the Federal Circuit noted that milk, which is indisputably a naturally occurring product and thus not patent eligible, falls into the scope of at least one embodiment of representative claim 1 with one exception – representative claim 1 specifies isolated NR while NR in milk is not isolated.

The court referenced the landmark case *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980) (“Chakrabarty”) in which the Supreme Court upheld challenged patent claims directed to genetically engineered bacterium because the bacterium had markedly different characteristics than any naturally occurring bacterium. However, in this case, the Federal Circuit noted that isolated NR as compared to how NR naturally exists in milk is “not sufficient, on its own, to confer patent eligibility.” The Federal Circuit found that “isolated NR is no different structurally or functionally from its natural counterpart in milk” and that “[t]he claimed compositions do not exhibit markedly different characteristics from natural milk and are, therefore, invalid for claiming a patent-ineligible product of nature.” The court further noted that some embodiments covered by the claims at issue are structurally different than milk, but because at least one embodiment covers milk, the claims are broad enough to embody a product of nature and, therefore, are invalid as being directed to patent-ineligible subject matter.

Appellants argued that the claimed composition possesses markedly different characteristics than naturally occurring milk because NR is only found in trace amounts in milk and because the NR in milk is not bioavailable. The Federal Circuit rejected Appellants’ arguments noting that milk increases NAD⁺ biosynthesis, which is the only therapeutic effect that the claims require, and further noting that the claims do not reflect any of the differences between the claimed compositions and naturally occurring milk that were identified by Appellants. For example, the claims do not require a specific amount of NR. Also, based on the way the term “isolated NR” was construed by the district court (which is unchallenged by Appellants on appeal), the claims at issue do not necessarily require that the isolated NR be bioavailable. Thus, the claimed compositions do not possess markedly different characteristics than milk. Accordingly, the Federal Circuit held the claims at issue to be directed to a product of nature such that they are not patent-eligible.

Interestingly, while the court noted that the inquiry into the patentability of the claims at issue could end based on the principles of *Chakrabarty*, the court further applied the *Alice/Mayo* two-step framework to the claims at issue. The court noted that at step one of the *Alice/Mayo* test the claims at issue are directed to a product of nature, and at step two the claims lack an inventive step “because they are directed to nothing more than compositions that increase NAD⁺ biosynthesis, which is the very natural principle that renders the claims patent-ineligible.” Appellants argue that the claims at issue embody two possible inventive steps: (1) “recognizing the utility of NR for enhancing health and well-being”, and (2) “the wisdom of isolating the NR to provide concentrations higher than what occur naturally.” The Federal Circuit rejected both arguments, noting that recognizing the utility of NR is simply recognizing a natural phenomenon, which is not inventive, and further noting that the act of isolating NR is not enough to render a patent-ineligible product of nature to be patentable. Thus, the Federal Circuit affirmed the district court’s decision holding the claims at issue to be invalid under § 101.

ChromaDex v. Elysium is just one more case in a long line of cases decided at the Federal Circuit level regarding what is and is not patent-eligible subject matter. This case provides insight into the detailed patent eligibility inquiry as it relates to products of nature as well as claimed compositions.



Is Artificial Intelligence Coming to the US Patent and Trademark Office?



JULIE SPIEKER

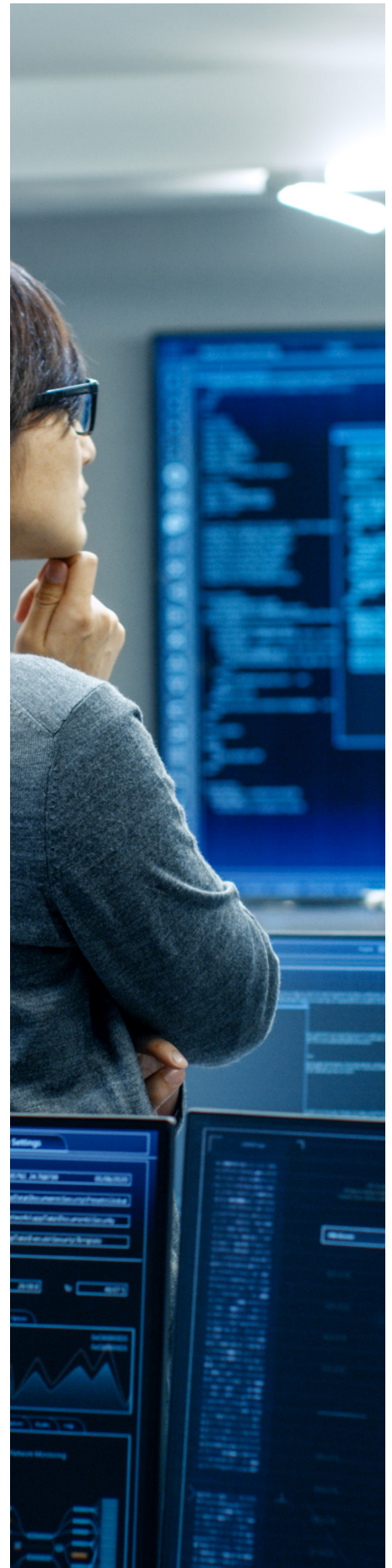
Intellectual Property Attorney

There is a lot of discussion within the legal community about the use of artificial intelligence in the fields of patents, trademarks, and copyrights. For instance, the current policy at the USPTO is that patents can only be issued to human inventors and not AI. In *Thaler vs. Vidal*, the Federal Circuit held that the word “individual” in the statute governing patent law that defines an inventor as “the individual ... who invented or discovered the subject matter of the invention” was correctly interpreted to apply only to humans. Mr. Thaler has petitioned the Supreme Court to review this decision.

Similarly, on March 16, 2023 the US Copyright Office released a Statement of Policy clarifying that only human-made creations are eligible for copyright protection. In the Statement, the Office explained “the term ‘author,’ which is used in both the Constitution and the Copyright Act, excludes non-humans.”

Furthermore, there is much discourse on whether or not AI may someday supplant attorneys for certain tasks like patent drafting, contract drafting, motion drafting, trademark registration, or writing articles (note: no AI was used to write this brief!). In fact, there are current tools utilizing AI to aid practitioners in drafting certain portions of a patent application, reviewing an application for errors, enhancing a prior art search, drafting portions of a licensing agreement, or checking the availability of trademarks. If used properly and wisely, AI can assist an attorney in providing a quality product more quickly and at a lower cost. Given the power and possible benefits of AI, will the USPTO utilize it? The concept of AI facilitated examination of patents and trademarks is intriguing. Eliminating humans altogether for a completely automated examination is not on the horizon, but removing the human examiner from the initial portions of examination may be more likely. An AI system could review an application, scan a patent specification and claim set for issues, search relevant prior art, and draft an Office Action detailing rejections and objections. For patent prosecution, it seems likely that AI could review prior art and identify disclosed claim elements for any novelty rejections. It also seems likely that AI could weigh differences between the invention and the art to evaluate obviousness.

Use of AI in this manner could substantially lower costs and save time. Currently, it takes an average of over 16 months from the patent



application filing date to the date a first Office Action is mailed by the Office. If an initial examination is completed automatically via AI, this pendency would obviously be shortened drastically.

However, interacting with an automated system to respond to an Action could be where the benefits diminish. Arguing with AI may prove difficult. For instance, how would an applicant convince the AI that the art selected was not applicable, or argue with the AI's characterization of a person of ordinary skill in the art? When arguing and/or presenting rebuttal evidence against a prima facie case of obviousness, how would an AI determine whether an argument is persuasive?

Moreover, in some cases an interview with an examiner is helpful to explain the state of the art,

or gather more information regarding a path to allowance. Would such an interview be eliminated with AI, or merely adopt a different interface?

Presumably the AI is learning from each user interaction. One could then imagine that after a certain argument or line of thinking is successfully utilized, that then becomes a known path to allowance within the art unit, for better or worse.

It seems likely that the USPTO will eventually utilize AI in some way for patent examination given its potential usefulness.



WHERE WE'LL BE

[TAI Iowa Technology Summit](#)

April 4, 2023 - Des Moines, Iowa

Sarah M.D. Luth, Intellectual Property Attorney in the MVS Biotechnology and Chemical Practice Group and Co-Chair, [MVS Data Privacy and Cybersecurity Practice Group](#)

Presenting on the topic "Data Leadership: Harnessing Your Data as a Value Driver."

[Michigan State University Innovation Celebration](#)

April 10, 2023 - Lansing, Michigan

Sponsored by MVS

[Downtown Des Moines Chamber of Commerce Women's Intentional Networking & Sharing \(WINS\)](#)

April 12, 2023 - Des Moines, Iowa

MVS will be attending and sponsoring

[Texas A&M 2023 Patent & Chancellor's Innovation Awards Luncheon](#)

April 14, 2023 - College Station, Texas

Sponsored by MVS

[CSU Strata Demo Day](#)

April 18, 2023 - Fort Collins, Colorado

MVS will be attending and sponsoring

[Legal Marketing Association Annual Conference](#)

April 23-26, 2023 - Hollywood, Florida

Richard Marsolais, Business Development Director

Presenting on the topic "30 Tips to Help Your Marketing Team Stay Afloat: A 60-Minute Odyssey."

[Inaugural Father Flanagan's Boys' Town IP Summit](#)

April 25, 2023 - Omaha, Nebraska

Luke T. Mohrhauser, Managing Partner and Chair, [MVS Mechanical-Electrical Practice Group](#)

Jonathan L. Kennedy, Partner practicing in Intellectual Property Law and Litigation and chair, [MVS Litigation Practice Group](#)

[University of Maryland Innovate Maryland Event](#)

May 2, 2023 - College Park, Maryland

Sponsored by MVS

Heidi S. Nebel, Patent Attorney and Chair, [MVS Biotechnology and Chemical Practice Group](#)

[Managing Partner Forum](#)

May 3-4, 2023 - College Station, Texas

Luke T. Mohrhauser, Managing Partner and Chair, [MVS Mechanical-Electrical Practice Group](#)

[Licensing Executives Society, Iowa Chapter Event](#)

May 8, 2023 - Ames, Iowa

Nicholas J. Krob, Intellectual Property Attorney in the MVS [Licensing Practice Group](#)

The event will be focused on best practices for term sheets. There will be a panel discussion about valuation and in-licensing and out-licensing from both a business (mature stage tech) and university (early stage tech) perspective. There will also be a collaborative exercise about "getting to 'yes.'"

[Iowa Society of Healthcare Attorneys Conference](#)

May 19, 2023 - Des Moines, Iowa

Cassie J. Edgar, Patent Attorney and Chair, [MVS Regulatory Law Practice Group](#) and Co-Chair, [Data Privacy and Cybersecurity Practice Group](#)

[Downtown Des Moines Chamber of Commerce Annual Celebration](#)

June 7, 2023 - Des Moines, Iowa

MVS will be attending and sponsoring

WHERE WE'LL BE

ABI Taking Care of Business Conference

June 13-15, Cedar Rapids, Iowa

Luke T. Mohrhauser

Managing Partner and Chair, MVS Mechanical-Electrical Practice Group

Sarah M.D. Luth

Intellectual Property Attorney in the MVS Biotechnology and Chemical Practice Group and Co-Chair, MVS Data Privacy and Cybersecurity Practice Group

Presenting on the topic "Data Security: How to View a Potential Vulnerability as a Valuable Asset."

Joseph M. Hallman

Intellectual Property Attorney in the MVS Mechanical-Electrical Practice Group

Julie S. Spieker

Intellectual Property Attorney in the MVS Mechanical-Electrical Practice Group and Biotechnology and Chemical Practice Group

Richard Marsolais

Business Development Director

Copyright Society Annual Meeting

June 11-13, 2023 - Newport, Rhode Island

Brandon W. Clark, Copyright and Trademark Attorney and Chair, MVS Copyright and Media Law Practice Group

InfoAg Conference

June 27-28, 2023 - St. Louis, Missouri.

Kevin M. Kercher, Intellectual Property Attorney, MVS Mechanical-Electrical Practice Group

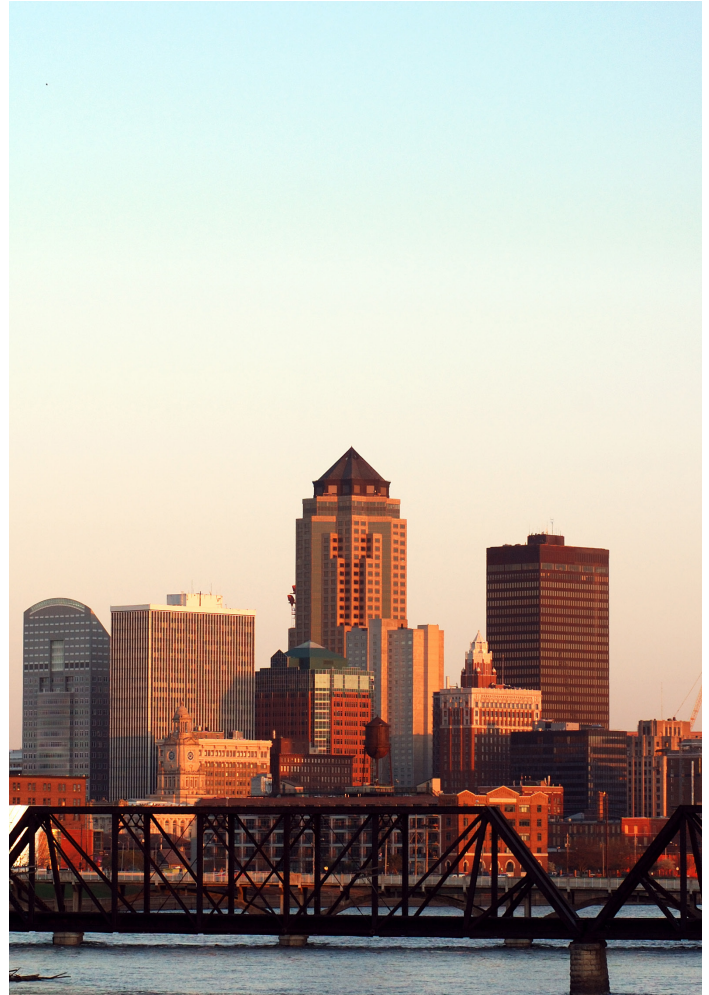
Gregory Lars Gunnerson, Intellectual Property Attorney, MVS Mechanical-Electrical Practice Group

2023 INTA Annual Meeting

June 27-29, 2023 - Virtual

Christine Lebrón-Dykeman, Intellectual Property Attorney and Chair, MVS Trademark Practice Group

Brandon W. Clark, Copyright and Trademark Attorney and Chair, MVS Copyright and Media Law Practice Group



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