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JUNE MEMBERS LUNCH

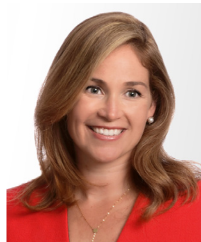
WED, JUNE 24, 2015 | 12-1:30 PM

The Club at McInnis
$45 MCBA members / $55 nonmembers
Registration

Update: 2015 Supreme Court Rulings

Speaker: Professor Rory Little

Register now! This is always a sold-out event. Professor Rory Little, expert on Constitutional Law at UC Hastings, will discuss recent Supreme Court cases including the much-awaited Equality of Marriage case now before the court. *1 General CLE Credit.*



MARIN LAW PRACTICE MANAGEMENT

How to Avoid Becoming the Client: Navigating Common HR Mistakes

By Natalja M. Fulton

As employers in California, law firms know that they must comply with a wide array of ever-changing laws, regulations regarding minimum employment standards, create employee entitlements, and impose employer obligations. Indeed lawyers often advise clients on these very obligations. Recent events in Silicon Valley have brought a national spotlight to alleged employer mistakes or violations which, in turn, has done much to educate today's workers about their rights and their opportunities to demand damages from their employers. These events have similarly brought the importance of an employer's consistent and objective performance documentation to the forefront. In this climate, proactive employers should look for ways to manage their employment law risks, so as to prevent the costs, lowered employee morale and reputational harms associated with employee claims.

Due to the nature of our business, issues related to employee claims and employer noncompliance can be more damaging to the firm's reputation than other types of employers. While California has the presumption that employees are employed on an at-will basis, there are several exceptions. Regardless of the merits of the claim, thousands of employment-based complaints are filed every year. Law firms are not immune to such lawsuits, and must spend time and resources to defend against claims. While we often counsel clients on best practices, it is important to practice what we preach when it comes to

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The Marin Lawyer editorial team thanks June Guest Editor Jessica Pliner.

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Calendar of Events

Tuesday, June 16, 5:30-7:00 pm
After-Work Mixer
Diversity & Barrister Sections

Wed, June 17: 12–1:00 pm
Probate & Estate Planning
Section Meeting

JUNE MEMBERS MEETING
Wednesday, June 24: 12-1:30 pm
Review of 2015 US Supreme Court Rulings

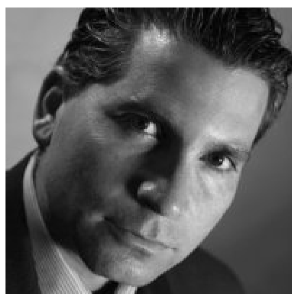
Tue, June 23: 12–1:30.
Probate & Estate Planning Section
Mentor Meeting

Wed, July 15: 12–1:00 pm
Probate & Estate Planning
Section Meeting

Tues, July 21: 12-1:30 pm
Labor & Employment Section
Brown Bag Lunch Meeting

JULY MEMBERS MEETING
Wednesday, July 22: 12-1:30 pm
Speaker, venue TBA

See page 13 for details & more events.



Huffman's Patent Reform Bill is of Dubious Benefit for Marin Technology Businesses

By Christian J. Martinez

Marin County has mostly small and mid-sized companies dependent on a robust patent system. For example, drug maker Biomarin, with $751 million in revenue in 2014, was assigned no less than 145 patents since 2000. There are numerous pharmaceutical ventures in Marin with Biomarin having spawned two, Rapture and Ultragenyx. Robert A. Baffi, Executive Vice President of Technical Operations at Biomarin noted that it expects to add to its 1000 Marin employees hundreds of highly-educated research positions at its new headquarters in San Rafael, and that Marin has potential to be a hub in the pharmaceutical industry. Patents will lead the way.

Autodesk, another Marin flagship company, has revenue of $2.3 billion and holds hundreds of patents related to its software products. On the other hand, Marin has countless small companies depending on patent protection. For example, Marin's Ecotensil, Inc. filed at least 9 applications since 2012 related to its novel foldable utensils. Emerging companies such as Ecotensil have as much, if not more, to lose in patent reforms.

Thus, Marin should take strong interest in the Innovation Act co-sponsored by Congressman Jared Huffman. Huffman's bill is intended to make it more difficult to enforce a patent. It makes a patent holder plead with more specificity, limits discovery, and creates a presumptive attorneys' fee award to the prevailing party.

The Innovation Act is only the opening salvo in the contentious debate surrounding patent litigation reforms intended to stop abusive litigation tactics by Non-Practicing Entities (referred to pejoratively as Patent Trolls). Everyone is against abusive litigation, but the issue is more nuanced than those urging reforms might appreciate. The most infamous type of Patent Troll acquires patents from inventors or intermediaries and sues numerous defendants with the intent to settle for less than the cost of defense. There is also "privateering" where operating companies, such as Microsoft, acquire patents and sue competitors through proxy companies. There is no consensus on who qualifies as a "Patent Troll" and definitions among scholars could include individual inventors, universities, or anyone who does not practice the patent as its "core" business.

In the 113th Congress, there were over a dozen reforms aimed at patent litigation with titles like "Patent Abuse Reduction Act," "Patent Litigation Integrity Act," and "Saving High-Tech Innovators from Egregious Legal Disputes Act"

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Epstein Law Firm is excited to welcome attorney Robyn Christo to its trust, estate, and general civil litigation team.

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(Huffman, continued from page 11.)

until Harry Reid tabled them abruptly.

Patent reform is not new. Congress passed a major patent act in every century since the Washington Administration, with numerous proposals in between. In 2011 Obama signed the America Invents Act, which aligned the US with the rest of the world by giving patent rights to the "first to file" a patent application, not the first to invent. The AIA also included provisions intended to curtail patent litigation, such as post-grant review procedures, where a defendant can ask the USPTO to give a "second opinion" as to whether a plaintiff's patent should have issued in the first place, stopping the underlying litigation until the USPTO makes a decision.

The AIA also required patent plaintiffs to sue each unrelated defendant in a separate lawsuit instead of joining them in one case (the norm). Thus, if there were 10 accused infringers, there would be 10 cases, not 1 with 10 defendants creating the appearance of a dramatic ten-fold "increase" in patent cases, and an opportunity for reformers.

Next, a 2012 study by Boston University professors reported that patent litigation cost businesses $29 billion the prior year, relying on data from patent defense firm RPX, which remarkably included Universities, individual inventors, and other broad categories as "patent trolls," not just patent plaintiffs that assert patents either in bad faith or to elicit "cost of defense" settlements. Moreover, they assume that the $29 billion was, in fact, a cost at all, as opposed to transfers of rights as envisioned by the U.S. patent system. (i.e., judgments, licenses, and settlements).

Perhaps their missteps in their methodology would not have been so thoroughly exposed (see, e.g., David L. Schwartz, Analyzing the Role of Non-Practicing Entities in the Patent System, Jan. 21, 2014), except that their initial $29 billion claim was parroted *ad nauseam* by public officials, including the President, and Representative Huffman.

The Judiciary also hit the brakes on patent litigation in a series of cases limiting damages awards and patentable subject matter, taking notice of ongoing efforts at reform.

In short, patent litigation became the legal WinCup, and a stop-work order arrived. According to one 2014 report by analytics firm Lex Machina, patent litigation cases were down 40% in October from the prior year. Yet, reform continues and politicians are eager to jump on the bandwagon.

Is this good for Marin businesses?

Marin patent owners are individuals and small to mid-sized businesses. For Marin's emerging companies, especially part of Marin's growing life sciences community, patent protection is pivotal.

But how should Marin's largest employers feel about inventors' rights? A search of public records reveals that in November 2014 Biomarin sued a competitor for infringement of seven patents for selling a generic version of Kuvan®, which treats a rare genetic disorder. Kuvan® accounted for roughly 25% of Biomarin's net product revenue for Q4 of 2014. Under Huffman's bill, Biomarin would face extra hurdles in alleging patent infringement and would face the possibility of paying the other side's attorneys' fees if it loses.

Autodesk is a completely different animal since it is in "tech" and not heavily-regulated biotech. Court records reveal that it was sued 19 times for patent infringement, mostly in Texas by non-practicing entities, but also by New York University and operating companies. Most cases were dismissed, likely due to settlement.

Yet, Autodesk has Marin's largest patent portfolio, which is vulnerable under recent Supreme Court precedence invalidating many software patents. Regardless, its CEO Carl Bass stated in 2014 that he'd give up Autodesk's software patents if all software patents went away. Which perhaps makes sense, particularly where, unlike Biomarin, Autodesk has broad copyright protection as well. Patent trolls typically sue on software patents (about 89% according to a 2013 GAO study) and recently Autodesk was hit with an $18 million jury verdict in Texas and had to pay Plaintiff's attorneys' fees.

Marin's startup community might have more to lose than Autodesk, especially those in the software industry. According to one survey conducted by UC Berkeley, 76% of venture-backed entrepreneurs and 67% of all entrepreneurs believed that patents were important to their investors. I am not convinced that patent protection should rightfully be the *raison d'être* for emerging companies, given how difficult it has become to enforce any patents due to recent Supreme Court opinions.

But for the same reason, Huffman's bill should die on the vine to allow the recent Supreme Court cases, the new post-grant procedures, and the America Invents Act to play out. If the steep decline in new patent cases continues, additional reforms such as the Innovation Act might at best be superfluous and at worst be harmful to the very innovators it purports to protect.

Christian J. Martinez practices intellectual property law with an office in Corte Madera. He has broad experience in licensing, technology, trade secrets, business torts, and state and federal court litigation. Christian earned a Master's in Law with a focus on technology from the University of California at Berkeley and a JD from the University of San Francisco.