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## JUSTICE FOR ALL: INNOVATIVE TECHNIQUES FOR INTELLECTUAL PROPERTY LITIGATION

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### I. New Approaches to Old Problems

Start-up companies, inventors and artists often lack the funds necessary to compete in litigation, yet they too need legal protection for their intellectual property rights. As this article suggests, enterprising advocates willing to search beyond traditional ways of representing these clients will discover rewarding opportunities exist, and that more clients can be served in the process. Clients unable to afford hefty retainer fees and high billable hour rates need lawyers who understand their different needs, who can adopt unconventional strategies, and who are willing to take more intellectual and philosophical risks. n1 Creativity is so important that noted trial lawyer Gerry Spence has even said that it is "the single most important ability a trial lawyer brings to the table." n2

This commentary explores how a lawyer may develop innovative litigation strategies such as (1) billing on a contingency basis, (2) using effective technology, and (3) strategizing with insurance coverage. In *The Art of War*, Sun Tzu stated that in designing strategy for war, one must take into account financial costs, physical costs, and durational costs when action is taken; but that successful missions will be based on comprehensive prescience gained from what is learned by men. n3 "When

[\*606] conducting conflict, do not rely mainly on physical and material power, but on mental power." n4 In litigation, like in war, the mind of the person leading the charge plays a significant role in determining the outcome. It is these powers that clients in need rely on.

## II. The Win/Win Contingency Fee Alternative

One of the most intriguing options available to parties who may become involved in litigation is the contingency fee arrangement. However, despite the fact that these fee agreements are quite common in other civil matters, they have received little attention in the intellectual property arena. n5 It seems that very few attorneys are willing to risk litigating intellectual property cases on contingency. Additionally, a contingency fee arrangement requires special consideration of a number of complicated issues including how the expected expenses are to be paid, how the counterclaims, settlements and appeals are to be handled, and if applicable, how the fee shifting statutory provisions are to be applied to any money recovered. n6 As litigation costs and the economic pressure to lower such costs continue to increase, clients will more actively explore alternative billing solutions, and the use of the contingency fee arrangement will most likely increase as a result. Cases where this arrangement has been used exist and provide some insight into the future of intellectual property litigation.

The case of Moleculon Research Corporation demonstrates that even established companies may benefit from the use of contingency fees in intellectual property litigation. Moleculon battled giant CBS, Inc. and Ideal Toy Corporation over the patent rights for the "Rubik's Cube." n7 The company was the assignee of a patent issued to Larry D. Nichols directed to a cube puzzle composed of eight smaller cubes that may be

[\*607] rotated in groups of four adjacent cubes. n8 Claims three through five were allegedly infringed by the Ideal Toy's Rubik's Cube. n9 Moleculon, a small chemical research company where Nichols was employed as a research scientist, sued Ideal Toy (prior to its acquisition by CBS, Inc.) for patent infringement seeking \$ 60 million in damages. n10 Although the rightful owner of patent rights in the invention, Moleculon actually considered not pursuing the litigation because of the extreme costs. n11 Non-patent attorney Robert Perry of the firm Wilkes, Artis, Hedrick & Lane agreed to take Moleculon's case on a contingency fee basis. n12 This arrangement allowed Moleculon to develop the case to the point of settlement. n13

Another well-known patent case that was handled on contingency was between Robert W. Kearns and Ford Motor Company. n14 The suit lead to a post verdict settlement of \$ 10.2 million for infringement of Kearns' intermittent windshield washer patent. The plaintiff's law firm, Arnold, White & Durkee, P.C., was retained on contingency. n15

Additionally, the widely reported waterbed patent case of Hall v. Intex Plastics Sales Co., n16 which led to a \$ 6.8 million recovery, was also won using a contingency fee basis for billing. n17

Included below are some illustrative stories as well as insightful discussions with three highly successful patent litigators who found a way

[\*608] to benefit from the contingency arrangement despite the risks of using contingency fees in intellectual property litigation.

A. A Discussion with Patent Lawyer Gerald D. Hosier

Gerald D. Hosier, n18 one of most financially successful small-firm attorneys in America, has engineered a novel, risky and so far extremely profitable approach to patent litigation - contingency fees. n19 Hosier represents only plaintiffs, and not all of his clients choose him and his contingency fee arrangement because they can not afford litigation costs. n20 That is, because of the arrangement's risk reduction, even major corporations are coming to appreciate this cost-effective approach. Hosier, ironically, has the potential to earn far greater profits than he would billing hourly. n21

"I know of only a couple of other lawyers who work on a contingency basis in the patent field," claims Gerald D. Hosier. "Almost no one is willing to take the risk. Patent cases tend to be very complex, time-consuming and expensive to prepare. Second, unlike a personal injury case where liability is often clear and the only question is 'how much,' patent cases are extremely difficult to evaluate. The outcome simply cannot be predicted with any degree of certainty. Third, patent lawyers can make a very comfortable living billing hourly rates since their clients tend to be successful, innovative corporations. Personal injury lawyers, for example, take cases on contingency because of necessity - their clients simply can not afford hourly fees."

Hosier continues, "Firms do have the opportunity to take contingency fee cases; however I find that most cases come to me only

[\*609] after they have been unsuccessfully shopped to other patent lawyers. Risk is a very large factor. If a client had confidence in his case, why would he or she choose a contingent fee approach that could net the lawyer multiples of hourly rates? Why would any lawyer turn down a contingent case if he or she had confidence that the fee would be multiples of hourly rates? Obviously, risk or fear on both sides is a compelling reason clients want contingent representations and the reason the lawyer is unwilling to accept such representations."

"Risk is an enormous concern," Hosier admits, "however, this is the interest and excitement, along with getting rewarded for a job well done. My risk management is my willingness to work longer and harder than most lawyers, and an efficiency in handling contested matters. I did pro bono criminal work early in my career. When I started taking contingent patent cases, it was a form of pro bono work for people I liked and felt deserved representation. Fortunately, it also became profitable."

In conclusion, Hosier states, "Lawyers billing by the hour profit on the process, not the result. The more they bill, the more they make. The longer it takes, the more they make. The bigger they make the problem, the more they make. The quicker a lawyer solves a problem, the less he or she makes. In many cases, the lawyer and the client simply are not wearing the same jersey - they are not on the same team. In short, in the area of contested matters, the lawyer and the client often have different agendas."

"There is no single answer," proffers Hosier. "There are situations where hourly billing is in the best interest of the client. There are situations where a client has no ability to pay and can only proceed on contingency. There are situations where some kind of hybrid is appropriate. Clients need to control costs. Lawyers, like businessmen, should learn to live within budgets and to suffer the consequences of overrunning a budget. Chicago trial lawyer Fred Bartlett has an interesting approach: up-front fixed fees based on an agreed valuation of the case with the client and a significant bonus for good results. This is a good approach at least in theory because now the most valuable lawyers are the ones who get good results quickly. In a traditional law firm environment, the most valuable lawyers are the ones who bill the most hours."

**[\*610]**

B. A Discussion with Alfred B. Engelberg

Alfred Engelberg n22 has earned over \$ 100 million by successfully challenging the validity and enforceability of patents and sharing in the resulting profits earned by generic drug clients. As patent counsel to the Generic Pharmaceutical Industry Association (GPIA) since its founding in 1980, Engelberg served as a principal negotiator of the Drug Price Competition and Patent Term Restoration Act of 1984 (the Hatch-Waxman" Act), the law which led to explosive growth in the use of generic drugs. n23 In 1985, Engelberg resigned from his law firm, Amster, Rothstein & Engelberg, where he had worked since 1969, to devote his full time to representing Schein Pharmaceutical, Inc. n24 Working alone from a computer in an office at home, he successfully conducted seven major litigations during the following ten years using contingency fee arrangements. n25 These law suits enabled Schein to market generic versions of several important patented pharmaceuticals at substantially lower prices than the branded product, long before the patents normally would have expired. n26

"Under the 1984 Drug Price Competition Act," reveals Engelberg, "a manufacturer of a generic drug may challenge the validity or enforceability of a patented drug while simultaneously seeking FDA approval to market the generic copy. If the challenge is successful, the generic manufacturer is allowed to begin competing with the branded name product long before the patent would normally have expired. In addition, for at least six months, the FDA is legally prohibited from approving a second generic copy. The gross profit margins on most drugs are enormous. Therefore, a contingency arrangement can be structured in which the attorney receives a percentage of those profits."

"I have been involved in seven contingent patent challenges over the last 10 years," affirms Engelberg, "and have received remuneration in excess of \$ 100 million. On an hourly basis, even if the cases had been fully staffed, the cases would have produced a total of no more than ten to fifteen million dollars in billing."

[\*611]

Engelberg continues, "In 1984, when the law was enacted to allow for these patent challenges, most generic drug companies were small businesses and could not afford to spend a million dollars on a lawsuit with an uncertain outcome. Nor could they afford the fees which would have been involved in conducting studies to determine which patents might be vulnerable to a challenge. My client has earned far more than I have from these challenges and has been able to build a very successful business. This success would not have been possible without the contingency arrangement. In addition, the success rate has been great because the client understood that I would not go at risk in cases in which I believed there was only a small chance of success. Therefore, the contingency arrangement served the purpose of screening out patent challenges having a low probability of success."

"In my days as a partner of a law firm working at an hourly rate," Engelberg attests, "I can remember telling clients that 'I have hours that are worth thousands of dollars and days that aren't worth a s--t.' I don't have very many of those kind of days anymore. In the days when I billed cases on an hourly basis we often engaged in extensive discovery in the hope of finding some bit of evidence which might help our case. Those activities were rarely cost effective from the client's perspective but they were financially rewarding for my firm. In my contingent fee work, I am predisposed to 'go for the jugular' and to avoid wasting time 'turning over every rock' in the manner which is so typical of attorneys being paid by the hour. The object of these cases is to get the earliest possible trial date because no product can be marketed and no money can be made unless and until the litigation is successfully concluded."

"In *Merck v. Danbury*," n27 continues Engelberg, "which is probably the best known case in which I have been involved, the case went to trial a little more than one year after it started and the Federal Circuit rendered the final decision on appeal only thirty months after the complaint was filed. The case was tried without a jury in five days and I presented only a single expert witness. While I kept no time records, my total time on the case was between 1000 and 1500 hours. Most of my cases have ended in less than three years."

Engelberg advises, "Before accepting a contingent arrangement an attorney would be well advised to consider the nature and extent of relevant discovery in which the opposition could legitimately engage, the likely length of time to complete litigation, and the stability and profitability of the market assuming a successful result is achieved. Given

[\*612] the fact that hourly billing can add up to several million dollars irrespective of the outcome, it would be unwise for an attorney to engage in a contingency arrangement involving a patent challenge unless there was a reasonable expectation of a payoff which was a substantial multiple of an hourly fee arrangement."

### C. A Discussion with Rolf Stadheim

Rolf Stadheim n28 and the firm he founded, Stadheim & Grear, Ltd., specialize in representing small companies and individuals who allege patent infringement, and they do so on a contingency fee basis. Stadheim has been called "the Butcher" for what he has done to corporate giants throughout his career. n29 He has handled a number of significant cases including securing in the damages and contempt phases of Smith Int'l v. Hughes Tool Co., n30 a two hundred and five million dollar judgment which was then the largest patent infringement judgment ever awarded. n31 Although he may take as much as forty percent of the monetary award, Stadheim says that most attorneys are not interested in using the arrangement. n32 Early in his career, Stadheim came to believe that taking intellectual property cases on a contingency basis could be a great business, as he knew that there were scores of small companies and individuals that could not afford to hire lawyers to litigate their patent cases. n33 His hunch proved to be correct, and now he represents clients who are unable to afford the costs of traditional litigation.

"I left my firm six years ago to do exclusive contingency fee cases," proclaims Rolf Stadheim. "Little inventors have no chance, really, when big companies refuse to pay licensing fees when they are infringing. I provide them a service. I offer them a chance to participate. Once the other company realizes that the little guy will be

[\*613] represented in court, they are more willing to sit down and negotiate a license rather than spend the half to a million plus to go through a trial."

Stadheim continues, "For the past 30 years I've seen an increase in litigation costs. As a result, everyone is becoming more aware of the costs, including lawyers. With patent litigation, there are so many issues that by the time you pay the lawyer by the hour, the costs are astronomical. When you are a trial lawyer paid by the hour, your job is to get the case ready for trial. However, trial lawyers are often the ones in the best position to settle a case, but there is little incentive to do so when the lawyer's worth is measured by billable hours."

"I see the philosophy of firms changing, however," affirms Stadheim. "I have also seen the older, established firms take a stab at contingency and have big problems with it. It's because they review their staff on a yearly basis. They judge what they did that year. If someone was working on contingency, they probably did not contribute as much to the firm if the matter was not resolved that year. Consequently, they don't appear to be doing such a good job for the firm. In a later year, when the matter is resolved, the firm won't give them as much credit for it because they remember that it is because they didn't contribute before. Once the firm structures itself that way, it is hard to mix the two billing mechanisms together."

In conclusion, Stadheim offers, "The average individual who owns a patent that is infringed by a much larger corporation can't do much about it because of the costs involved in trying a patent suit. I like representing those who are seeking justice but can't afford it. Representing the plaintiff as the underdog in these cases is like living a dream."

### III. Leveling the Playing Field Through Efficiency and Technology

#### A. Developing an Efficient Strategy

The intelligent and efficient use of traditional resources can also make intellectual property litigation more affordable. Surgical Systems, Inc., a small New England based company and owner of several medical related patents, is an excellent example of how this strategy can be used to compete successfully against larger corporations in costly patent litigation. The company has made effective use of a combination of litigation talent, law professor and law student help, and computer

[\*614] support. n34 In the "survival of the fittest" arena of intellectual property litigation, efficiency is the key when facing opponents with aggressive litigation strategies and unlimited budgets. Employing the right people at the right prices has kept this small patent holder in the fight and able to afford the lengthy battle.

Intellectual property students, under the guidance of a law professor, perform research, analyze issues and draft preliminary documents. The data then is compiled in a single software utility for the "primary" attorney to review, revise and rework. The arrangement allows the litigation staff to pursue multiple issues and ideas to help build a stronger case, while costs are kept at a minimum. Occasional conference calls are necessary, but the majority of the preliminary human "grunt work" is eliminated by instead exchanging documents entered into a fully integrated litigation software package. Were it not for such technology and its efficient application, the client would have far greater difficulty in seeking judicial protection or redress for its patent infringement dilemma.

Other strategies can be equally effective. Morgan Chu, attorney for Stac Electronics, a small company with limited resources, used a completely different approach when it sued giant Microsoft Corporation n35 for infringement of its patented data compression technology. n36 He took a "rifle shot" on the patent issues by purposely streamlining the complaint so the court would have to deal with only a few issues. This had the effect of drastically decreasing the document load and shortening the time required for the case to go to trial. n37 Since Microsoft's strategy depended on making litigation time-consuming and expensive for adversaries, Chu's strategy of efficiency stole much of their thunder. n38 Stac was able to speed the case to trial only one year after filing and, as a result, win a significant one hundred twenty million dollar judgment against Microsoft in the process. n39

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## B. Use of Technology As a Weapon

The future of the U.S. court system lies in the use of state-of-the-art "paperless" computer technology. n40 In a paperless trial, documents are electronically stored in computers and presented in court through computer images. n41 Document management is much easier and less time consuming because full text searches may be conducted almost instantaneously, and chronological indexing is easily performed. This makes computers a powerful, efficient and persuasive technological tool in the courtroom. n42

Many may think that only the federal government and large firms can afford to utilize such technology, but that simply is not true. n43 Smaller firms have the opportunity to gain equal footing to compete with larger firms in complex litigation through affordable automation software. For instance, the basic price of the CASE-Links n44 litigation software, which the U.S. Attorney's Office recently used in Massachusetts's first paperless trial, is available at a cost of \$ 295.00 for a single user and \$ 395.00 for a network.

Other products can provide a similar advantage, although only a few are currently available. "TrialMaker," n45 developed and refined by an attorney with twenty years of experience in civil litigation, is available at a cost of \$ 379.00 for a single user or \$ 479.00 for a multi-user license for up to 3 people. Like CASE-Links, TrialMaker also has the advantage of full text capabilities. Scanned documents can be imported to TrialMaker and linked to other documents and files, allowing for ease of organization, effective information retrieval and efficient case preparation.

In order to compete with larger firms that are able to put numerous associates and partners on a complex case, smaller firms can even-out the odds by investing in high-tech automation. n46 A recent

[\*616] article describes just such a case where the smaller firm, "David," found a way to compete with the financial resources and intimidating litigation team of the larger firm, "Goliath." n47 David scaled a mountain of documents produced during discovery by "working smarter, not harder" through the use of a few savvy people with PC's, document scanners and litigation software to sift through the mass of material. n48 He was able to find the small fraction of documents that contained the key information needed to prove the patent infringement issue. n49 This preparation made it easier for David and his attorney to go up against a giant, who was no longer so intimidating, and prevail.

#### IV. Identifying and Effectively Using Insurance Coverage to Fund Intellectual Property Litigation

##### A. Identifying Available Intellectual Property Coverage

Most individuals or companies who find themselves involved in an intellectual property lawsuit would prefer, at least, to share the costs with someone else. They may not realize that because business insurance policies provide coverage for their defense in many situations, cost sharing may be a real possibility. n50 When faced with an intellectual property dilemma, insureds and their counsel should carefully review insurance policies to identify policy terms that potentially support full coverage of litigation costs. n51 Although not a novel legal suggestion, this critically important analysis is often overlooked by business and intellectual property attorneys alike. n52 Such coverage may be key in determining litigation strategy or even whether or not to pursue litigation. Intellectual property attorneys owe a duty to their clients to

[\*617] attempt to secure coverage for litigation costs through their business insurance policies.

Business liability insurance can provide an avenue of defense for a variety of intellectual property disputes. Because this is a relatively new approach, courts are just beginning to provide some guidance to what may and may not be covered. n53 Coverage is found typically under the insured's General Commercial or Comprehensive Liability (GCL) policy. n54 The specific language that usually is contained within the "advertising injury" provision and occasionally within the "personal injury" provision of the policy, may create the duty to defend certain lawsuits. n55 Although these contract terms are standard in the industry, coverage in individual policies may vary according to their specific coverage exclusions.

The advertising injury provision in most GCL policies since 1986 offers coverage for:

- (1) oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods or services;
- (2) oral or written publication of material that violates a person's right of privacy;
- (3) misappropriation of advertising ideas or style of doing business; or
- (4) infringement of copyright, title or slogan. n56

Courts have broadly applied the "advertising injury" provision to all forms of intellectual property, although not always consistently and not always in the insured's favor. n57 If an enumerated offense is alleged to have occurred in the course of advertising activity, and the offense occurred during the policy period, then the insurer may have a duty to

**[\*618]** defend n58 so long as there is not a modified endorsement or definitional change contained within the policy that clearly excludes such coverage. n59

It is important to note that insurance coverage is a contractual issue that requires specific language interpretation. n60 Fortunately for insureds, advertising activities generally are interpreted broadly by the courts in furtherance of coverage, n61 while exclusionary clauses and ambiguities are narrowly construed against the insurer in favor of the policy holder. n62 Exactly how a policy is interpreted, however, may vary from jurisdiction to jurisdiction.

#### B. The Duty to Defend Intellectual Property Cases

Intellectual property torts are continuous torts whereby each alleged infringement triggers an independent duty to defend. n63 The insurer may be required to fully defend and pay all damages based on the mere possibility of liability under the policy's coverage, whether revealed by facts in the complaint or otherwise known to the insurer. n64 This is not to say that all intellectual property disputes are covered nor are most insurance companies likely to agree immediately to provide defense coverage when confronted. n65 Insureds and their counsel should consider

[\*619] retaining specialized counsel to assure that full policy benefits are received. n66

## 1. Patent Infringement

Patent infringement has been the leading type of intellectual property case involving insurance coverage. n67 Generally, coverage is not available for direct acts of patent infringement. n68 However, contributory infringement or inducement to infringe can be covered under insurance so long as the acts occur through an advertisement or other product promotion. n69

Insurance companies have reacted to the increase in litigation and have begun issuing policies that expressly cover patent infringement actions. n70 These policies are for insureds charged with infringing on the patents of others, irrespective of the policyholder's advertising activities. n71 The coverage is specifically intended for patent defense and covers litigation expenses for patent infringement, patent validity counterclaims and reexamination proceedings. n72 Participating insurance companies include Lexington, Homestead, National Union Fire, Classic Fire & Marine n73 and American International Group, Inc. n74

## 2. Trademark Infringement

Finding insurance coverage for trademark and trade dress infringement is significantly easier than finding coverage for patent infringement under most policies because trademarks and trade dress are,

[\*620] by their nature, involved in advertising, which is covered by the above-mentioned advertising provision. n75 It is important to review policies carefully for specific definitional language and current exclusionary provisions, as not all policies extend coverage for trademark infringement claims. If any ambiguities or conflicts are found to exist in policy language and the exclusions for trademark infringement, it will favor the insured as it violates the rule against "illusory coverage," rendering the exclusion ineffective and unreasonable. n76

### 3. Copyright Infringement

Copyright infringement is the most likely claim to activate insurance coverage. n77 The issue in most copyright infringement cases is whether there is a causal connection between the insured's advertising activities and the enumerated offense. n78 Few courts have addressed the issue, but the ones that have easily found that the connection existed. n79 So far, few insurance companies have specifically modified policies to exclude copyright claims. With the growth of computer and software copyright claims, however, coverage for this type of claim could change in the future.

### 4. Unfair Competition

Courts have struggled with the scope and meaning of "unfair competition" as applied to potential coverage under "advertising injury." n80 Prior to the 1986 provision change in most policies, courts defined advertising injury broadly so as to include acts of piracy and unfair

[\*621] competition. n81 More recently, courts have tended to restrict coverage to situations where a competitive relationship exists between the parties, and where damages were available as a remedy for the competitive injury. n82 However, the injury need only arise out of an offense occurring in the course of the insured's advertising activities. n83 Also, if the contract term "unfair competition" is vaguely defined or is not in the policy, courts construe it against the insurer, which in itself may settle the issue.

## 5. Trade Secret Misappropriation

Trade secret misappropriation claims trigger a duty to defend under "advertising injury" in policy coverage. n84 Misappropriation has also been applied to situations in which an employee seeks to directly compete with a former employer. n85 The issue is whether the information may remain a trade secret if it is the subject of advertising activities. n86

## C. Strategic Considerations of Insurance Coverage

Insurance coverage can impact strategic decisions in intellectual property litigation in a number of ways. n87 A plaintiff's counsel may desire to structure the complaint so as to maximize the likelihood that the defendant's insurance coverage will be required n88 or, conversely, to avoid issues that may trigger defendant's insurance coverage. Defendants must also consider the possible coverage of the opposing side when

[\*622] drafting counterclaims for the same reasons. n89 It is important to remember that insurance agreements are discoverable according to Federal Rule of Civil Procedure 26 (a)(1)(D) and should be closely inspected in every case.

Insurance coverage may allow a small business to compete in expensive litigation. It can provide funding to secure competent legal counsel and the ability to weather the storm of trial. When two parties of equal financial standing do battle, the one covered by insurance may have more strategic options available. n90 If the opponent realizes this, it might be encouraged to settle earlier. n91 On the other hand, what might have been a short dispute before the injection of insurance funding may be expanded to a lengthy trial to the opponent's detriment. n92 Discovering that insurance coverage is available for litigation may make the difference between winning and losing a case.

## V. Conclusion

Justice has a price that, unfortunately, not every one can afford. The result is that some inventions, creations, marks and works of art are protected by our laws while others are not.

Lawyers are in a fortunate position to help correct these inequities. To do so, however, may require a deviation from the usual practice of intellectual property law. Alternative litigation strategies do exist. Economically less fortunate clients have special needs that require special attention. Lawyers willing to tailor their representation to meet the needs of these clients can find it rewarding helping those without the financial resources to help themselves. Such resourceful lawyers not only help to catalyze equality in our justice system, but they can do well in their legal practice as well.

n1 Steven Keeva, *Opening The Mind's Eye*, 82 *ABA Journal* 48, 55 (1996) (quoting Houston Att'y Sam Guiberson).

n2 *Id.* at 54.

n3 Sun Tzu, *The Art of War*, 111-12 (J.H. Huang, research and reinterpretation, *The New Translation*, Quill 1993).

n4 *Id.* at 49.

n5 William E. Jackson, *Contingent Fee Representation In Intellectual Property Cases*, 1 *U. Balt. Intell. Prop. L.J.* 207 (1993).

n6 *Id.* at 213-15.

n7 *Moleculon Research Corp. v. CBS, Inc.*, 594 *F. Supp.* 1420, 224 *U.S.P.Q. (BNA)* 595 (*D. Del.* 1984); *aff'd in part, vacated and remanded in part*, 793 *F.2d* 1261, 229 *U.S.P.Q. (BNA)* 805 (*Fed. Cir.* 1986); *cert. denied.*, 479 *U.S.* 1030 (1987); *aff'd*, 666 *F.*

*Supp. 661, 4 U.S.P.Q.2d (BNA) 1312 (D. Del. 1987)*; rev'd, rehearing denied, *872 F.2d 407, 10 U.S.P.Q.2d (BNA) 1390 (Fed. Cir. 1989)*.

n8 More Complex Rubik's Cube Infringes Patent Under Doctrine Of Equivalents, 34 *Pat., Trademark & Copyright J. (BNA) 436, 436-37 (1987)*.

n9 Id.

n10 A Patent Puzzle Over Rubik's Cube, *Bus. Wk.*, August 2, 1982, at 26.

n11 Id.

n12 Id.

n13 Telephone Interview with Robert X. Perry, Jr., Partner in the law firm of Wilkes, Artis, Hedrick & Lane (May 16, 1996). The terms of settlement are confidential.

n14 See *Kearns v. Ford Motor Co.*, *726 F.Supp 159 (E.D. Mich. 1989)*, motion for summary judgment denied, *773 F.Supp 979, 19 U.S.P.Q.2d (BNA) 1138 (E.D. Mich. 1990)*; *Kearns v. Chrysler Corp.*, *771 F.Supp 190 (E.D. Mich. 1991)*; dismissed in part, *9 F.3d 978 (6th Cir. 1993)*, cert. denied, *116 S. Ct. 518 (1995)*; *Kearns v. General Motors Corp.*, *31 F.3d 1178, 33 U.S.P.Q.2d (BNA) 1696 (Fed. Cir. 1994)*; cert. denied, *115 S. Ct. 1105 (1995)*.

n15 Id.

n16 *Intex Plastics Sales Co. v. Hall and WBX Partners*, *20 U.S.P.Q.2d (BNA) 1367 (N.D. Cal. 1991)*, aff'd, *960 F.2d 155 (Fed. Cir. 1992)*; *Hall v. Intex Plastics Sales Co.*, *809 F.2d 788 (Fed. Cir. 1986)*.

n17 William E. Jackson, Contingent Fee Representation In Intellectual Property Cases, *1 U. Balt. Intell. Prop. L.J.* 207 (1993).

n18 Telephone Interview with Gerald Hosier (May 9, 1996). Gerald Hosier is a patent lawyer and sole practitioner of the Law Offices of Gerald D. Hosier in Las Vegas. Hosier was the subject of a May 1993 cover story in *The American Lawyer*, entitled "The Sky's the Limit" where it was reported that in 1992 he had earned more than \$ 150 million. Stewart Yerton, *The Sky's the Limit*, *Am. Law.*, May, 1993, at 64. According to *Forbes* magazine, Hosier netted \$ 14 million from his law practice in 1994. *The Top Trial Lawyers*, *156 Forbes*, Nov. 6, 1995, at 160. *Lawyers Weekly USA* listed Hosier as No. 3 in its top 10 list of richest small-firm lawyers in America and was the only intellectual property lawyer named to the list. Rebecca Conklin, *The Richest Small-Firm Lawyers in America*, *96 Law. Wkly. U.S.A.* 296 at B4.

n19 Rebecca Conklin, *The Richest Small-Firm Lawyers in America*, *96 Law. Wkly. U.S.A.* 296 at B4.

n20 Id.

n21 Id.

n22 Telephone Interview with Alfred B. Engelberg (May 17, 1996). Alfred Engelberg founded the Engelberg Foundation in 1991 which provides charitable funding for innovative health care and related social service projects.

n23 Id.

n24 Id.

n25 Id.

n26 Id.

n27 *Merck v. Danbury Pharmacal, Inc.*, 873 F.2d 1418, 10 U.S.P.Q.2d (BNA) 1682 (Fed Cir. 1989).

n28 Telephone Interview with Rolf Stadheim (June 3, 1996). Rolf Stadheim is a patent lawyer and partner of the Law Offices of Stadheim & Gear, LTD. in Chicago.

n29 David Rubenstein, Stadheim Firm, Out On A Limb, Finds Rewards, 7 Merrill's Illinois Legal Times, (August 1993), at 1.

n30 718 F.2d 1573, 219 U.S.P.Q. (BNA) 686 (Fed. Cir. 1983); cert. denied, 464 U.S. 996, 220 U.S.P.Q. (BNA) 388 (1983).

n31 Rubenstein, supra note 29.

n32 Id.

n33 Id.

n34 See notes 40-49 and accompanying text. Surgical Systems, Inc. uses the same CASE-Links software as described in that section.

n35 *Stac Electronics v. Microsoft Corp.*, 38 F.3d 1222 (Fed. Cir. 1994).

n36 Morgan Chu, A Giant-Killer Should Limit Scope of Attack, Nat'l L. J. C10, (Col. 1) (Mar. 13 1995).

n37 Id.

n38 Id.

n39 Id.

n40 Claire Papanastasiou Rattigan, The 'Paperless' Trial; A Recent Massachusetts Case Proves That Cases Can Be Tried Without Paper, 24 Mass. Law. Wkly., Feb. 19, 1996, at B1.

n41 Id.

n42 Id.

n43 Id. at B-1, B-5.

n44 For more information contact: CASE-Links, The Document Manager at CAT-LINKS, Inc., 2100 North Broadway, #200, Santa Ana, CA 92706, Phone: (800) 825-4657.

n45 For more information contact: TrialMaker Software, Litigation Support Database, 5 Keniston Road, Lynnfield, MA 01940, Phone: (617) 334-3367.

n46 Rattigan, supra note 40 at B-5.

n47 David vs. Goliath, 5 News-Links (Cat-Links Newsletter), Winter/Spring, 1993, at 1.

n48 Id. at 2.

n49 Id.

n50 See David Gauntlett, Changing Winds: Recent Decisions Favor Policyholders in Intellectual Property Claims, 5 Coverage, May/June, 1995 at 20.

n51 Patti Verbanas, Lawsuits Increase as Intellectual Property Definitions Change, Corp. Cashflow Mag., Sept. 1, 1995 at 1.

n52 See, e.g., id. at 9 (intellectual properties involve many things that people would not think to be covered by insurance, including ancillary claims).

n53 Id.

n54 Mark Delflache, Insurance Coverage In Intellectual Property Disputes, 13 IPL Newsletter, Summer, 1995, at 7.

n55 Id.

n56 Id.; see also Malcolm A. Misuraca, Insurance Defense In Intellectual Property Cases, C137 ALI-ABA 281, 285 (January 26, 1995).

n57 Delflache, supra note 54.

n58 See Microsoft Entitled to Coverage For Defense Costs, 10 Computer Law., March 1993, at 31 (reporting on Federal Ins. Co. and Great Northern Ins. Co. v. Microsoft Corp., No. C92-610D (W.D. Wash. Jan. 15, 1993)).

n59 See David Gauntlett, No Advertising Injury Exclusions In Commercial General Liability Policies Bar Coverage For Intellectual Property Lawsuits, 14 IPL Newsletter Spring, 1996, at 13; David Gauntlett, Solid Case Law Supports Finding That GCL Insurers Owe A Duty Of Defense To Their Insureds In A Variety Of Lanham Act Claims, 14 IPL Newsletter, Fall, 1995, at 9.

n60 Delflache, supra note 54.

n61 See, e.g., *State Farm v. Partridge*, 514 P.2d 123, 128-29 (Cal. 1973); *New Hampshire Ins. Co. v. Foxfire*, 820 F. Supp. 489, 493 (N.D. Cal. 1993).

n62 See, e.g., *Gray v. Zurich Ins. Co.*, 419 P.2d 168 (Cal. 1966); *Aetna Casualty Co. v. Certain Underwriters*, 129 Cal. Rptr. 47 (Cal. Ct. App. 1976); *Continental Casualty Co. v. City of Richmond*, 763 F.2d 1076, 1079 (9th Cir. 1985).

n63 See Gauntlett, supra note 59.

n64 See, e.g., *Gray*, 419 P.2d at 177; *CNA Casualty of California v. Seaboard Surety Co.*, 222 Cal. Rptr. 276, 285 (Cal. Ct. App. 1986).

n65 See Daniel J. Callahan, Recent Developments In Insurance Coverage Of Intellectual Property Torts 14 (Mar. 10, 1992) (unpublished manuscript).

n66 Id.

n67 Delflache, supra note 54.

n68 See *id.*; see also *Iolab Corp. v. Seaboard Surety Co.*, 15 F.3d 1500 (9th Cir. 1994); *Aetna Casualty & Surety Co. v. Orange County Superior Court*, 23 Cal. Rptr. 2d 442 (Cal. Ct. App. 1993).

n69 Delflache, *supra* note 54.

n70 See Gauntlett, *supra* note 50 at 21.

n71 See Delflache, *supra* note 54.

n72 *Id.*

n73 See Gauntlett, *supra* note 50, at 21; see also Evelyn Gilbert, Patent Infringement Suits Spur Plan Development, National Underwriter, February 7, 1994, at 17.

n74 Verbanas, *supra* note 51.

n75 *Id.* at 36.

n76 Bradford P. Lyerla & Manual A. Abascal, Insurance Coverage for Intellectual Property Claims: The California vs. The New York Approach, 19 AIPLA Q.J. 189, 202 (1991).

n77 Verbanas, *supra* note 51, at 37.

n78 Gauntlett, *supra* note 50, at 25.

n79 See, e.g., *Irons Home Builders v. Auto Owners Ins. Co.*, 839 F. Supp. 1260, 1266 (E.D. Mich. 1993); *Zurich Ins. Co. v. Killer Music Inc.*, 998 F.2d 674 (9th Cir. 1993); *Federal Ins. Co. v. Microsoft Corp.*, 1993 U.S. Dist. LEXIS 5467 (Jan. 15, 1993), *recon. denied*, 1993 U.S. Dist. LEXIS 5468 (April 14, 1993); *Phoenix Control Systems, Inc. v. Insurance Co. of North America*, 796 P.2d 463 (Ariz. 1990).

n80 See Gauntlett, *supra* note 50, at 25.

n81 Delflache, *supra* note 54, at 37.

n82 See Gauntlett, *supra* note 50, at 25-26; see also *Bank of the West v. Superior Court*, 833 P.2d 545 (Cal. 1992); *Keating v. Nat'l Union Ins.*, 995 F.2d 154 (9th Cir. 1993); *McLaughlin v. Nat'l Union Fire Ins. Co.*, 29 Cal. Rptr. 2d 559 (Cal. Ct. App. 1994).

n83 See Gauntlett, *supra* note 59.

n84 See, e.g., *Kurisu v. Michigan Miller's Mutual Ins. Co.*, 28 U.S.P.Q.2d (BNA) 1430 (Cal. Ct. App. 1993); *Sentex Systems Inc. v. Hartford Accident & Indemnity Co.*, 882 F. Supp. 930 (C.D. Cal. 1995).

n85 See, e.g., *Merchants Co. v. American Motorists Ins. Co.*, 794 F. Supp. 611, 619 (S.D. Miss. 1992).

n86 Delflache, *supra* note 54, at 37.

n87 Lyerla & Abascal, *supra* note 76, at 191.

n88 *Id.*

n89 *Id.*

n90 See Delflache, *supra* 54, at 37.

n91 *Id.*

n92 *Id.*