**Patents: Home on the Range or Wild Frontier?**

*By: Laura Schneider, J.D. Candidate 2014*

Nina Wang, Chair of the IP section of Colorado Bar Association, opened the conference with the welcoming address. She was immediately followed by Phil Wieser, Dean of the University of Colorado Law School, who introduced the keynote speaker, David Kappos, Director of the USPTO.

Director Kappos provided an update of the reforms within the USPTO in response to the America Invents Act (AIA), which many believe strikes a proper balance between the needs of first innovators and follow-on innovations. Director Kappos explained that the USPTO is hiring new examiners in an effort to expedite the examination process. Significant pro bono efforts have also been made to ensure "no invention is left behind." The new best mode requirements have been implemented, and the prioritized examination process is in place. The USPTO is also improving the ability of 3rd parties to make submissions of prior art. Most importantly, Director Kappos expects the backlog of unexamined applications to decrease significantly over the next 2.5 years, allowing examiners to spend more time on each application. As a result, the overall quality and integrity of the patent review process will improve.

However, although much progress has been made with these changes, Kappos clarified that there is much work to be done. Many of the reform efforts attempt to address the issues underlying the recent and public patent wars. Patent wars are not new, he explained with a summary of historical patent battles pertaining to inventions like the sewing machine, the telegraph, and even airplanes. As companies and patent owners continue to battle out their rights in court, the patent system seems reminiscent of the "wild west." As long as the tension between first innovators (who seek to protect their inventions) and follow-on innovators (who try to capitalize on improvements and developments) exists, the litigation incentives are likely to remain.

Immediately following Direct Kappos, a panel moderated by Phil Weiser focused on how companies view patents. Dean Weiser began by asking the panelists if they think patents are more akin to "fences" or "land mines." The group of panelists discussed recent Supreme Court decisions, such as *Bilski* and *Prometheus*, and suggested that they believe the ways patents are used with shift in the future. Thomas Cech, professor at the University of Colorado, argued that patents can be both fences (used to exclude others from the market) and land mines (unexpectedly disastrous). In some fields, like pharmaceuticals, patents inhibit innovation because the costs of licensing or litigation (added to the time, money, and manpower that go into developing a product) may make inventions less lucrative. He did suggest, however, that a trend towards non-exclusive licenses might alleviate this problem, as it would lower the cost of licensing and allow innovators to continue forward without fear of litigation.

Natalie Hanlon-Leh, a managing partner at Feagre Baker Daniel, suggested that inventors certainly should be able to fence in their creations by excluding others from practicing their inventions. On the

other hand, patent trolls create land mines, and she noted that the power of patents as land mines is shocking. She also pointed out that many, if not most, of the landmine problems are in high tech, with patent litigation being a very poor tool for fixing the system.

Keith Maskus, a professor at the University of Colorado, took the perspective that when companies buy patents, they are really buying security and often pay much more than one would predict for it. He also noted that although one intuitively would believe that the current system causes significant reductions in the rate of innovation, smoking gun evidencing of this has not been found. Litigation costs have not been proven to cause less innovation. However, as John Thorne, Senior Vice President and Deputy General Counsel at Verizon Communications Inc., noted, the patent system is not doing a good job of promoting high tech innovation. Luckily, inventors invent for reasons other than patent protection. In all, the first panel made it very clear that patent rights, such as the right to exclude others, are important; however, patents also can unexpectedly devastate a business.

Danny Sherwinter, an associate at Marsh Fischmann & Breyfogle and moderator of the second panel, focused on the changing patent landscape. He opened by asking the group of panelists to assess the impact that non-practicing entities (NPEs) have had on the patent landscape. Aaron Brodsky, managing counsel at Oracle Corp., responded that he believes NPEs can abuse the system because it is hard to construe what is covered by a patent, especially in high tech fields. He also pointed out that royalty stacking, where a single product may infringe a number of patents and thus possibly become subject to multiple royalty payments for a single product, is a major problem because patent owners don't know how many competing patents can be asserted against a single product. Roy Hoffinger, Vice-President and Legal Counsel at QUALCOMM Incorporated, countered that there is actually little evidence of NPEs causing problems. Royalty stacking, he said, is a theory, not a tangible problem. He argued that predictability is the bigger concern, as clear claim construction and the delineated boundaries it creates for patents often do not exist.

Bernard Chao, Assistant Professor at the University of Denver, argued that NPEs are a symptom, not a cause of the problem. Practicing entities, those who actually use the invention, abuse the system in the same way. He argued that if the system worked well, a major purchase would be made for the benefit of owning a great technology. In a dysfunctional system, on the other hand, fear of potential litigation incentivizes purchases. This is why, for example, companies spend a significant amount of money taking patents off the market.

Representing a company that helps clients address potential litigation, Mallun Yen, Executive Vice President of RPX Corporation, gave anecdotal examples of this type of activity. In her experience, Ms. Yen noted that patent suits have increased 10-fold in last 10 years. She has also seen a corresponding rise in the number of large patent portfolio acquisitions. Her clients buy patent for many reasons, including

risk avoidance (such as blocking NPEs), or fear of competitors. Because patents are so fundamental to the success of a company, she stated that portfolio acquisitions are necessary to minimize risk. In the end, the panel agreed to disagree over the effects of NPEs on the current patent system.

The conferenced rounded out with the third and final panel discussion lead by University of Colorado Professor Paul Ohm. This panel considered the similarities and differences between the mineral law prospector system and patent law. Stan Dempsey, Chairman at Royal Gold, Inc., described the history of mineral prospecting and noted that despite the many analogies to patent policy today, there is a critical difference: in prospecting, the prospector may lay claim to a vein of minerals; if the vein runs counter to one's expectations, one can change direction and follow the vein of the minerals. David St. John-Larkin, Partner at Merchant & Gould P.C., pointed out that "following the vein" raises scope of patent issues in patent law. He questioned how, using a prospector model, one would determine the rights beyond what is defined in the claims. In mining law, the speculation occurs when there is demand, but this does not necessarily translate into the patent sphere as, particularly in the days of NPEs, patents are a market in and of themselves. He suggested that perhaps the metaphor should be: does one have the right to exhaust the mineral rights of a piece of property without knowing what is in the land?

Lee Osman, Partner and Patent Group Head at Dorsey & Whitney LLP, argued that the prospector analogy generally works well. However, it breaks down when one considers that technology is a moving target. Technology advances so quickly that it is impossible to expect perfectly defined patents. Essentially, Mr. Osman argued that companies end up turning to self-help.

Patty Limerick, Professor at the University of Colorado, noted that today's patent system is very similar to the westward mining expansion, which played a great role in the growth of the United States. Individual profit-seekers benefit from their efforts, just as patents allow today's inventors to do. However, today's system evokes a feeling of wasted effort that many unsuccessful minors felt in the days of mining expansion because few patent holders profit from the work of the many. She was also greatly concerned that the significant transfer of wealth seen in major acquisitions "smacks of speculation." She reminded the group that although the resources of the west were greatly exploited, there were also many victims. In the end, the third panel agreed that the many similarities between patents and prospecting exist. Comparing the two and applying lessons learned from mineral law can help improve the patent system.