INSIDE THE MINDS

Litigation Strategies for Intellectual Property Cases

Leading Lawyers on Understanding the Marketplace, Presenting a Case, and Meeting Client Expectations

2011 EDITION

ASPATORE

First Printing, 2011
10 9 8 7 6 5 4 3 2 1

New Challenges for Today's Lawyers in Litigating Patent Cases

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New Developments and Key Issues in Recent Patent Litigation

There have been some key developments in recent times with respect to venue, damages, and injunctions in patent litigation; these items have been getting the most attention at both the appellate and district court level recently.

Motions to transfer venue have received a lot of attention recently. Where a patent litigation is tried is of particular importance. Not only does the venue lead to considerations regarding jury selection and issue presentation just as in other cases, venue has particular importance in patent cases. Several jurisdictions have specific local rules on how patent cases are going to proceed in that venue. In the 1990s there was only one district in this country that had patent rules—the Northern District of California—and now there are more than fifteen, with many other districts considering implementing such regulations. If you file a patent case in a certain venue, there will be specific rules in place that will dictate how the case progresses. For example, the rules typically set times for disclosure of infringement contentions, invalidity contentions, and Markman hearings to construe the meaning of patent claims. These rules truly control the case and are an important consideration when deciding where to file a patent case.

For particular reasons, including the patent rules enacted by the various courts, patent owners have selected venues that suited their desires. And, up until a few years ago, a patent holder could file a case virtually anywhere in the country, as long as the allegedly infringing product was sold somewhere in that district. Since most products are sold nationwide, a patent owner could select any desired venue. Recently, there have been some drastic changes with respect to the venue issue in patent cases over the last two years as a result of *In re TS Tech USA Corp.*, 551 F.3d 1315 (Fed. Cir. 2008), which went up to the Federal Circuit from the Eastern District of Texas upon a denial of a transfer motion. In *TS Tech*, the parties were located in Michigan and Ohio, but the suit was brought in the Eastern District of Texas. Ultimately, the Federal Circuit held that the denial of the transfer motion was improper. This case lead to several other decisions on motions to transfer from the Federal Circuit. *In re Nintendo Co.*, 589 F.3d 1194 (Fed. Cir. 2009); *In re Genetech Inc.*, 566 F.3d 1338 (Fed. Cir. 2009); *In re Zimmer Holdings Inc.*, 609 F.3d 1378 (Fed. Cir. 2010); *In re Hoffman-La Roche Inc.*, 587 F.3d 1333 (Fed. Cir. 2009). In these cases, the Federal Circuit repeatedly

held: "in a case featuring most witnesses and evidence closer to the transferee venue chosen by the plaintiff, the trial court should grant a motion to transfer." *In re Nintendo Co.*, 589 F.3d 1194. Consequently, these decisions have brought some major changes to patent litigation that must be considered at the onset of a case—i.e., you have a venue that is appropriate for the parties in your case, and a patent owner cannot simply seek the most desirable venue because of patent rules or jury composition.

On the other extreme of a patent lawsuit from selection of venue are damages and injunctions. New issues with respect to damages and injunctions started in 2007 when the Supreme Court issued its decision in *eBay Inc. v. Mercexchange LLC*, 547 U.S. 388 (2006), which represented a substantial change in patent law. Basically, the Court ruled that as a patent owner, you are not presumptively entitled to an injunction against an infringing product. That has greatly changed the area of patent litigation, because the imposition of an injunction or even the threat of an injunction is a very strong and valuable asset to have as a patent owner. Injunctions are still available, but before *eBay* injunctions were presumptively available based on the fundamental right to exclude which is awarded by a patent. There is now a four-part test that is applied to permanent injunction, and for example, an injunction may not be available where monetary recovery is acceptable. Injunctions in markets where there are multiple parties that sell competing products and in areas where the patent owner does not sell products are no longer readily available.

Subsequent to the *eBay* decision, starting in 2009, the Federal Circuit has been curtailing what patentees can do to establish damages. Damages in patent cases typically fall under two categories—lost profits and a reasonable royalty. In the past, the majority of patentees, whether or not they were making a competing product, would always rely on the statute stating that they were entitled to a reasonable royalty for infringement. But now that reasonable royalty calculation is getting a lot of attention from the Federal Circuit. Since its inception in 1984 until 2010, you could probably count on one hand the number of Federal Circuit cases concerning how to calculate a reasonable royalty. In fact, the seminal case for evaluating a reasonable royalty, *Georgia Pacific Corp. v. United States Plywood Corp.*, 318 F.Supp. 1116 (S.D.N.Y. 1970), was a district court decision before the creation of the Federal Circuit. Within this past year there have been a half

a dozen significant decisions regarding damages by the Federal Circuit. In essence, a greater quantum of proof—related specifically to the benefits of the patent—is required to establish a reasonable royalty. For instance, if a patentee could simply use a non-infringing technology, then that becomes an important consideration in the reasonable royalty calculus. Previously, a patent owner could use unrelated patent licenses or a 25 percent rule of thumb to split profits of the infringer regardless of the benefits of the invention. Now, there is a much more rigorous analysis that is required.

Among the most important damages cases of recent times is *Uniloc USA vs. Microsoft* Corp., 2011 WL 9738 (Fed. Cir. 2011); *Resqnet.com, Inc. v. Lansa Inc.*, 594 F.3d 860 (Fed. Cir. 2010); *Word Tech Inc. v. Integrated Network Solutions Inc.*, 609 F.3d 1308 (Fed. Cir. 2010); and *Lucent Technologies Inc. v. Gateway Inc.*, 580 F.3d 1301 (Fed. Cir. 2009). Another important damages case was *i4iLtd Partnership vs. MicrosoftCorp.*, 589 F.3d 1246 (Fed. Cir. 2009), but it has obtained more importance now because an issue raised in that case is now before the Supreme Court. The Supreme Court is looking at the burden of proof for patent invalidity.

New Considerations in Patent Law Cases

As a representative of patentees, I typically like venues that have clearly stipulated patent rules, because those rules give the client a certain level of comfort. Essentially, they know when certain things are going to happen and when they have to meet certain deadlines like infringement contentions and Markman hearings. In such districts, a patentee knows that their case will proceed in a systematic fashion. Consequently, I have always considered venues that have patent rules when choosing where to file patent cases, and favored such venue where the client desires that level of certainty for their case.

Now, as a patentee, you cannot simply file a patent case anywhere you wish just because you like its patent rules or you believe that it has a favorable jury pool. Rather, you have to file your case in a venue that makes sense in some way. Therefore, when we consult with clients on the front end of an IP case we often talk about the pros and the cons of different venues that have a connection to the parties—as opposed to which venues are the most attractive for the case. Ultimately, we make our decision based on a

balancing of several considerations. These include the location of the parties, the presence of patent rules, the jury composition, the reputation of the bench, the speed of the district, the costs associated with the particular districts, and many others.

On the defense side, one has to consider whether you want to file a motion to transfer venue, particular if another venue is a better connection to the case or has a more favorable disposition to your case, such as having patent rules that are desirable. Prior to being served with a complaint, it is also important to consider whether you can preempt a lawsuit by filing a declaratory judgment action. As a defendant, if you have had discussions with a patentee and you expect that you are going to be sued, then you can look at bringing a declaratory judgment action in your favored venue in order to preempt the patentee. For example, you could file in your home forum to keep litigation costs to a minimum. This area of patent law has also changed quite a bit in recent years. Previously, you could bring a declaratory judgment action any time you had a reasonable apprehension of a suit. However, the test for bringing such a suit is more stringent now, and consequently, it is more difficult to establish subject matter jurisdiction in these actions. The Supreme Court in *MedImmune Inc. v. Genetech Inc.*, 549 U.S. 118 (2006), changed the standard in this area, and made it more difficult to file declaratory judgment actions, changing the "reasonable apprehension of suit" test to a totality of the circumstances test. A recent Federal Circuit case applying this standard includes *Hewlett-Packard v. Acceleron LLC*, 587 F.3d 1358 (Fed. Cir. 2009).

In summary, there are many new considerations on the front end of a patent lawsuit these days, whether your client is a plaintiff or a defendant. As a plaintiff, you need to consider the most appropriate venue for the objectives of your litigation. As a defendant, you need to consider motions to transfer venue as well as whether there is the possibility of filing a declaratory judgment action—and all of these considerations directly relate to how much money and time a client is going to spend in litigating their case.

The Impact of Global Factors on IP Law

When you get involved in a patent litigation matter in the United States, international IP law does not really come into play. In fact, many courts will

consider exclusion of activities that took place in other areas of the world. With some exceptions, patent monopoly rights are strictly limited to the boundaries of the United States. For this reason, a complete international patent strategy including whether suits in other countries should be pursued should be discussed and considered.

International IP law also may come into play in a patent litigation case when your client is close to licensing IP in conjunction with a settlement. As a patent owner, you can use international rights to increase the favorability of the license terms. As a licensee, you need to ensure that your entire worldwide operations are free to operate if you enter into a license.

Developing a Plaintiff's IP Litigation Strategy

The first step in developing an IP litigation strategy is based on whether you are representing a plaintiff or a defendant, because the strategies vary drastically. For a defendant, you are primarily developing defenses to the patent claim and proceed accordingly. This development typically takes place after a lawsuit is filed if there was no knowledge of the patent prior to suit. On the other hand, if you are representing a plaintiff, you need to do your studying before suit. You must first understand the patent or patents completely. You need to read and understand all of the prosecution that went into the filing before the Patent Office, understand what the patent claims mean and how they might be construed. You must do your due diligence in terms of how you think the case may progress through litigation—i.e., what are the best shots that the other side can take against your client's patent? Basically, you want to know where you stand going into the case.

The next thing that you need to do is to look at the accused product or process, and really try to understand that product as much as you can—i.e., does it infringe, and if so, what are the issues with regard to infringement? And importantly, you need to understand how the parties compete in the marketplace. In other words, is the infringing product really causing the damage that your client thinks it is causing, and if so, how is it causing that damage and how do you prove it? In some litigation matters, you can get to the damages phase of the case and then realize that the two products at the center of the case do not truly compete with one another for the same

customers. Therefore, it is very important to learn all that you can about your client's patent so that you can understand its validity and what challenges can be made against it. You also need to understand the infringement issues in relation to the accused product, and the market the parties' products compete in.

In addition, you need to understand what your end game is. Nobody goes into IP litigation by saying, "I want to pay my lawyers a lot of money to fight the other side." Rather, clients have certain expectations with respect to what they want to achieve in IP litigation, and knowing how to proceed and manage those expectations is essential. Most importantly, you need to let the client know if you cannot help them achieve their goals before they spend a lot of money on litigation.

Another important consideration is whether you want to have a jury decide the dispute, or if the two parties want to maintain a business relationship. That strategy may change over the course of the litigation, as you learn new things. In any litigation, there are opportunities for such discussions with the other side, and it is important to keep that fact in mind so that you do not miss an opportunity that you might regret later on. For example, many districts require mediation or other settlement talks; these sessions can provide an opportunity to see if your client's objectives can be met.

Putting Together the Litigation Team: Choosing Experts

An IP lawyer on either side always needs to put together the right litigation team. That team will include experts such as engineers and other technical people who have a particular knowledge of the technology that is involved in the patent litigation.

Experts play a huge role in patent litigation; in fact, they can become the face of the company you are representing to the jury. Of course, you want an expert who has knowledge with respect to your client's technology, and who knows how to present that knowledge clearly, but you also want to pick someone with whom the client is comfortable. When a lawyer hires experts in an IP case, they need to do so with the understanding that those experts are representing the client, not their law firm, and should involve the client in those decisions.

It is also essential to develop strategies to contain expert costs. Experts can add another dimension onto the bills of a litigation matter. For example, in some recent cases, we have seen clients who faced upwards of $1 million on expert expenses, and if you expect that you will need to spend that much money, you need to let the client know that fact in advance. Education and oversight is the best way to keep expert expenses down. If an expert is educated about the legal process and billings are controlled, then costs can often be kept down. In such situations, a client and an expert can get along so well and respect each other that the client may use that expert for technical consulting or other matters.

Developing a Defense Strategy in IP Cases

On the defendant's side of an IP case your options are much more limited because you do not run the show—you have been ordered to go to court and you have to show up. Nothing good ever happened to a defendant in a courtroom; typically, the best that you can hope for is to walk out in the same position as you came in. However, while the defendant has a lot less power in crafting the litigation strategy in an IP case, if you have had some communication with the patentee beforehand, you might be able to implement a declaratory judgment action strategy, as previously mentioned where a defendant can select the forum and push for an early appropriate decision.

Ultimately, every defendant needs to have a strategy in terms of how they are going to attack infringement and validity, as well as develop any other defenses they might have. Consequently, they need to focus their discovery efforts on issues that can produce results such as a particular invalidity defense or infringement defense as opposed to ten non-infringement defenses that dilute the best issues. The attorney for the defendant in an IP case needs to identify the key issues in the case, rather than simply trying to find a defense strategy along the way, as this enables the defense team to maintain costs and create a better work product. Also, the defense has the same issues with regard to choosing experts as the plaintiff.

Most significantly, the defendant, unlike the plaintiff, does not have a choice with respect to going to litigation. Simply stated, if the plaintiff is dead set on going to trial, then the defendant has to go to trial unless it can

win as a matter of law. Again, in certain cases you can go on the offensive by filing a declaratory judgment action, or by asserting inequitable conduct through the Patent Office—i.e., you assert that the plaintiff committed fraud to get the patent, or assert certain counterclaims. Being the aggressor in an IP matter is a defendant's strategy that may or may not work, but it is always a strategy that has to be developed in consultation with the client.

The Discovery and Research Process

During discovery in a patent case, the patentee provides information about the patent itself and their activities with regard to the patent, whether that involves selling, testing, or developing a particular product. On the defendant's side, the plaintiff wants to obtain discovery regarding how the defendant developed their infringing product, why it was important that they used the patented feature, and what are their sales figures and what those figures have to do with the features of the patent, if anything. Proving market damages is a large area of discovery that although second in time (after liability is determined) can be first in importance. A few years ago, I tried a case for a patent defendant, and lost on liability. The plaintiff was seeking multiple millions in damages and the jury awarded only $14,167. While second in time, and it was difficult to accept a loss on liability, it was first in importance.

In some cases, the infringement aspect of discovery is very simple—i.e., if the case involves a physical or some other device with a particular feature, you an often tell if there was infringement just by looking at the feature in question. However, if an IP case involves biotechnology or software, you will typically need to analyze and study not only the product, but also the documents that come along with it. Essentially, you need to understand why certain things were done during the product development phase in order to fully understand the product.

The same issues apply on the invalidity side—in other words, if the defendant is trying to find prior art that might invalidate the patent. In such cases, you need to understand as much about the prior art as you can, which can be difficult if you have to evaluate source code in order to fully understand how something works, or if you need to do tests or analysis on a biochemistry process. Often, a successful defense strategy requires as

much discovery into the prior art as into the patented process. For example, often it is beneficial to subpoena and question those involved with the prior art, just as you would the inventor of the patent in suit.

Patent cases vary greatly in size. There are some cases where discovery is concluded with the exchange of 20,000 documents; while in other cases, millions of documents may be exchanged between the parties—and people who understand the technology involved need to go through those documents in order to see how they fit into the client's defenses and determine how to move the case forward.

Understanding Complicated Technologies in IP Cases

One of the advantages of being an IP lawyer is that you must have some type of science or technology background. For example, I have a BS in chemical engineering and a Master's degree in mechanical engineering. Therefore, although I am not an expert in any particular field, I am able to get up to speed very quickly with respect to the science in these cases because of my educational background and knowledge of various technologies. As an IP lawyer, not only must you be able to understand these technologies, you also must be able to distill the technology for presentation at a hearing or at trial in a clear and understandable fashion.

In fact, all of the lawyers in our firm who do patent litigation have such a background. Some may have a degree in electrical engineering and others in biochemistry, but everyone brings their own background to the case. As IP lawyers, we like to take the lead in analyzing a case, and use experts to fill in the technology gap, if there is one. It is important to know how to analyze the prior art in the accused products and how they operate, and understand the statements that were made during the design of a device. It may be that the client chose to use a certain feature because it was better than another feature that happens to be patented. In order to do that, you must understand the technology.

Consequently, clients in IP litigation should always look for lawyers who have a good technology background and education. Otherwise, litigation is going to be a very expensive process, because your lawyer is just going to turn the case over to the experts, which is never a good thing.

Pre-Suit Communications

In IP cases where the parties compete with each other—or alternatively, are looking to develop a relationship—there will typically be some pre-suit discussions that will often craft how the litigation proceeds. For example, whenever a client receives a letter accusing them of an infringement, their response to such a letter often becomes critically important to the case—it may even become the most important evidence. If they handled the situation appropriately by giving the letter to their lawyers and the lawyers provided an appropriate response, then that will make the case proceed in a certain direction. Alternatively, if they simply brushed the matter under the carpet, then the case will proceed in a different way, because willfulness evidence can drive many decisions in a litigation, both on the plaintiff and the defense side.

That is why it is important for clients to be savvy when they get such letters or communications from the other party, because other than proving infringement, those types of communications are often used to prove willfulness, which is the third most important issue for a patentee—the first being liability and the second being damages—because willfulness can lead to treble damages. Again, this standard has been modified recently by the Federal Circuit *en banc* making establishment of willfulness more difficult for a patentee. *In re Seagate LLC*, 497 F.3d 1360 (Fed. Cir. 2007). But where there is pre-suit communications that are not handled properly, there can be a high likelihood that willfulness will be involved.

Strategies for Saving Money during Litigation

I believe that it is extremely important to develop a defined litigation plan at the outset of an IP case if you wish to save money for your clients. Many large law firms will simply turn over a case to a bunch of associates who will work on it for a few years, and when the process finally moves toward litigation, someone with more experience will get involved and decide what to do. That type of strategy has led to the "scorched earth" litigation mentality that prevails at some of the law firms in the legal centers of our country, such as New York and Washington, DC. Such firms are dependent upon litigation revenues; therefore, while they may put a lot of energy into trying a case, there is not a lot of focus, and that is the easiest way to waste money.

Therefore, I believe that defining a litigation strategy and using discovery to develop and build that strategy is far more economical—and typically, far more successful—because the issues that you deem as important are the ones getting attention. Simply put, preparing a case and defining the issues up front is the key way to handle litigation budgets. A few years ago, I was a co-author of a presentation called, "How to Effectively Manage Costs in IP Litigation," in which I discussed how to do a front-end identification of the issues that you want to develop in IP cases. This surgical patent litigation can work very effectively in keeping the costs of litigation down for a client.

Overcoming Challenges in Cases with Multiple Defendants

In many IP cases these days, the defendant will get sued along with twenty other defendants, and I find those cases challenging. The challenge on the plaintiff's side is managing the case with so many parties. The challenge on the defense side occurs because you have to actually negotiate with your co-defendants in order to present a strong, coherent position to the court. If two defendants are presenting contrary defenses, or more than one position on how to construe a patent claim, the plaintiff has the upper hand. Simply put, if the court finds that nobody can agree on the defense side, the judge may decide that the plaintiff may be correct. Therefore, it is important to negotiate with the other defendants in these types of cases, because if you do not have a consensus on the positions, it weakens all positions.

Identifying Winning Issues: Mistakes to Avoid

Litigation challenges are typically on the issue side—in other words, how do you improve your position if you do not have very good issues in your case? That is one area where I think every patent attorney needs to spend more time—and if they do so, they will perform a valuable service for their clients. All too often, lawyers will ignore that challenge for some time, because it can be difficult to identify winning issues—and that is where experience and a technology background really helps.

Every day presents new challenge in this practice area. Therefore, a young associate in the IP litigation world must be ever diligent. Frequently in litigation you must exert a certain amount of energy for every issue that you pursue—and if you do not, you are going to miss something, or something

is going to fall through the cracks or not be developed in the way it should. Consequently, young associates must have that desire to develop the issues in their client's case as best as they can. It is much like taking a test in school; in order to get the best grade, you have to put energy into studying. I have never met a patent attorney or patent litigator who was brilliant out of the box; it takes a lot of work over many years.

Also, if you find yourself confronting an issue you have never faced before, you need to raise that issue with someone who has. You should always seek advice as soon as you are in uncharted territory. In our firm, our young associates are able to do that, because we have a lot of experienced litigators. At the same time, the effort level you put into a case is extremely important. I like to say that in school you can often skate by just by being smart, but that is not the case in patent litigation. You have to be smart and have appropriate experience, but importantly, you also have to work harder.

Venues for International Patent Cases

Typically, international IP lawsuits will follow the money. For example, if the US market for the litigated product was a small market but the German market was very big, I would expect the litigation to proceed in Germany. However, the US market is usually preferred as a litigation venue for a number of reasons, but primarily because the United States is the biggest market for consumer products. Therefore, most international IP cases are conducted where the money is—i.e., in the United States.

I have also tried cases before the International Trade Commission (ITC), which is another strategy for patent holders that are dealing with international issues. The ITC is an executive branch court, and it has the unique power to stop the importation into the United States of infringing products. Therefore, if you do not win your case before the ITC you do not get any money, but you can stop the importation of products from anywhere else in the world. That injunction power is far more difficult and may be impossible to obtain in other courts. The litigation process in the ITC is also very quick; it typically takes only about eighteen months to reach a decision, which is reached by an administrative law judge who is very patent savvy, because they primarily handle patent cases—and there are no juries. Therefore, if your client is simply looking to quickly stop the

importation of infringing products into the United States and does not want to get into litigation in other countries, then they should try their case before the ITC—so long as they do not seek damages.

Looking to the Future

I believe that the area of IP law that is changing the fastest these days pertains to the first and last aspects of litigations with the patent venue and rules on the front end. When I started out in this practice area, there was one court that had just implemented local patent rules, and now there are about a dozen with most other courts, I imagine, considering them. At the same time, each court has their own priority; therefore, certain rules that apply in Texas do not necessarily apply in Florida. Ultimately, instead of hunting for those forums with patent rules, some clients may wind up hunting for the forums that seek more of a free-form litigation.

The main area of activity in the last few years has been on the back end of an IP case, and I do not see that changing because the law with respect to the middle of a case is fairly well developed with respect to infringement and invalidity. I expect that there may be new developments in the area of injunctions, reasonable royalty law, and lost profits law, which come into play at the back end of cases, because ultimately, relief may be the most important aspect of IP litigation. Therefore, I would expect more activity in that area.

Key Takeaways

- If you are representing a plaintiff, not only must you understand the patent completely and its prosecution history before the Patent Office, you must determine where your case has the most chance of success in accordance with the new guidelines for appropriate venue from the Federal Circuit. But more importantly now, you must understand how the parties compete in the marketplace to obtain a successful recovery.
- An IP lawyer on either side always needs to put together the right litigation team. That team should include engineers and other technical people as lawyers and as experts. Experts that have a particular knowledge of the technology that is involved in the

patent litigation are critically important—especially experts who can relate very well to your client as they become a face of your client to the Court.

- As a defendant, you typically are ordered to show up and respond to issues. However, in certain cases, a defendant can become the aggressor by filing a declaratory judgment action, or by asserting inequitable conduct through the Patent Office—i.e., you assert that the plaintiff committed fraud to get the patent, or assert certain counterclaims. Being the aggressor in an IP matter is a defendant's strategy that may or may not work, but it is always a strategy that has to be developed in consultation with the client.
- You must pay particular attention to the recovery aspects of the case. Infringement and validity are the typical liability issues, but damages and injunctions are typically the most important aspects to a client. No plaintiff wants a finding of liability but no recovery. And most defendants would accept liability if the recovery is truly minimal. This is now the most important litigation issue that must be considered and evaluated from the beginning.

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Mr. Lorelli graduated from the University of Detroit Mercy School of Law in 2001. He was the valedictorian of his graduating class and was an editor of the Law Review. *Mr. Lorelli has a Master's degree in mechanical engineering from the University of Michigan, and an undergraduate degree in chemical engineering from the University of Notre Dame, where he graduated magna cum laude. His degrees and work experience in both mechanical and chemical engineering allow him to handle cases involving many different technologies.*

Prior to joining Brooks Kushman in 2001, Mr. Lorelli was a patent agent at an automotive corporation. During his three years in that role, he gained extensive experience in preparing and prosecuting chemical, mechanical, and electrical patent applications. He

understands how to meet his clients' patent prosecution needs, since he was a client himself. Mr. Lorelli learned firsthand about client expectations and how best to service clients. This experience is invaluable to his current practice, which involves a great deal of client counseling in both prosecution and litigation matters.

Mr. Lorelli is co-author of "How to Manage an Intellectual Property Litigation," Institute of Continuing Legal Education, February 2004 and author of "What A Patentee Must Do To Prove Infringement and Damages of a Method Claim For Computer Software," Michigan Computer Lawyer*, January 2001 and "How Trademark Litigation Over Internet Domain Names Will Change After Section 43(d) of the Lanham Act,"* University of Detroit Mercy Literary Review*, January 2000.*

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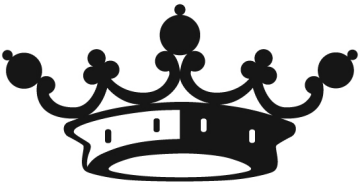

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