

2015

# Foreword

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## Recommended Citation

Bruzzone, Daniel L. and Pedersen, Brad D. (2015) "Foreword," *Cybaris*<sup>®</sup>: Vol. 6: Iss. 2, Article 1.

Available at: <http://open.mitchellhamline.edu/cybaris/vol6/iss2/1>

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# Cybaris<sup>®</sup>

An Intellectual Property Law Review

Volume 6 | Number 2 | Summer 2015



WILLIAM MITCHELL  
COLLEGE OF LAW

## FOREWORD

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With passage of the America Invents Act (AIA) in 2011, huge changes have been made to the statutes governing patent prosecution in the United States; affecting everything from filing strategies to how the patents are examined to even post-grant challenges. If the AIA itself was the earthquake, the subsequent court rulings have been the aftershocks. The debate and analysis of the issues provided by journals like Cybaris® provide the early warnings for these aftershocks. The reflections of veteran practitioners and the fresh eyes of students come together in one place, informing and persuading policymakers before the law ossifies.

The effects of the AIA were mostly in the area of patent prosecution. Because the AIA was implemented between 2011 and 2013, and because of the lengthy nature of patent prosecution, some of the implications of the AIA with respect to patent prosecution are still being worked out at the U.S. Patent and Trademark Office and in law firms across the country. As patent practitioners, we think about the effects of the AIA nearly every day. In our opinion, some of the most beneficial changes of the AIA included those very things advocated for in previous editions

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of this journal, including international harmonization<sup>3</sup> and the availability of patent pro bono services.<sup>4</sup>

Despite the short time since these patent prosecution reforms, commentators and legislators continue to be concerned about deficiencies in the current patent enforcement and litigation mechanisms. An article in this journal, for example, described how the high costs of patent litigation have permitted the reemergence of the “sharks” of the 19th century, now dubbed “patent trolls.”<sup>5</sup> The response to this problem of abusive patent litigation tactics, however, cannot be to make patents toothless.<sup>6</sup>

One mechanism for reducing abuses of the system is to provide litigation alternatives, such as those detailed in Joseph Dubis’s article. Post-grant proceedings before the Patent Trial and Appeal Board can dispatch with claims by patent trolls for a fraction of the cost of litigating at a district court. Understanding the options available and how to use them properly will be crucial in the coming years. J.P. Morgan famously said “If you have to ask the price, you can’t afford it.” For those involved in patent disputes

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<sup>3</sup> Jay A. Erstling et al., *Usefulness Varies by Country: the Utility Requirement of Patent Law in the United States, Europe and Canada*, 3 CYBARIS AN INTELL. PROP. L. REV. 1 (2012).

<sup>4</sup> Amy M. Salmela & Mark R. Privratsky, *Patent Law Pro Bono: A Best Practices Handbook*, 4 CYBARIS AN INTELL. PROP. L. REV. 1 (2012).

<sup>5</sup> Lucas Hjelle, *Case Note: Identifying Indicia of Extortion in Patent Troll Cases: Eon-Net LP v. Flagstar Bancorp*, 3 CYBARIS AN INTELL. PROP. L. REV. 133 (2012).

<sup>6</sup> See 114 CONG. REC. S2532 (daily ed. April 29, 2015) (statement of Sen. Chuck Grassley) (“This bipartisan legislation is the result of a careful and deliberative process in which we worked with many stakeholders representing almost every area of the economy, the judiciary, and the administration. Since the process started in the last Congress, we’ve listened and tried to be responsive to all the concerns raised from the different industries and constituencies. As a result, we have made great strides in addressing issues that have been raised along the way and getting stakeholders comfortable with the bill. So I believe the PATENT Act strikes a good balance. Our intent is to protect the rights of patent holders while addressing the problem of abusive litigation. The PATENT Act does that.”).

who find they have less than J.P. Morgan's assets, the sub-heading on Cost for each option will doubtless be appreciated.

Another way to address abusive litigation concerns is by considering the ways damages and attorney fees are awarded. For example, pending legislation is awaiting action by Congress at the time this article was written to provide for fee-shifting in patent cases, among other things.<sup>7</sup> The historical context of remedies in patent litigation provided in James Ryan's article provides not only the current rules, but also the context and recommendations for providing flexibility to courts to modify the rules to be more equitable.

Another area of patent law that has recently been in flux is the very question of what types of inventions are even eligible to be patented. This topic has been addressed by the Supreme Court,<sup>8</sup> and Kelly Fermoy's article provides guidelines for lower courts to apply the Court's somewhat abstract or nebulous decision, and for litigants to advocate along those lines.

Many of the changes described above harmonize our patent application, prosecution, and enforcement mechanisms with other countries around the world. As intellectual property law becomes more internationally harmonized, there has been a good deal of discussion relating to the efficiencies and benefits of regional or global filing systems and courts. Rebecca Tsosie's article provides an interesting counterpoint on the downsides of a one-size-fits-all approach, and the benefits of customization of intellectual property protection to the people it is meant to serve. While standardized rules provide benefits of efficiency and predictability, they could come at the cost of failing to protect the creative works of many groups of people, including native artists.

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<sup>7</sup> Innovation Act, H.R. 9, 114th Cong. (2015); PATENT Act, S. 1137, 114<sup>th</sup> Cong. (2015).

<sup>8</sup> Alice Corp. v. CLS Bank Int'l, 134 S. Ct. 2347 (2014).

And of course, concerns about regional protection in an era of international commerce are not exclusive to patent law. As outlined in Professor Port's article on regionally based trademarks, collective marks are being increasingly used not only in the United States, but also in countries such as Japan. Implementation of regional or national trademark systems as a type of domestic booster can be difficult to accomplish, and policymakers would be wise to look to the eventual success or failure of the *chiiki* system before attempting to emulate it.