Chief Judge Rader described the Bilski and CLS v. Alice rulings as "the greatest failure in my judicial career" and said the Federal Circuit will try to correct widespread confusion over Section 101.

The judge was responding to a comment from AIPLA’s Executive Director Q. Todd Dickinson, who remarked during a question and answer session at Friday’s lunch reception that the Supreme Court had adopted the "abstract idea" approach advanced by Judge Rader’s dissent in Bilski.

“I think in all honesty I consider [the result in CLS] the greatest failure in my judicial career,” said Rader.

“I think we have a responsibility to deal with what we are given and try to provide guidance in the right direction and we did not do that. But the opportunity is still open and I think the court will move with diligence to try to correct the problems we created in CLS v. Alice.”

Rader used some colorful metaphors to describe the roles of the USPTO and the Patent Trial and Appeal Board in shaping IP rights.

“You have got an agency with people giving birth to IP rights, then you have got people attacking them as death squads killing property rights,” he said. “I think there’s a kind of schizophrenia going on there.”

He said that there needs to be more efficiency and discipline in the discovery process, but that it would be difficult for Congress to make rules to correct the issue.

“I don’t think there’s any way to set a rule for something as case-specific as discovery,” he said. “At least 10 districts have adopted the model that was proposed by the Federal Circuit’s Advisory Council and that continues to have good results throughout the system. But to set a rule really attacks the heart of judicial independence and the judicial system and the need to tailor the rules to the case.”

Rader spoke about how sequestration had affected the Court following the recent breakdown in budget negotiations between the Republicans and Democrats. He said the Court had unanimously voted to continue to hear cases, but had to let go of employees in order to meet the demands of sequestration.

One of the casualties of sequestration was the Mediation Program, but the court has maintained it with the help of volunteers. The Program is now being run by magistrates.

It’s official: the explosion of generic top-level domains (gTLDs) has begun. On Wednesday, the first four strings were delegated under ICANN’s New gTLD Program. All four strings are internationalized domain names, using non-Roman scripts (see below), and their registries are

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**The four new gTLDs**

- شركة – Arabic for “web/network”
- онлайн – Cyrillic for “online”
- сайт – Cyrillic for “site”
- 游戏 – Chinese for “game(s)”

Continued on page 2
How to respond to patent trolls

Knowing both your client and your opponent is crucial when developing a strategy for dealing with patent trolls.

At yesterday’s session The Latest Thinking About Non-Practicing Entities (NPEs), speakers discussed ways to respond to demands from trolls.

David Foster, a partner of Foster Murphy Altman and Nickel, said lawyers should take into account the type of business model the NPE has adopted.

For example, some NPEs take what he described as a “lateral” approach, seeking a large payoff from relatively few cases. They typically conduct extensive due diligence and are willing to go to court. They usually seek litigation against at least one significant player with the means to pay high damages.

Other NPEs take a “scattershot” approach, attempting to extract relatively small settlements from a large number of parties. Their claims may be weak and they often target smaller businesses. Their business model is based on the large number of patents they own and leveraging the cost of litigation.

“Where the NPE has concerns about the quality of the patent, it may be more inclined to go after targets it believes will be less willing to litigate and more inclined to settle,” said Foster.

Some NPEs have recently begun using the FTC because of the potential to obtain a Section 337 exclusion order enforceable by US Customs, which creates a high incentive for targets to settle.

Felicia Boyd, a partner of Barnes & Thornburg, said it may be difficult to accurately assess upfront the cost of settling versus the cost of going to trial. “Someone who has a lot of patents and can keep coming at you with different ones will have to be dealt with differently than someone who has one or two patents,” she said.

Boyd said lawyers should also consider the type of client they are representing. “If I represent a small company, their decision about whether to defend a case is likely going to be different than an Apple or a 3M.”

Some companies, such as Vimeo, publicize the fact that they never settle with trolls, in order to avoid being identified as an easy target. In other cases, it may be better to ignore letters from trolls. “Sometimes the best response is no response,” said Boyd. “You might have been part of a huge letter-writing campaign. The troll can’t sue everyone.”

Is your business a troll target?

- What’s your history? How has your business responded to troll threats in the past?
- Do you have a viable way to control troll risk?
- Do you have a product feature clearance program?
- Can you identify individualized troll claims as opposed to letters that have been sent to numerous targets?
- Keep a central repository of troll letters and how you have responded to them. Once you have identified your strategy, stick to it consistently.

Former USPTO Director David Kappos received the Board of Directors’ Excellence Award last night.

Panelists at yesterday’s session on Evolving IP Rights in China discussed the country’s IP Strategy, recent trademark and copyright developments, patent litigation and unfair competition.

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New gTLDs

Continued from page 1

soon expected to begin the compulsory sunrise period during which brand owners can register domains corresponding to their trademark rights.

The four gTLDs delegated this week are the first of up to 1,400 expected to be launched over the next two years. The new gTLDs will be launched gradually, with some being operated as open registries and others as closed. Some brand owners have applied to operate one or more gTLDs themselves, but all companies now have to consider whether they want to protect their trademarks in open registries, either for their own use or to prevent cybersquatting.

Mark Partridge, Chair of AIPLA’s Trademarks and the Internet Committee, told the AIPLA Daily Report that to take advantage of the sunrise process in any of the new gTLDs, brand owners need to register their trademarks in the Trademark Clearinghouse (TMCH). He said, “Is the TMCH perfect? No. But is it better than nothing? Yes. Without it, we would have to do this separately with each new gTLD. It will save a lot of time and expense.”

As well as enabling trademark owners to participate in sunrise periods, the TMCH offers benefits including notification of relevant domain name applications, reduced costs when using the new Uniform Rapid Suspension service and eligibility for extended rights protection mechanisms, such as those planned by registry operator Donuts.

Partridge said not all brand owners would want to make use of the Clearinghouse, but they should at least consider it. “Some companies are more at risk either because of the nature of their business or the nature of their brands,” he added, “rights holders need to have a strategy to deal with this. If not, they will run into problems.”
Surprising progress on grace period

Is harmonization of the grace period getting closer? Surprisingly, it could be. That’s the message Peter Schechter of Edwards Wildman brought back from the AIPPI Forum & EXCO in Helsinki last month.

Schechter co-chaired the US committee that produced a country report on one of four questions debated at the Congress this year, and also co-chaired the international committee. Speaking at the AIPPI-US meeting yesterday, he described the experience as “fascinating,” saying he thought it would be merely “an academic exercise,” but he ended up being surprised by the extent of agreement. In a vote on the resolution, 93% of delegations supported a single, simplified, 12-month grace period.

The responses to the questions posed on the grace period were “all over the map,” said Schechter. “Most countries do have a grace period for patents but most of them are completely unusable – so most lawyers and countries take the view ‘we can’t use it.’” That meant, he said, that the overriding view was that the only way forward is to have a single, simple system.

Since the passing of the AIA, there seems to have been a softening of resistance to having a grace period in some major markets, notably in Europe. AIPLA Executive Director Q. Todd Dickinson noted that the grace period was one of four major issues addressed by the Tegernsee group of patent offices and that 51% of respondents to a recent study in Europe supported it. “A lot of the traditional institutional opposition in Europe is disappearing. There seems to be movement,” said Dickinson. However, he cautioned that any substantial reform is “a long way off.”

Chairing the meeting, David Hill of Finnegan (pictured) said that the resolution on the grace period was one of four passed at the Helsinki meeting. The others concerned copyright term, the relevant public for protecting famous trade marks and relief other than injunctions in IP cases. He noted that all four resolutions “were supportable by our US group.” A fifth resolution, on plain packaging, was passed by correspondence after the meeting despite US opposition. Shortly after, the European Parliament rejected a proposal to mandate plain packaging for tobacco products resulting in the unusual situation that, as Hill said, “the EU position is more favorable to trademark owners than the AIPPI resolution.”

Next year’s AIPPI Congress will be held in Toronto. The working questions to be considered then cover second medical use patents, the basic mark requirement under the Madrid Protocol, copyright exhaustion and IP licensing and insolvency. The US group will make reports on all four questions, and the process to analyze them will begin in February.

Randi Karpinia, chairwoman of AIPLA’s Women in IP Law Communications and Electronic Outreach Subcommittee, was presented with a superhero cape at the Women in IP Law Breakfast yesterday morning.

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How to beat the cybercriminals

Author Joseph Heller would have understood cyber crime. “Just because you’re paranoid doesn’t mean they aren’t after you,” he wrote in Catch 22, published in 1961. Speakers at yesterday’s session on Terra Terror and Traveling Tricks echoed that message.

“Things have got worse,” said Steve Chabinsky of CrowdStrike (pictured), explaining that many companies are seeing “data going out of the door” to cyber attacks from organized criminals and some nation states. Thomas E. McCabe of Aliion Science and Technology Corporation, agreed: he cited a study estimating that cyber crime has cost the US $508,000 jobs and $100 billion, with the global cost as much as $400 billion. “This is the greatest transfer of wealth in human history. It’s bigger than the international drugs cartels,” he added.

In one attack, Saudi Aramco, the world’s largest company, had 30,000 computer hard drives wiped clean overnight. In another, a company lost not only all its data but also its back ups, and the attacker published the stolen information online. According to Chabinsky, by the time a company realizes it has a problem the security breach has typically existed for more than a year.

“It’s not just corporate IT systems that need to be protected. Increased connectivity means that cars, medical systems and even pacemakers inside the body are vulnerable to hacking. “It’s life in the fast lane,” said Chabinsky, quoting the Eagles: “People are taking everything all the time.”

What’s more, he said: “Lawyers are absolutely being targeted. We have a gold mine of sensitive data and typically we don’t have the security our clients have.” That’s why some state bars are now considering firms’ ability to protect both their own and their clients’ data, when assessing competence to practice. And lawyers are mistaken if they believe they can take care of the challenge without specialist help, he added. “You wouldn’t let your IT staff give legal advice. Why would you advise on IT?”

But McCabe added that lawyers have a vital role to play alongside computer specialists: “It’s not just a technology issue. It’s a business risk. Lawyers have to be part of the process.” Everyone should take simple steps such as creating original passwords, changing them regularly and updating software from trusted sources. Organizations should also put in place a formal plan to respond before there is a problem, including having arrangements with forensic security companies, law firms and PR agencies.

Finally, you need to consider how you will react when the attack comes. Gabriel M. Ramsey of Orrick stressed the need to “be a good victim.” Find out who was responsible, get trade secret litigators involved, share information on the threat, then name and shame them (Facebook is good at this). In the last resort, you may even be able to hack back, said Ramsey: “There may be legal ways to dismantle their technical infrastructure.”
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Standing up for patents

It’s going to be a busy year for the new AIPLA President Wayne Sobon. He talks to James Norton about his varied career and why he is closely watching proposals for further patent reform in the US.

Wayne Sobon begins his term as AIPLA President with calls to change the patent law coming from the media and from certain parts of Washington DC. He is all too aware of the challenges this brings. There are multiple bills before Congress, including the discussion draft recently published by Rep. Goodlatte, and AIPLA is studying all of them in order to engage in the debate. While emphasizing that he does not want to pre-empt the outcome of that discussion, Sobon believes that whatever action is taken should be “narrowly and carefully tailored.” He argues for a cautious approach: “Those who would change a system have a huge burden given the evident success of the American experiment in patent law.”

That’s not to say the system is perfect, of course. “There are certain behavior that are problematic and inappropriate—I call them parasitic,” says Sobon, citing reports of threatening letters sent to Mom’n’Pop stores demanding hush money. “In any industry, you have people who don’t play by the rules. That kind of behavior is counter productive” But he cautions: “Whatever you do to address specific behaviors, don’t undermine a system that has nurtured America’s economy for more than 200 years.”

Sobon says one of his priorities during his term will be to encourage greater public understanding and appreciation of the value of the IP system. While there are loud voices proclaiming that patents are destroying the economy, there are fewer presenting the opposite view. “Reading the media you would think patents are a poison. I believe AIPLA can play a crucial and unique role in addressing that misunderstanding,” he says. This is partly thanks to its broad membership and wide reach, which Sobon hopes to develop as President, with more roadshows and local events and more activities for under-represented groups: “We can broaden our umbrella as an organization.” One area in particular which he will prioritize is the bridge between businesspeople and lawyers: “Value is lost when both sides don’t talk to each other and we don’t share a common language. Sometimes lawyers can be too navel-gazing about the details of the law and miss the bigger picture.”

Sobon’s interest in issues surrounding patent law and reform comes from his own career experiences. In particular, he has voiced concerns about changes to patent eligibility regarding software and business methods—something he has been following closely since working at Andersen Consulting (later Accenture) during the 2000s. He was recruited to help found its IP department and recalls being “surprised” at the extent to which Accenture Laboratories were developing interesting new internet and communication systems, coinciding with the development of early smartphone technology. Part of his task at Accenture was to build a robust patent portfolio to protect these inventions.

Sobon describes as “a very blunt tool” the machine-or-transformation test developed by Federal Circuit case law: “The test was a significant threat to what we were doing, which was the marriage of software and business services.” As a result, Accenture became involved in the Bilski case, filing briefs at both the Federal Circuit and US Supreme Court. Sobon says the Supreme Court’s overturning of the machine-or-transformation test in favor of more flexibility was “a very big step” and adds that the principle that an invention should be patentable subject matter as long as it has a practical application and is not abstract is “perfect” and “completely correct.”

What’s more, he rejects criticism from those who say the Supreme Court’s ruling does not provide enough clarity for Section 101 analysis: “That is the one of the greatest bugbears plaguing the system right now. It has infected the courts like a virus.” He describes the debate over patent eligibility as “a

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pseudo-problem” and says that the emphasis in patent examination should be on novelty and obviousness under Sections 102 and 103 rather than on Section 101. “The smartphone is probably the most complex device human beings have ever created. Why would you say that putting an extra gear into a cuckoo clock is a patent-eligible invention but adding an innovative app on a smartphone is not?” he asks.

Today, if anything, Sobon is even more directly affected by the debates in Congress. Since January this year, he has been VP and General Counsel of Inventergy, a start-up licensing company that helps technology leaders achieve greater value from their IP assets. He describes joining the company, which is led by former HP head of IP and global strategy Joe Beyers, as a “fantastic opportunity” to work with a great entrepreneurial team and “flex some muscles I haven’t used in a while.” He worked without a salary for the first few months, but initial funding is now secured and Sobon is concentrating on building a long-term platform in different technology spaces.

“I really wanted to combine the business and legal side of IP,” says Sobon of his latest move. His career up to now has taken in optical engineering, private practice and working in-house, and he says this latest challenge is unique. After studying physics and German at Stanford, he joined Hughes Aircraft as an engineer in 1985 at the height of the Cold War, but wasn’t satisfied and found himself asking: “Will someone tell me what I want to do?” By chance, a Hughes patent attorney took him to lunch, a fortuitous meal that led to him becoming an apprentice patent agent, and then joining a Los Angeles patent firm. He graduated from UC Berkeley in 1992 with a JD and MBA degree, and joined the Silicon Valley office of Fish & Richardson, later moving with fellow partner and mentor Jim Pooley (now WIP0 Deputy Director-General for Patents and also a former AIPLA President) to Gray Cary, which became DLA Piper. From there, he was recruited to Andersen Consulting, where he worked for a decade, and then joined Rambus as chief IP counsel, dealing among other things with licensing and standards issues.

It’s already been a long and varied career, all sparked by that chance lunch in the 1980s, which led Sobon to value the intellectual challenge of marrying technology and communication. “I quickly realized I loved the patent field,” he says, “especially translating technical issues into language.” That’s a skill that should stand him in good stead for what promises to be a busy and demanding year as AIPLA President.

“Sometimes lawyers can be too navel-gazing about the details of the law and miss the bigger picture.”

ALONGSIDE PATENT LAW, WAYNE’S OTHER PASSION IN LIFE IS MUSIC: HE WRITES AND PERFORMS UNDER THE NAME WAYNE PARRISH. HIS FOUR-TRACK EP “OUTSIDE” WAS PRODUCED EARLIER THIS YEAR AND IS AVAILABLE ON ITUNES, SPOTIFY AND OTHER DOWNLOAD SITES. THE SONGS WILL APPEAL TO LIGHT ROCK AND COUNTRY LOVERS. WAYNE DESCRIBES THEM AS “PERSONAL” AND ONE REVIEWER WROTE: “JUST BOUGHT AND LISTENED TO OUTSIDE! AMAZING I LOVE IT.”
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TODAY’S SCHEDULE: SATURDAY, OCTOBER 26 2013

7:30-8:30 am  WIP0 Advisory Group Breakfast Meeting (Group Members Only) Virginia A, Lobby Level
8:00 am-12:00 pm  Registration, Exhibits, Cyber Café, Technology Center, CLE Information* and Membership Service Center Exhibit Hall A, Exhibition Level
8:00-9:30 am  Continental Breakfast Continental Breakfast Exhibit Hall A, Exhibition Level
8:00 am-12:00 pm  Spouse/Guest Hospitality Suite Park Tower B201
9:00-11:00 am  Global Sector Leadership Group Meeting (Leadership Group Members Only) Thurgood Marshall North, Mezzanine Level
10:00 am-12:00 pm  2014 Mid-Winter Institute Planning Committee (Committee Members Only) Maryland C, Lobby Level

Closing Plenary Session
9:00 am-12:00 pm  Case Law: The Year in Review Marriott Ballroom Salons 2 & 3, Lobby Level
12:00-2:00 pm  Networking Luncheon Virginia BC, Lobby Level
12:00-4:00 pm  Board of Directors Meeting Delaware AB, Lobby Level

VOX POP What is the number one IP issue for you and your clients?

Jeffrey Wolfson  Haynes and Boone, Washington, DC  "The biggest issue would be the ongoing fees diversion from the innovation community into the US Treasury. Fees are higher than they should be and the services don’t function as efficiently as they should because of the disagreement in Congress."

Rob Ray  Infinium Technologies, Powder Springs, GA  “Trolls. They cost a lot of money. Usually we try not to pay them. My company is a supplier so we often get lawsuits and cease and desist letters. It’s often a challenge because it can be very expensive.”

Liza Heinig  Tarolli Sundheim Covell & Tumming, Cleveland, OH  "The biggest issue is transitioning to first-inventor-to-file. Getting my clients to understand the transition and change their internal procedures appropriately without panicking is a challenge."

Arlir Amado  KramerAmado, Alexandria, VA  “The commoditization of prosecution. The corporate clients want to make patent prosecution a package deal. They are trying to bring the cost down as much as possible.”

Jacqueline Lee  HC Park & Associates, Reston, VA  “NPEs. We represent manufacturing companies so we constantly get sued. They use a lot of shell companies so sometimes it’s difficult for us to find the real party in interest. In terms of cost management, it becomes a challenge.”

Dajian Wu  Yuhong, Beijing, China  “Enforcement is the greatest concern. Also for us, I have continuing concern about Section 337. More and more Chinese companies are being brought before the ITC and have been investigated. It is a very big issue for many Chinese companies, for example clients exporting high speed technology.”

Liza Heinig  Tarolli Sundheim Covell & Tumming, Cleveland, OH  “Trolls. They cost a lot of money. Usually we try not to pay them. My company is a supplier so we often get lawsuits and cease and desist letters. It’s often a challenge because it can be very expensive.”

Christine Hoeff  McCarthy Barnes & Thornburg, Washington, DC  “Stretching our budget - whether to litigate, how much IP to protect, what to enforce and whether or not to settle. Clients are very cost-conscious.”

David Moreland  Meunier Carlin & Cuffman, Atlanta, GA  “I litigate, so it is certainly NPEs. Getting a reasonable negotiation at the beginning is hard unless it is a large NPE. If it is a small NPE that is most difficult.”

In an uncertain legal environment, we are one law firm that is not content simply to accept the status quo. We work constantly to influence the evolving body of Mexico’s intellectual property laws, with the goal of ultimately bringing them in line with international standards. While we continue to make great strides in this regard, clients from all over the world rely on us to prosecute, manage, and defend their IP portfolios under the laws that exist today. In other words, we work effectively within the system, even as we seek to change it.

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