MEETING RECAPITULATION
THE PAULINE NEWMAN
IP AMERICAN INN OF COURT
TUESDAY, NOVEMBER 10, 2015

The third Inn meeting of the 2015-2016 year again took place in the Auditorium below the Atrium in the Madison Building of the headquarters of the U.S. Patent & Trademark Office in Alexandria, Virginia.

There was a reception beginning at 6:00 p.m. at which food and drinks were served. The program began after 7:00 p.m.

President Judge Hubert C. Lorin introduced the program. Chico Gholz of Oblon Spivac served as the moderator. David Werner discussed the Inn logo, and displayed the three top vote getters for Inn logo.

Professor Adam Mossoff of the George Mason School of Law gave the first part of the presentation on America's Great Patent Wars. Some people question the relevance of history to patent law. Mark Twain said, "There are three kinds of lies: lies, damned lies and statistics." This is relevant to much policy discussion regarding patents today. It is claimed that we are in the midst of a "patent litigation explosion". The smart phone patent wars of today are nothing new.

Inventions that led to cycles of massive litigation before the American Civil War included the telegraph, the cotton gin, the sewing machine, and vulcanized rubber. Patent licensing is not novel; it was used for these inventions. The inventors did not themselves manufacture their inventions; they licensed them to companies that did.

Later in nineteenth century, there were patent wars over the inventions of electric lighting, barbed wire, the telephone, and well drilling techniques. Edison himself was involved in 800 lawsuits to enforce his patents on the electric light bulb. Again, the patents for these inventions were licensed by their inventors.

Earlier in the twentieth century, there were patent wars over airplanes, electrical distribution systems, and radios. Later in the twentieth century, there were patent wars over lasers, semiconductors, stents, and diapers.

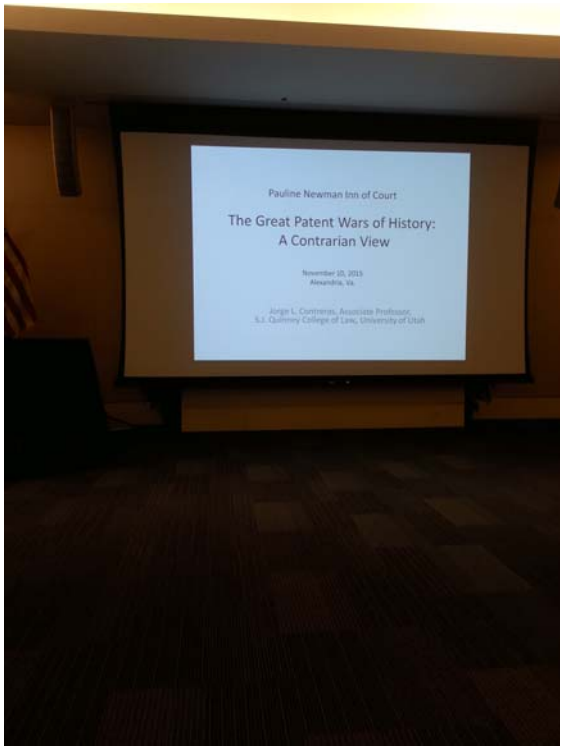
Massive litigation is the result of new property rights and the common law system of judicial resolution of disputes. There was similar massive litigation over real property rights in newly settled western territories in the nineteenth century.

There is patent infringement because people want new inventions for free. Critics of the patent system focus on the cost to defendants, while ignoring the costs to plaintiffs who have legitimate property rights because of the creation of the inventions. History provides a good basis for understanding what is going on today with patent licensing and litigation.

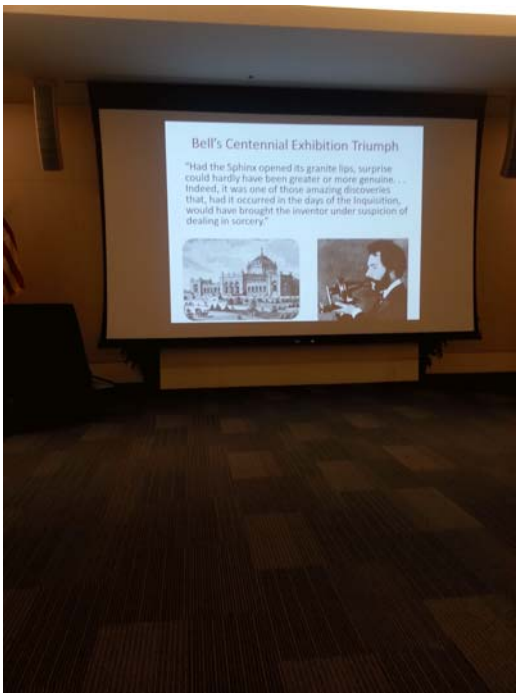
Professor Jorge Contreras of the University of Utah College of Law responded in the second part of the presentation with a Contrarian View. The first antitrust law was passed in 1890, and his focus is on the interaction of antitrust and patent law, so he did not go so far back in history as Professor Mossoff.

Professor Contreras discussed five patent history "koans": 1. Being a great technologist does not make one always right. 2. Pursuing economic self-interest does not always promote public welfare (or help the economy). 3. The fact that things turned out O.K. (for some) does not mean that the means used to achieve them was acceptable. 4. We don't live in the best of all possible worlds. 5. A historical example can be found to support any contemporary policy position.

Alexander Graham Bell filed his patent application for the telephone on February 14, 1876, and Elisha Gray filed his patent caveat (similar to a provisional application) for the telephone the same day a few hours later. The first telephone conversation was not until the next month, so Bell has his patent application on file before beginning any marketing. An interference ensued, in which there were claims of inequitable conduct, spying and a drunken patent examiner. Bell won the interference and got the patent. The next year, Bell formed the Bell Telephone Company, and in 1885 the American Telephone & Telegraph Company was formed. Lars Ericsson complained that "the patent conditions have made all competition impossible" in the American telephone market. In 1926, Bell and RCA settled an antitrust suit and their patent claims against each other, and split the market, Bell taking telephony equipment and service, and RCA taking wireless communication. AT&T controlled the entire telephone system, and did not allow new equipment such as the "hush-a-phone" to be used. In 1956 another antitrust suit was settled. The settlement limited AT&T to telephony (but excluded it from computers, which IBM wanted to itself). The settlement required AT&T to license its patents to GE, RCA and Westinghouse for reasonable royalties, and to all others royalty free. There was little innovation in the telephone industry while AT&T kept its monopoly, because it had little incentive to innovate.



There were many unsuccessful attempts to create heavier-than-air flying machines, before the Wright Brothers finally succeeded at Kitty Hawk in 1903. The Wright Brothers' first *pro se* patent application was rejected, but after they hired a patent attorney, their patent was issued in 1906. There had been earlier patents for flying machines since the 1860s, but they did not work very well. The Wright Brothers' patent disclosed methods of simultaneously controlling pitch, roll and yaw. In 1904, Glenn Curtis began building airplane engines. In 1910, the Wrights sued Curtis for patent



infringement. They won at trial in 1913, and on appeal in 1914. Curtis, however, obtained many more patents than the Wrights, and became the market leader. When World War One broke out, the U.S. government wanted an end to the patent litigation, and the Manufacturers' Aircraft Association was formed in 1917, which was one of the first patent pools.

Lesson that can be learned from these examples: Even patents that reward great leaps forward can be misused. Thickets of patents can be used to curtail follow-on innovation and market entry. Sometimes, government intervention is appropriate or needed to re-open markets that have been closed through abusive practices involving patents.

The presentations were followed by a question and answer session, with questions to the panel from the John Witherspoon pupillage group. The sewing machine patent pool was the first patent pool. Patent pools became the key tool for settling patent wars. For a time, patent pools were excluded as a solution by the antitrust authorities. They are now allowed under a "rule of reason", and there are now thousands of patent pools. "The first thing businessmen do when they get together is to collude."

Professor Mossoff said that patents are not too slow to be relevant. Claims are too broad. Professor Contreras pointed out the Tesla was really cross-licensing its patents, not making them available for free. Patents encourage commercialization. The U.S.A. was the first country to allow patents to be licensed and "spliced and diced" to encourage their commercial development.

In closing, Judge Pauline Newman thanked the speakers for their insights.

The program concluded at about 8:30 p.m.

Respectfully submitted,

Stephen Christopher Swift

Secretary