MEETING RECAP
THE PAULINE NEWMAN
IP AMERICAN INN OF COURT
THURSDAY, NOVEMBER 8, 2012

The third monthly meeting in the second year of the Pauline Newman IP American Inn of Court took place in the U.S. District Court for the Eastern District of Virginia, Alexandria Division, near the headquarters of the U.S. Patent & Trademark Office. As no cell phones or cameras are allowed in the courthouse, this meeting recap will not have photographs. It began with a reception in the Jury Assembly Room on the third floor of the courthouse from about 6:00 p.m. to about 7:00 p.m. As alcoholic beverages are not allowed in the courthouse, the reception was alcohol-free.

The program began at about 7:00 p.m. in the ceremonial courtroom on the tenth floor of the courthouse. The topic was patent litigation involving Non-Practicing Entities ("NPEs" or "patent trolls"). President Al Tramposch made introductory remarks. He thanked Judges Anderson and O'Grady and Lloyd Smith for helping to make the courthouse available for the Inn meeting. Judge Pauline Newman was not able to attend. Laurin Mills organized the program.

The first presenter was Ron Epstein of Epicenter IP Group LLC in Los Altos, California. He went to law school at Berkeley, worked at Wilson Sosini, and then went in-house at Intel. He described himself as an "arms merchant in the patent wars". He was "in the room when the term 'patent troll' was coined." The three parts of his business are patent brokering, strategic consulting, and licensing. Patents have been transformed from legal assets to business assets, and this led to the rise of NPEs. The smallest part of new technology in products comes from internal research and development. The main sources are from contributors (customers, suppliers, competitors) and unsuccessful entrants (universities, research labs, start-ups). 69,000 start-ups have gone out of business in recent years. One end of the spectrum of patent value is "crap"; the other end is "oh crap!" There is much more on the first end than the second end.

There are three segments in the market for new technology: 1. Early adopters. 2. Ethical adopters. 3. Everyone else (who will not pay for licenses voluntarily). Prospective licensees will look for problems with patents (validity, infringement, etc.) and revenue potential, and will use any excuse not to pay. If someone is asking for one hundred million dollars, but I can bankrupt them for ten million dollars, which do you think I am going to do? I always look at the bank account of the guy across the table. The reason there are so many patent infringement cases filed is that inside counsel cannot recommend paying ten million dollars in response to a notice letter; they need to be sued to cover themselves. Filing a lawsuit is a way of sending a message about your seriousness and your resources. For every patent prosecutor, companies

may spend one to two million; for every patent litigator, they spend ten to fifteen million. So screwing up a single patent is not that big a deal, but screwing up a patent litigation is.

Former Judge Walt Kelly, now with Jones Day, was the second presenter. NPE litigation has become common because patents are like lottery tickets. When someone incorporates features claimed in your patent in a product, litigation is like cashing a lottery ticket. Many lawsuits have a "shakedown" quality. When multiple defendants are sued in one action, they have difficulty coordinating their defense. The NPE has very few documents to produce in discovery, while the discovery burden on defendants is substantial. The NPE will offer settlements to groups of defendants at increasing amounts. NPE are buying large numbers of patents as lottery tickets, in the hope that if they buy enough of them, some will be winners. Patent infringement actions brought by NPEs increased nationally from 578 in 2001 to 5031 in 2011. Big companies have found out how to monetize their patent portfolios without litigation, by transferring them to NPEs. NPEs do not have to worry about being sued for patent infringement themselves, so this eliminates the "mutually assured destruction" in patent litigation between practicing entities with large patent portfolios.

In the second part of the program, Michael Lew asked questions of members of a panel consisting of Ron Epstein, Walt Kelly, Kim Choate (an IP litigator), Ted Essex (an Administrative Law Judge of the International Trade Commission), Liam O'Grady (Judge of the U.S. District Court), and John Anderson (Magistrate Judge of the U.S. District Court). Some responses were: Litigation is way of forcing a conversation. The function of the courts is the same, regardless of whether or not the parties are NPEs. Litigation is a function of the PTO issuing more patents. Juries have very little experience with patents, but are not instructed to consider whether a plaintiff is an NPE. Litigation is not cheap for anyone. The early burden in discovery may be on defendants, but plaintiffs have to analyze the documents produced. NPE litigation has expanded because of financing. Firms that financed debt collection suits started financing patent litigation suits. Inventors typically end up with a very small sliver of the damages collected. A document in discovery contained the phrase "bleed them white." It is not known how the new procedures under the AIA will work out. Restrictions on joinder may backfire, because it will reduce joint defenses. The market is reacting to patents becoming much more valuable starting about fifteen years ago. The ITC has become popular with NPEs and other plaintiffs, because it acts more quickly than the courts usually do, and it provides exclusion orders that may substitute for injunctions. AIA restrictions on joinder do not apply to the ITC. The domestic industry requirement at the ITC as applied to NPEs is "evolving". Patent infringement plaintiffs are required to plead with particularity, but some judges are more strict about this than others.

The meeting adjourned at about 8:30 p.m.

Respectfully submitted,

Stephen Christopher Swift
Secretary-Treasurer