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## Patent Invalidation Standard under Review

The United States Supreme Court will review the key question of whether "merely a preponderance of" or "clear and convincing" evidence should be the standard for proving patent invalidity. This review stems from an appealed case where i4i Inc. persuaded a Texas jury that versions of Microsoft Word infringed their software patent for manipulating document architecture. If the case stands, Microsoft must pay more than \$290 million in penalties and the current federal court standard of "clear and convincing evidence" will remain intact.

**MARK YOUR CALENDARS!**  
~ To attend our free seminar ~

### STRATEGIC POSITIONING OF YOUR PATENT PORTFOLIO: PLANNING FOR LITIGATION

**When: Wednesday, March 23, 2011 8:30 - 9:30 A.M.**

**Where: Automation Alley - Troy, MI**

for more information contact: [nau@raderfishman.com](mailto:nau@raderfishman.com)

## 25% Rule Abolished

The U.S. Court of Appeals for the Federal Circuit recently rejected use of the "25% Rule" as a means for calculating damages arising from infringement of a patent in *Uniloc USA, Inc. v. Microsoft Corporation*, calling the rule "a fundamentally flawed tool."

In the dispute, Uniloc alleged that Microsoft's sale of its software products infringed Uniloc's patent relating to a method for preventing unauthorized copying of the product by a user. The jury awarded Uniloc \$388 million and Microsoft appealed the damages award before the CAFC.

35 U.S.C. § 284 provides, on finding infringement, damages shall "in no event [be] less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court." In litigation, a reasonable royalty is often calculated based on a hypothetical negotiation between willing parties at the time infringement began. The 25% Rule assumes that a willing licensee would pay the

See [story](#).

## Travis' Law Proposal To Ban Trolling Facebook Memorial Pages

Travis' Law stems from a woman's experience, Karla O'Malley, of witnessing a young man's death, Travis McAfee, and the subsequent cyber-trolling of his memorial page. Cyber-trolling is a recent trend of specifically seeking memorial sites to post hateful and derogatory comments. [See Article and News Video](#).

Ms. O'Malley, after reading the horrible comment of 'I wish Travis had suffered more ... I would have laughed,' expressed her emotion: "this is over-the-line, this is harassment, this is an abuse of freedom of speech." She is not alone in her anger, but what can we as consumers do outside waiting for the proposed Travis' Law. Navigating a social website's privacy and takedown policies may be an offended user's best and most efficient weapon against cyber-trolling.

## America's Deaf & Blind Receive Some Relief

The implementation of the

patentee about 25% of its expected profits for a product that incorporates the patented subject matter.

On appeal, the CAFC held that Uniloc expert's testimony regarding the 25% Rule failed to satisfy the *Daubert* criteria because the expert failed to tie the application of the 25% Rule to the specific facts of the case, and the expert's methodology was therefore "arbitrary, unreliable, and irrelevant." Microsoft was awarded a new trial on the issue of damages.

*Uniloc USA, Inc. v. Microsoft Corp.*, Nos. 2010-1035, 2010-1055, 2011 U.S. App. LEXIS 11 (Fed. Cir., January 4, 2011). See opinion [here](#).

## USPTO To Open Satellite Office in Detroit

The U.S. Patent and Trademark Office will open its first satellite office in Detroit in the summer of 2011 and will hire 100 patent examiners to help reduce the PTO's backlog of 710,000 patent applications. "Michigan's selection for the first regional satellite patent office speaks to the wealth of engineering talent and innovation in our state," said U.S. Sen. Carl Levin, D-Mich. U.S. Sen. Debbie Stabenow, D-Mich., said "it makes perfect sense" for Detroit to get the office because of the "groundbreaking [in state] research in areas such as agriculture, batteries and autos." See: [www.uspto.gov](http://www.uspto.gov).

## Supreme Court Hears Costco's Copyright Appeal

Costco challenged Omega's use of the "first-sale doctrine" under U.S. copyright law to control the distribution and resale of imported products in oral arguments before the United States Supreme Court last November. The dispute arose when Costco purchased Omega watches from a U.S. distributor and then sold them at discounted prices. The U.S distributor had obtained the watches from foreign distributors. See [story](#).

## European Commission Puts Pharma Patent Settlements under the Microscope - Again

"In a further crackdown on anti-competitive practices,

Twenty-First Century Communications and Video Accessibility Act of 2010, which will bring relay services for deaf-blind individuals, began last January. FCC Chairman Julius Genachowski stated that implementing the Act will "bring the benefits of modern communications to people with low incomes who are both deaf and blind. It is my hope that with access to Twenty-First Century communications services, these individuals will be able to participate more fully in the economic and civic life of our nation." See: [Accessibility Act](#)

the European Commission has addressed information requests to selected pharmaceutical companies, asking them to submit copies of their patent settlement agreements - also dubbed pay-for-delay deals - concluded in the European Economic Area (EEA) in 2010 between originator and generic companies." [See Article.](#)

Joaquin Almunia, Competition Policy VP, said that "the outcome of our first monitoring exercise, [in 2009,] showed that potentially problematic agreements had decreased significantly, [and that the 2011 probe is important] to assess whether this positive trend is confirmed." [Quote origin here.](#)

## Kappos Q & A at AIPLA Winter Meetings

David J. Kappos, the Director of the United States Patent and Trademark Office (USPTO), held a Q & A session with Todd Dickinson for the Thursday Keynote Presentation at the AIPLA Annual Meeting. Kappos emphasized USPTO consolidation and efficiency by stating the goals of 1) reducing the action per disposal to a 2.1 ratio and 2) expanding by 1000 their examiner pool through hiring across all experience levels, including "experienced practitioners, fresh meat law grads, and technical experts." Kappos said "we want you to come and work for the USPTO," as we need more people to keep up with filings. He also stated that legislation is needed to move the United States to a first-to-file system and that harmonization with the world is an administrative objective.

## RFG Firm News

RFG Partner Terry Rader has been named "Detroit Area *Best Lawyers* Intellectual Property Lawyer of The Year" for 2011. See news [here](#).

RFG Partner Michael Stewart has been named to the list of "2011 Top Lawyers" by *dbusiness magazine*. See news [here](#).

RFG Partner Kristin Murphy has been elected to our firm's Board of Managers. Kristin joined Rader, Fishman & Grauer in 1997 as an Associate. In 2003, she was elected Partner at the firm. As of January 1, 2011 Kristin serves as a Managing Partner on the firm's Board of Managers. See news [here](#).

We are pleased to introduce two new attorneys in our Washington D.C. office. Robert Kimmer and Jiyeon Choi have joined our Trademark Practice in Washington, D.C. See [Our Professionals](#).

## **Rader, Fishman & Grauer PLLC**

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