

Remarks of
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*FIA Perspectives
on the
Emerging Significance of Patent Claims*

1. OVERVIEW

- a. A spate of recent patent related litigations have caught the attention of the futures and securities industries.
 - i. "Wagner" patent.
 - ii. eSpeed "Workup" patent.
 - iii. Trading Technologies "static ladder"/"single action" execution patents.
- b. Industry reaction reminiscent of the reaction to the issuance of the first business method patents for financial products in the early '90's.
 - i. Widespread consternation.
 - ii. Strongly held views that the relevant claims were either not novel or were obvious.
- c. Some threshold observations.
 - i. Patent law is generally not well understood within the futures industry.
 - ii. Industry observers are quickly becoming aware of the enormous power of patents.
 - iii. The trend toward patent prosecution will likely accelerate for reasons that are both:
 1. Strategic; and
 2. Defensive.

d. Related observations.

- i. Patent defense is extraordinarily expensive.
- ii. Patent issuance conveys enormous economic leverage.
- iii. Issuance of patents can profoundly impact both:
 1. Cost of access to markets; and
 2. Competition.
- iv. The stakes can be profound.
- v. We have seen only the tip of the iceberg.

2. FIA PERSPECTIVES

- a. Because of the potentially enormous power and transformative effect of patents, and the direct cost and competitive implications:
 - i. It is vital the PTO and the courts get it right.
 - ii. The industry should explore how it can play a role in promoting that result.
- b. The FIA Board has formed a committee of the board to formulate specific recommendations as to specific initiatives in which the FIA can participate to promote prudent and informed decisions by the industry, the PTO and the courts.

3. SPECIFIC INITIATIVES

- a. Sponsoring continuing education for futures industry participants regarding patent law.
- b. Participating in systematic archiving of relevant "prior art" and "contemporary art".

Challenges:

- i. Sponsorship/ownership/funding;
- ii. Facilities: dedicated hardware and data storage;
- iii. Database design and taxonomy;

- iv. Data collection (initial and ongoing);
 - v. Maintenance and support;
 - vi. Access.
- c. Exploring avenues for contributing to the education of PTO examiners regarding the futures industry and related technology.
- d. Monitoring of:
- i. PTO issuances, denials and application publications;
 - ii. Judicial actions and decisions.

Challenges:

- i. Developing a mechanism to reliably identify and track developments;
 - ii. Balancing the desire for information against concerns regarding "notice" of patent claims.
- e. Monitoring legislative and judicial developments that may present a need or opportunity for FIA support or intervention.
- f. Reaching out to and coordinating with other associations, organizations and agencies in pursuit of these initiatives.