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In this Issue

- ▶ **Upcoming Events** 2
- ▶ **The Perils of Keyword Search Engine Advertising** by Daniel Scardino & Emilio B. Nicolas, *Jackson Walker L.L.P.*..... 3
- ▶ **Medimmune v. Genentech: The Supreme Court Upends Licensing Law** by J. Roger Williams, Jr., *Andrews Kurth L.L.P.*..... 6
- ▶ **SEC Adopts New Disclosure Rules Regarding Executive and Director Compensation and Related Party Transactions** by Thomas W. Adkins, *Bracewell & Giuliani L.L.P.*..... 9
- ▶ **CSC GC Dashboard** by Wade Bennett, *Corporation Service Company*..... 10
- ▶ **NEW! Spotlight**..... 12

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Upcoming Events & ACC Webcasts:

April Social Event – Wine Tasting

April 4, 2007 from 6:00 p.m. to 8:00 p.m.
Mirabelle Restaurant
8127 Mesa Drive #A100

Sponsored by Brown McCarroll L.L.P. Please RSVP by Friday, March 30th, to Violetta Baczewski at vie@austin.rr.com or (512) 996-6581 or 466-9139.



CLE Lunch – “Trends in Outsourcing” by Nathaniel Chapin, EDS; Jordan Herman, Baker Botts LLP; and Jamey Seely, Direct Energy, LP

April 26, 2007 from 11:30 – 1:00 PM
Cool River Café
4001 Parmer Lane

Event sponsored by Baker Botts L.L.P. One hour Texas CLE credit has been requested. Members – no cost; non-members \$10. Please RSVP to Chapter Administrator, Violetta Baczewski at vie@austin.rr.com.

Golf / Spa and CLE

May 18, 2007
Barton Creek Resort & Spa
8212 Barton Club Drive

Event sponsored by Jackson Walker L.L.P. Details and invitation will be provided soon.

Events tentatively scheduled for the remainder of the year:

June	CLE lunch at Shoreline Grill
July	Social Event (TBD)
September	“Pocket MBA for Lawyers”
October	Social Event at Dave & Busters
November	CLE lunch at Renaissance Hotel
December	Annual Meeting / General Counsel Roundtable and Sponsor Appreciation

*** Dates and events subject to change.*

Upcoming ACC Webcasts. To see a full list and register, go to <http://webcasts.acca.com>

4.12.07 The Wait Is Over ▸ Facing the Final 409A Regulations

4.18.07 Infusing Records Policy Into Technology

4.24.07 Critical Strategies for Successful Outsourcing

5.31.07 Outsourcing to India: A Practical Guide to IP Protections, Enforcement Mechanisms and Export-Import Issues

[Back to Top ↑](#)

The Perils of Keyword Search Engine Advertising by Daniel Scardino & Emilio B. Nicolas



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Google, Inc., the Mountain View, California-based internet behemoth, is an innovative leader in e-commerce: from search engines, to YouTube, and now, legal precedent. Google – along with several competitors, most notably Yahoo! – has the federal courts decisively split over whether keyword search engine advertising (or keyword advertising) constitutes actionable trademark infringement.

Background

An estimated 97% of Google's revenue comes from "AdWords", Google's keyword advertising program.¹ Using AdWords, advertisers "purchase or bid on certain keywords, paying Google for the right to have links to their websites displayed in the Sponsored Links section [of Google's search engine] whenever an internet user searches for those words."²

The practice, however, has created a legal conundrum because Google apparently sells the trademarks of an advertiser's competitors as searchable keywords. As a result, trademark owners are suing Google and the purchasers of keyword advertising (or keyword advertisers) for trademark infringement.

Trademark owners argue the practice constitutes trademark infringement because internet users cannot distinguish between their websites and a keyword advertiser's website when they both appear as a paid-for search engine result. In contrast, keyword advertisers argue the practice is not actionable, but rather a permissible form of comparative advertising.

Split Decisions

The split in authority over keyword advertising centers on what constitutes a "trademark use". "Trademark use" is the threshold issue for a federal trademark infringement claim whereby the plaintiff must demonstrate the defendant made "use" of the plaintiff's marks to identify the source of goods or services.³

Some courts analyze the "use" requirement by strictly looking to the Lanham Act's definition of "use in commerce".⁴ "Use in commerce" means the use of a mark in commerce "(1) on goods when (A) it is placed in any manner on the goods or their containers or the displays associated therewith ... and (2)

¹ Brief of Petitioner-Appellant at 3-4, *Rescuecom Corp. v. Google, Inc.*, No. 06-4881-CV (2nd Cir. Jan. 12, 2007).

² *J.G. Wentworth, S.S.C. Ltd. P'ship v. Settlement Funding LLC*, No. 06-0597, 2007 WL 30115, at *2 (E.D.Pa. Jan. 4, 2007).

³ *J.G. Wentworth*, 2007 WL 30115, at *4.

⁴ *Buying for the Home, LLC v. Humble Abode, LLC*, 459 F.Supp.2d 310, 321-22 (D.N.J. 2006) (some courts presented with claims "involving the purchase or sale of trademarks as search engine keywords generally have ... examined 'use' by looking more specifically at the definition of 'use in commerce' under the Lanham Act"); *Rescuecom Corp. v. Google, Inc.*, 456 F.Supp.2d 393, 401 & 403 (N.D.N.Y. 2006); *Merck & Co., Inc. v. Mediplan Health Consulting, Inc.*, 425 F.Supp.2d 402, 415 (S.D.N.Y. 2006).

on services when it is used or displayed in the sale or advertising of services ...”.⁵ At least one court has strictly applied this definition to require a visible display of the competitor’s trademark on the internet search engine’s resulting link or the keyword advertiser’s website before the court will find an actionable “trademark use”.⁶

Other jurisdictions take a broader approach by analyzing the “use” requirement in terms of the total circumstances surrounding the defendant’s use, regardless of whether the plaintiff’s trademark is visible to internet users.⁷ For example, if the defendant is an internet search engine, such as Google or Yahoo!, then a court might find a “trademark use” when the defendant (1) “trades on the value of the [plaintiff’s] marks” by accepting bids on the plaintiff’s mark from the plaintiff’s competitors, (2) acts “as a conduit to steer potential customers away” from the plaintiff to the plaintiff’s competitors, and (3) “identifies those of [the plaintiff’s] marks which are effective search terms and markets them to [the plaintiff’s] competitors.”⁸

Where the defendant is a keyword advertiser, like the customer of Google’s AdWords program, then a court might find a “trademark use” when the defendant (1) trades “on the value of the plaintiff’s mark” by purchasing the plaintiff’s mark as a keyword, and then (2) uses that keyword “to trigger internet advertisements for itself”.⁹

Still, other courts take a third approach by analyzing “use” in terms of “initial interest confusion”. The initial interest confusion doctrine applies when “similar marks could ultimately affect a consumer’s consideration of the defendant’s product as well as affect the plaintiff’s goodwill with its customers”.¹⁰ In the context of the internet, for instance, a court might find a initial interest confusion when internet users realize the website they have accessed is not the one they were looking for, but decide to purchase or use the offerings of the keyword advertiser’s site regardless.¹¹

The Ninth Circuit has held that the mere placement of a competitor’s trademark in a metatag constitutes a “use in commerce” when “used ... in a way calculated to deceive consumers into thinking” the competitor is the keyword advertiser.¹²

⁵ 15 U.S.C. § 1127.

⁶ *Rescuecom*, 456 F.Supp.2d at 401 (granting Google’s motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure because Rescuecom’s complaint failed to properly allege “trademark use” by not showing that (1) Google displayed Rescuecom’s mark in any of Google’s Sponsored Links, and (2) Google’s “internal use” of Rescuecom’s mark by way of metatags places Rescuecom’s mark “on any goods, containers, displays, or advertisements, or that its internal use is visible to the public”).

⁷ *J.G. Wentworth*, 2007 WL 30115, at *6; *Humble Abode*, 459 F.Supp.2d at 321 & 323 (some courts presented with claims “involving the purchase or sale of trademarks as search engine keywords generally have examined whether the defendant’s alleged ‘use’ of the mark constituted a ‘trademark use’ generally, i.e., commercial use of the mark as a trademark”); *800-JR Cigar, Inc. v. GoTo.com, Inc.*, 437 F.Supp.2d 273, 285 (D.N.J. 2006); *Edina Realty, Inc. v. TheMLSOnline.com*, No. 04-4371JRTFLN, 2006 WL 737064, at *3 (D.Minn. Mar. 20, 2006).

⁸ *800-JR Cigar*, 437 F.Supp.2d at 285.

⁹ *J.G. Wentworth*, 2007 WL 30115, at *6; *Humble Abode*, 459 F.Supp.2d at 323.

¹⁰ *Promatek Indus., Ltd. v. Equitrac Corp.*, 300 F.3d 808, 813 & 814 (7th Cir. 2002) (applying the initial interest confusion doctrine as a means of finding a “likelihood of confusion”); *J.G. Wentworth*, 2007 WL 30115, at *2 & 6 (rejecting the initial interest confusion doctrine as a means of finding a “likelihood of confusion” because “[a]t no point are potential consumers ‘taken by a search engine’ to defendant’s website due to defendant’s use of plaintiff’s marks in meta tags”); *Kinetic Concepts*, 2005 WL 3068223, at *8 (holding “the mere use of trademarked keywords has been found to create a likelihood of initial interest confusion”); *GEICO v. Google, Inc.*, 330 F.Supp.2d 700, 703 (E.D.Va. 2004) (describing the initial interest confusion doctrine as a means of finding a “use in commerce”).

¹¹ *Brookfield Commc’n, Inc. v. West Coast Entm’t Corp.*, 174 F.3d 1036, 1062 (9th Cir. 1999).

¹² *Playboy Ent., Inc. v. Netscape Commc’n, Corp.*, 354 F.3d 1020, 1026 (9th Cir. 2004) (applying the initial interest confusion doctrine to keyword advertising); *Brookfield Commc’n*, 174 F.3d at 1062 (applying the initial interest confusion doctrine to infringing internet domain names).

Needless to say, the various approaches of the courts across the country present a cacophony that is confusing for the courts and clients. All in all, the available case law suggests that plaintiffs have can in most jurisdictions bring a colorable claim. As it stands, in those jurisdictions where the claim is allowed, the internet search engines and keyword advertisers can be held jointly-and-severally liable under theories of direct infringement, contributory infringement and vicarious infringement.¹³

The Law in Texas

The Texas appellate courts and the Fifth Circuit have not decided whether keyword advertising constitutes trademark infringement. The Northern and Western Districts of Texas have seemed to adopt the initial interest confusion doctrine.¹⁴ In an unreported, Western District of Texas decision styled, *Kinetic Concepts, Inc. v. Bluesky Med. Group Inc.*, the plaintiff sued the defendant for using the plaintiff's mark in keyword advertisements.¹⁵ In applying the initial interest confusion doctrine from other jurisdictions, the District Judge denied the defendant's motion for summary judgment because, the Judge ruled, the defendant's "mere use of trademarked keywords" constituted "sufficient evidence to raise a fact issue" as to a likelihood of confusion.¹⁶ After trial, however, the District Court ruled for the defendant because "[t]he jury found no direct infringement, contributory infringement or inducement of infringement."¹⁷

Whether keyword advertising constitutes trademark infringement is another example of how the law persistently rides on the heels of technology. With such decisive splits over the "trademark use" issue, it appears that arguments against liability should focus on persuading the court to strictly apply the definition of "use in commerce" adopted by the courts in *Rescuecom*.¹⁸

It is unknowable which of the approaches Texas appellate courts and the Fifth Circuit will ultimately apply in deciding whether keyword advertising is trademark infringement. Unless there is a definitive answer provided by the appellate courts, Texas keyword advertisers will have to ask themselves whether the risk of possible infringement is worth the reward of potential increased business, and trademark owners will have to ask themselves whether the cost of litigating a claim based on unsettled law outweighs the damage being done to their marks.

The following suggestions may help to mitigate potential liability for the unregenerate keyword advertiser:

First, keyword advertisers should prevent another company's trademarks from visibly appearing on their websites and in linked advertisements, like Google's "Sponsored Links."

Second, keyword advertisers should inquire about insurance for trademark infringement and dilution liability.

¹³ *800-JR Cigar*, 437 F.Supp.2d at 282 (claiming that an internet search engine "monitors and controls the third-party advertisements is sufficient to plead actual or constructive knowledge required to allege contributory infringement", while claiming that both an internet search engine and keyword advertisers "control the appearance of the advertisements on ... [the] search results page and the use of ... [the plaintiff's] trademarks therein" is sufficient to plead vicarious infringement against the internet search engine); *GEICO*, 330 F.Supp.2d at 704.

¹⁴ *Kinetic Concepts, Inc. v. Bluesky Med. Group Inc.*, No. SA-03-CA-0832-RF, 2005 WL 3068223, at *8 (W.D.Tex. Nov. 1, 2005); *MCW, Inc. v. Badbusinessbureau.com, L.L.C.*, No. Civ.A.3:02-CV-2727-G, 2004 WL 833595, at *20 (N.D.Tex. Apr. 19, 2004).

¹⁵ No. SA-03-CA-0832-RF, 2005 WL 3068223, at *8 (W.D.Tex. Nov. 1, 2005).

¹⁶ *Id.*

¹⁷ Verdict at 1, *Kinetic Concepts, Inc. v. Bluesky Med. Group Inc.*, No. SA-03-CA-0832-RF, 2006 WL 3932855 (W.D.Tex. Aug. 3, 2006).

¹⁸ *Rescuecom Corp. v. Google, Inc.*, 456 F.Supp.2d 393, 401 & 403 (N.D.N.Y. 2006).

Third, keyword advertisers should investigate the indemnification and warranty policies of the internet search engines with which they do business.

Finally, in the event of a lawsuit, it may be worth the effort to bring a third-party action against the internet search engine for contribution or indemnification.

[Back to Top ↑](#)

Medimmune v. Genentech: The Supreme Court Upends Licensing Law by J. Roger Williams, Jr.



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The Supreme Court kicked off 2007 with a bang in *Medimmune v. Genentech*.¹ At first glance the decision is a straightforward ruling on federal court jurisdiction--namely, whether a non-repudiating patent licensee's suit for a declaratory judgment of invalidity satisfies the Article III "case or controversy" requirement of the United States Constitution. In practice, however, the ruling will give some patent licensees a "big stick" to renegotiate the terms of the license, and it will certainly provoke more patent lawsuits.

Legal Background

Before *Medimmune*, the Federal Circuit's 2004 *Gen-Probe v. Vysis, Inc.* decision essentially required a licensee to materially breach the license as a precondition of filing a declaratory judgment ("DJ") action to invalidate the licensed patent.² Under the Federal Circuit's "reasonable-apprehension-of-suit" test, two conditions must be met to show federal court jurisdiction for a DJ action for invalidity. First, there must be an explicit threat or other action by the patentee which creates a reasonable apprehension on the part of the DJ plaintiff that it will face an infringement suit; and second, there must be present activity by the DJ plaintiff which could constitute infringement or concrete steps taken with intent to conduct such activity.³ In *Gen-Probe*, the Federal Circuit held that a "non-repudiating licensee" (*i.e.*, a licensee who had not materially breached the license) had no reasonable apprehension of suit, and therefore could not satisfy the first prong of the test for federal court jurisdiction.

Factual Background and Decision

Medimmune held a license from Genentech under the Cabilly II patent. Genentech notified *Medimmune* that one of *Medimmune*'s products (Synagis) was covered by Cabilly II and that Genentech expected *Medimmune* to pay royalties under the license agreement. *Medimmune* disputed Genentech's claim to royalties on both noninfringement and invalidity grounds, but continued to pay royalties (under protest) to avoid Genentech's threat to file an infringement suit. *Medimmune* then filed suit seeking a declaratory judgment of non-infringement and invalidity. Relying on *Gen-Probe*, the District Court dismissed the patent law claims for lack of subject matter jurisdiction because *Medimmune* was a

¹ *Medimmune v. Genentech*, 127 S.Ct. 764, 75 U.S.L.W. 4034 (2007).

² *Gen-Probe v. Vysis, Inc.*, 359 F.3d 1376 (Fed. Cir. 2004).

³ See *Gen-Probe v. Vysis, Inc.*, 359 F.3d at 1380; *C.R. Bard, Inc. v. Schwartz*, 716 F.2d 874, 879-82 (Fed. Cir. 1983).

licensee in good standing; and the Federal Circuit affirmed.⁴ The Supreme Court granted certiorari, and on January 9, 2007 handed down a decision (authored by Justice Scalia) reversing the Federal Circuit and remanding the case to the lower courts for further proceedings.

Summary of the Court's Reasoning

But for Medimmune's own actions to avoid the risk of an infringement suit (by continuing to pay royalties), the Medimmune dispute clearly met the Court's long-standing test for Article III jurisdiction, *i.e.*, a "substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Relying on its 1943 decision in *Altvater v. Freeman*,⁵ the Court held that Medimmune's voluntary payment of royalties did not eliminate the "case or controversy." *Altvater* held that a licensee could challenge the validity of a patent in federal court even though it was still paying royalties (pursuant to an injunction) because "the requirements of a case or controversy are met where payment of a claim is demanded as of right and where payment is made, but where the involuntary or coercive nature of the exaction preserves the right to recover the sums paid or to challenge the legality of the claim."⁶ Although the royalty payments in *Altvater* were made to comply with an injunction (rather than to comply with a license as in *Medimmune*), Justice Scalia explained that this was not a material difference because the threat in *Altvater* that preserved the right to challenge the legality of the claim was not the contempt remedy (for violation of the injunction) but actual and treble damages in an infringement suit, the same threat as in *Medimmune*. The Court remanded the dispute to the lower courts to decide whether the district court should exercise its discretion (under the Declaratory Judgment Act) to hear the dispute at all, and whether Medimmune, as a non-repudiating licensee, should be estopped from denying the validity of the license.

Two other aspects of *Medimmune* stand out. First, the Court called into question the Federal Circuit's Article III "case or controversy" jurisprudence by pointedly observing that the "reasonable-apprehension-of-suit" test is contradicted by *Altvater* and is in "conflict with" or "in tension with" other Supreme Court cases.⁷ Second, Genentech had argued that a license was like an insurance policy, where the licensee is protected against an infringement suit by the patentee so long as it continues to pay royalties and does not challenge the validity of the patent. Allowing the licensee to sue to invalidate the patent, argued Genentech, would deprive the licensor of the benefit of this bargain. Justice Scalia rejected this "insurance policy" argument because (among other things), the license lacked a "no challenge" provision (*i.e.*, a promise not to challenge the validity of the patent). Although the royalty obligation ceased if and when the patent was declared invalid, an agreement to pay royalties unless and until a patent is declared invalid is not the same thing as a promise never to challenge the validity of a patent.

Implications of the Ruling

What are the implications of the *Medimmune* ruling? Most obviously, by opening the door to the courthouse to non-repudiating licensees, the Court has given licensees a "big stick" with which to force renegotiation of *existing* licenses that are vulnerable to a validity challenge. Although this "big stick" is not cost-free -- a DJ suit for invalidity can be expensive -- it is generally risk-free, in that the licensee retains its "insurance policy" against an infringement suit if the validity challenge fails.

As to the implications for *prospective* licenses, prospective licensors will now try to demand higher up-front payments to compensate for the risk of a validity challenge during the lifetime of the license.

⁴ *Medimmune v. Genentech*, 427 F.3d 958 (Fed. Cir. 2005), *reversed*, 127 S.Ct. 764 (2007).

⁵ *Altvater v. Freeman*, 319 U.S. 359, 63 S.Ct. 1115 (1943)

⁶ *Altvater v. Freeman*, 319 U.S. at 365, 63 S.Ct. at 1118-19.

⁷ *Medimmune v. Genentech*, 127 S.Ct. at 774, n. 11.

We can also expect many patentees to propose a wide variety of contractual restrictions on validity challenges, such as “no challenge” clauses (perhaps made conditional on enforceability), automatic-termination-in-case-of-validity-challenge clauses, mandatory arbitration of validity challenges, attorneys’ fees clauses that award fees to the patentee for any unsuccessful validity challenge, and the like. Such provisions require consideration of the Supreme Court’s repudiation of the doctrine of licensee estoppel in *Lear v. Adkins* (1969).⁸ Because the strong federal policy of encouraging challenges to invalid patents trumps state-law property rights, *Lear v. Adkins* holds that no state law of estoppel could prevent a licensee from challenging the validity of a patent. *Lear v. Adkins* was not at issue in *Medimmune*. Regardless, *Lear v. Adkins* remains highly relevant because it is generally construed to render unenforceable any license provision that precludes the licensee from challenging the validity of the licensed patent.⁹ What, then, do we make of Justice Scalia’s logic in rejecting the “insurance policy” argument because the license did not include a no-challenge clause? One possibility is that Justice Scalia was unaware, or simply *forgot*, that *Lear v. Adkins* has been construed to render unenforceable such clauses. Another possibility is that Justice Scalia was inviting parties to reconsider using contract rights to allocate the risk of a validity challenge by the licensee, and implicitly inviting a challenge to that aspect of *Lear v. Adkins*. In any event, the enforceability of such clauses will be in doubt for the next several years, so the patentee should ensure that the license agreement includes a savings clause to protect the enforceability of the remainder of the license agreement.

We can also expect to see more litigation triggered by simple “notice” letters. Under the Federal Circuit’s pre-*Medimmune* jurisprudence, there was a fairly well-defined line that allowed a patentee to notify a potential infringer of the existence of the patent and possibility of infringement (and thus start the damages clock) but avoid triggering a DJ action of non-infringement or invalidity so long as the patentee did not actually create a “reasonable-apprehension-of-suit” by making an unqualified charge of infringement or threatening an infringement suit.¹⁰ The Supreme Court blurred that line by impugning the Federal Circuit’s “reasonable-apprehension-of-suit” jurisprudence. Consequently the next several years should bring an increase in DJ actions filed by prospective infringers based on something less than an actual threat of infringement. Counsel for patentees must account for this additional risk when evaluating how to initiate license negotiations with a potential infringer. We don’t know yet where, or even whether, the Federal Circuit will redraw the bright line. However, Justice Scalia emphasized the “clear threat” that Genentech would terminate the license agreement and seek damages, treble damages, and an injunction in an infringement suit. A licensor that desires to avoid triggering a DJ action must take care not to make or imply such threats.

Finally, we should also see more patentees initiate license negotiations by filing suit first instead of sending a notice letter. In part this will be a response to the heightened risk that sending a notice letter *might* trigger a DJ action in an unfriendly forum. In addition, a preemptive suit enables the patentee to exploit a relatively well-established exception to the *Lear v. Adkins* prohibition against “no challenge” provisions. Because of the weighty public interest in enforcing final judgments and terminating litigation, the courts generally will enforce a provision that precludes a subsequent challenge to the validity of a patent (notwithstanding *Lear v. Adkins*) when it is contained in a consent decree or a settlement agreement that resulted in a dismissal with prejudice.¹¹ Thus, a patentee for which it is important to secure an enforceable “no challenge” provision has a better chance of achieving that result today if it sues first and includes a “no challenge” provision in a license embodied in a settlement agreement or consent decree.

⁸ *Lear v. Adkins*, 395 US 653, 89 S.Ct. 1902 (1969).

⁹ See, e.g., *Panther Pumps & Equip. Co. v. Hydrocraft, Inc.*, 468 F.2d 225, 230-32 (7th Cir. 1972) (contractual “no challenge” provision in a patent license is unenforceable but not patent misuse).

¹⁰ See, e.g., *SRI International v. Advanced Technology Labs*, 127 F.3d 1462, 1469-70 (Fed. Cir. 1997).

¹¹ See, e.g., *Flex-Foot, Inc. v. CRP, Inc.*, 238 F.3d 1362, 1367-71 (Fed. Cir. 2001).

The Federal Circuit and the district courts clearly have their work cut out for them in sorting out patent licensing law in the wake of *Medimmune*. In the meantime, score a win for the trial lawyers.

(The content of this article is intended to provide a general guide to the subject matter, and is not legal advice.)

[Back to Top ↑](#)

SEC Adopts New Disclosure Rules Regarding Executive and Director Compensation and Related Party Transactions by Thomas W. Adkins



Thomas W. Adkins is a partner in the Austin office of Bracewell & Giuliani LLP. He represents companies and other parties involved in business transactions, including acquisitions and dispositions of publicly and privately held businesses, and public and private securities offerings. He has assisted numerous public companies and boards of directors with Sarbanes-Oxley and other corporate governance issues as well as state and federal securities laws and regulatory compliance.

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The SEC's new rules regarding disclosure of executive and director compensation, related party transaction disclosures and other matters will have a significant impact on proxy statements (beginning with the 2007 season) and Form 8-K filings (effective 11/7/06). Although the rules have a variety of effective dates, in general they will apply to disclosure of compensation and other information beginning with 2006, but will not require restatement of disclosures for prior years.

Summary of New Disclosure Requirements

Under the new rules, compensation disclosure will begin with a narrative discussion and analysis of executive compensation policies and decisions, followed by detailed tables of total compensation in three broad categories:

- Compensation for the last fiscal year (and the two preceding fiscal years, as phased in over the next two years), including salary, bonus, perquisites and other benefits;
- Holdings of and recent realizations on equity-related interests that relate to compensation or are potential sources of future gains; and
- Retirement and other post-employment compensation arrangements, including those payable in the event of a change in control.

Compensation Discussion and Analysis

The new rules require presenting this information in a Compensation Discussion and Analysis (CD&A). This basically is a beefed-up version of the compensation committee report previously required in the annual proxy statement, but is a *company* disclosure covered by the CEO and CFO certifications required under the Sarbanes-Oxley Act. Companies will not be required to disclose targets for specific performance-related factors considered by the compensation committee, but must discuss how difficult it will be to achieve the undisclosed target. The CD&A must also address matters relating to executives' option compensation, with particular emphasis

on the timing and pricing of stock option grants and the determination of the exercise price.

Other Key Disclosure Elements

- Disclosure must be for “named executive officers”: the CEO, CFO, and three other most highly compensated corporate officers. Form 8-K disclosure may apply to other executives.
- Compensation for Board of Director members must be disclosed in detail similar to that used for the named executive officers.
- There are revised rules for disclosure of certain relationships and related party transactions (including indebtedness), with the disclosure threshold increased to \$120,000.
- Compensation committee disclosures, similar to those for the audit and nominating committees, will now be required, including committee charter, authority, processes and procedures in considering and determining executive and director compensation.

December Amendments

On December 22, 2006, before the first proxy statements were prepared under the new rules, the SEC amended the new rules. These amendments made several changes to the rules, including a requirement that the dollar values shown in the Stock Awards and Option Awards columns of the Summary Compensation Table and the Director Compensation Table be amortized over the vesting period. The rules as adopted in July 2006 had required the full grant date fair value be included. This amount will now be required in a new column in the Grants of Plan-Based Awards Table. For some companies this amendment may change the identity of the "named executive officers" for whom compensation disclosures are required.

More Information

These are merely brief highlights of the complex new disclosure rules. For a detailed review and sample disclosure tables, please go to our web site, www.bqllp.com.

[Back to Top ↑](#)

CSC GC Dashboard is the early warning system general counsels and their law departments need to detect nascent legal issues and deal with them before they mushroom into serious problems by Wade Bennett

Corporations have come to rely on powerful business intelligence systems to mitigate risk and optimize results in their profit and revenue centers. These expensive systems sift and scrutinize all available data, seeking trends and spotting trouble. Sophisticated, customizable “scorecards” put the results in the hands of managers, who use the data reconnaissance for damage control and to enhance business strategies.

Wade Bennett is a Vice President with Corporation Service Company® who oversees technology and product development of a wide spectrum of services for corporate law departments. Throughout his career, he has authored several articles on technology and the law and spoken frequently on the same subject.

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In the race to boost corporate performance with cutting edge technologies such as these, however, the legal department is still on the starting blocks. This is because most attorneys have been reluctant to give up the towering stacks of paper reports on their desks and use computerized information and spreadsheets. Also, as a cost center, the corporate legal department has not been an attractive candidate for the kind of investment that these systems represent.

But things are starting to change. Corporate executives have grown concerned about the potentially staggering costs resulting from unforeseen risk, while corporate attorneys now realize that it's impossible to effectively anticipate and manage the vast scope of legal matters using current tracking processes. They have begun to recognize the value of having a proactive, rather than reactive, approach to risk management of legal issues that relies on business intelligence technologies.

Until now, however, there has not been an effective tool available to manage legal risk. The software giants supplying business intelligence systems to the rest of a corporation's divisions have never fully grasped the inner workings of the legal department, and have been unsuccessful in creating cost-effective applications tailored to general counsels' needs. The solution would have to come from a company with comprehensive knowledge of the legal department, one familiar with how general counsels' work and the kind of tools they use.

That solution has come from CSC. With over a hundred years of experience servicing the legal community, CSC is uniquely qualified to design a tool that meets the needs of general counsels and their staffs. The result is GC Dashboard, a web-based application that provides instant access to critical information on a single, secure web page.

CSC GC Dashboard uses real-time information taken from CSC's operating systems to provide a consolidated view of litigation, transactions, compliance, governance and IP concerns, allowing corporate attorneys to spot and handle incipient problems before they spin out of control.

The CSC GC Dashboard is a smoke detector, which gives general counsels access to the information they need to spot trends and the first signs of risk at a single glance. The application eliminates the need to generate and pore through reports about the corporation's myriad activities, because that information is gathered and then distilled onto a single screen shot. A general counsel can look at the screen and immediately see the data they need to manage their law departments' activities. For example, they can see how many new service of process were generated in the last 30 days; the status of the company's intellectual properties; legislative news coming from the states. It's all right there on one page, in an intuitive graphical format.

In addition, the CSC GC Dashboard uses open standards technology to enable it to communicate and mesh with virtually all existing (and future) software and information systems, which means that information from existing documents, contacts, reports and other proprietary data sources or third party solutions can also be integrated into the single consolidated view.

The application also includes a tool that searches for word patterns to detect trends. For instance, if the tool is running and searching through the data, and detects for example, that the term 'sexual harassment' has appeared 27 percent more in the past month than in any other month in the last year. The CSC GC Dashboard sends an alert to make the general counsel aware of the situation.

Such features not only save time and resources, but it also ensure that critical information is not overlooked. There are time issues, and accuracy issues, which can cost the company in unforeseen risk.

Tailored and Timely

The CSC GC Dashboard screen contains data, charts, alerts and trends in rich formats with detailed drill-downs. The information on the page is customized so that users have exactly the information they need in a format that they are comfortable with. Specifically, during implementation, CSC spends enough time with users to understand their needs, and the areas of focus that are important to them. In turn, we use that feedback to customize and create their dashboard look. For example, if your organization is a manufacturing company, you probably have serious litigation issues. As a result, CSC can design the screen around those issues, and break them down by jurisdiction, by product, or whatever category you are most interested in seeing.

CSC discovered that while every legal department buys software, the lawyers don't use them. This is due to the fact that attorneys require reports to be generated, and then they review those reports. Consequently, CSC has created the reports for corporate law departments. Simply requiring the attorney to just turn on the computer, and the information is delivered in a report format for the attorney to interpret and analyze.

Another invaluable feature of the GC Dashboard is that it refreshes the data automatically, so that users are always looking at the most current information available. This is critical if the tool is to be used as an early warning system. For instance, if a general counsel is examining a graph regarding how many discrimination claims he/she is receiving. Because the system is dynamic, the Dashboard automatically updates the number as new claims are filed. Again, this allows general counsels to act proactively, and deal with a situation like this before it gets out of hand.

[Back to Top ↑](#)

Spotlight

✦ The 2007 Austin Under 40 Awards finalists have been announced. Finalists in the Legal category are **Ed McHorse** from Graves, Dougherty, Hearon & Moody, **Nikelle Meade** from Brown McCarroll, **Gregory Sapire** from Hughes & Luce, **Joseph Stallone** from Bracewell & Guiliani, and **Gavin Villareal** from Baker Botts. **Shannon H. Ratliff II** from Bracewell & Guiliani is a finalist in the Government/Public Affairs category. The Austin Under 40 Awards is hosted by the Young Women's Alliance and the Young Men's Business League. The finalists were selected on the basis of excellence in their professional field and commitment to the Austin community.

✦ **GRAVES, DOUGHERTY, HEARON & MOODY** was nominated for the Texas State Bar's W. Frank Newton Award for pro bono service and **Pete Kennedy, Jim Hemphill, Melissa Garcia, Michelle Alcalá** and **Chris Trickey** (all in Litigation) for their work on two important pro bono cases. The award recognizes the pro bono contribution of attorney groups whose members have made an outstanding contribution in provision of, or access to, legal services to the poor. The award is named for W. Frank Newton, former Dean of Texas Tech University School of Law and long time pro bono advocate.

★ **Clarke Heidrick** (Shareholder, Corporate) received the David Walter Award for public service, the Austin Bar Foundation's highest award, at the annual gala on January 20, 2007.

★ **BAKER BOTTS L.L.P.** is pleased to announce that former Partner, **Chris Brown**, has joined our client, **NETSPEND CORPORATION** as General Counsel. We look forward to working with him in his new role.

★ **BRACEWELL & GIULIANI** is pleased to announce that **Deanna E. King** has been named partner in our firm.

SUBMISSIONS: If ACCA members or sponsors would like to submit news – such as career updates, awards, and honors – for consideration for the next newsletter, please email Julie Wong at Julie_wong@dell.com

[Back to Top ↑](#)

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