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## Legal Issues Raised by the Driverless Vehicle Revolution: Part 1

Fueled by the high-profile efforts of technology giants like Google, major manufacturers like General Motors and Tesla, and new auto industry entrants like Uber and Apple, the driverless car revolution is here. Tomorrow's self-driving cars will rely on a combination of familiar driver-assist features coupled with newly developed computer hardware and software, working together to make driving decisions based on input from sensors, cameras, and the surrounding environment. In much the same way, the legal issues related to autonomous vehicles will be addressed using a combination of existing law and new legislation. This article explores the steady climb of vehicle automation, the road that lies ahead, and an overview of the patent landscape impacted by this autonomous vehicle revolution. Part 2 will focus on safety regulations, product liability, data security, and other areas.

### *The Technology*

*Driverless v. Driver-Assisted Cars.* There are two schools of thought behind the autonomous vehicle revolution. The first school—led by Google and Uber—maintains that truly autonomous vehicles cannot be achieved

incrementally; instead, full automation is necessary. Human drivers in less-than-fully autonomous cars must constantly pay attention to be able to address sudden and unexpected situations—the very situations that easily distracted human drivers are ill-suited to handle. According to this view, the more control given to the computer, the less a human has to contribute, and the safer the car becomes.

The other school of thought—embraced by Tesla, General Motors, Mercedes-Benz, Audi, Volvo, Toyota, and Ford—maintains that autonomous technologies will continue to require driver assistance. In support of their view, these companies point to the successful integration of numerous autonomous technologies into today's cars, ethical quandaries presented by fully autonomous cars, and the reluctance of drivers to abandon control of their vehicles. This perspective also has historical support: most other technological revolutions, including the industrial, electrical, computer, and Internet, have arrived in incremental improvements, not in lightning strikes.

At the heart of this debate is the lurking question: can, and *should*, sensors and a computer truly replace

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## Quinn Emanuel Again Named One of *Law360's* "Fearsome Foursome"

*Law360* once again has named Quinn Emanuel as one of the "four firms in-house counsel fear the most." The 2016 "Fearsome Foursome" were selected based on BTI Consulting Group's recent survey of over 300 General Counsel, Chief Legal Officers, and other legal decision makers at major corporations. According to the report, the Fearsome Foursome "consistently manage to make clients feel they are getting all the attention, as if they had no other clients or matters" and "can not only both strategize and implement, they can change as they go." This is the fourth time Quinn Emanuel has been named to the Fearsome Foursome since 2010. [Q](#)

## Victoria Maroulis Named a 2015 Power Player in Tech Law by *The Recorder*

Victoria Maroulis has been named a 2015 "Woman Leader in Tech Law" by *The Recorder*. She was also deemed a "Power Player"—a special distinction given to only the top ten lawyers for distinguished achievement and leadership. Ms. Maroulis was specifically recognized for her representation of Samsung in the "smartphone wars," and for her role in recent matters for other clients, including Marvell Semiconductor. *The Recorder* also recognized her dedication to mentoring young attorneys and law students through programs at Stanford and Yale. [Q](#)

human senses and control? Hypothetical situations abound where the car's computer could be confronted with difficult choices. Example: suppose a car is about to hit a group of pedestrians. Should the car veer off the road, into a median, or even into oncoming traffic? Proponents of driverless cars argue that such hypotheticals are contrived and unlikely in the real world, and that a human being would not have the time to make a judgment call anyway under such circumstances. Proponents of driver-assisted cars understand that, regardless of the ethical implications of such decisions, most drivers would not want to cede them to a computer. It is difficult to predict which school of thought will ultimately prevail, and federal regulation is required to avoid the patchwork of laws that will result as each state issues its own pertinent regulations. Indeed, the California DMV has reportedly issued draft regulations requiring automated cars to have a licensed driver positioned behind a steering wheel, tacitly favoring the "driver-assisted" school.

*The Future Is Now.* Examples of autonomous features currently on the market include:

- **Automatic/intelligent braking or forward collision control** senses an imminent frontal crash, warning the driver, adjusting the brake force, and/or engaging the brakes. The GMC Yukon and Sierra models' "Intelligent Brake Assist Technology" senses an emergency stop and enables higher braking force before the driver fully depresses the pedal.
- **Automatic headlight control** senses ambient light levels and turns on or adjusts headlights. Toyota's "Automatic High Beam" detects nearby light sources like tail lights or headlights and automatically switches between high and low beams.
- **Parking assistance** features range from sounding chimes when the car approaches an obstacle to autonomous parallel parking. Initially popularized in the U.S. by Toyota, newer, more advanced systems, for example by component manufacturer Bosch, enable the driver to leave the car and activate the feature using his or her smartphone.
- **Blind-spot monitoring** warns the driver when a vehicle enters a car's blind spots. Volvo's "Blind Spot Information System" produces a visible alert when lenses mounted on its doors detect a car in a driver's blind spot as the driver switches lanes.
- **Cruise control**, as we know it, maintains a car at constant speed by taking over the car's throttle. Adaptive cruise control uses radar or lasers to determine the location of surrounding cars to

adjust speed to maintain a safe distance. BMW's X5 now includes a traffic jam assistant where the car automatically speeds up and slows down in stop-and-go traffic.

- **Traffic-sign recognition** uses cameras to identify road signs, displaying the information to the driver or, as will be the case with Ford's upcoming "Intelligent Speed Limiter," adjusting the throttle to maintain a legal speed.
- **Lane-departure warnings and auto-steering**, like in Tesla's Model S and X, use visual, laser, or infrared sensors to detect lane markers. If the car drifts out of its lane, the system either warns the driver or automatically adjust the car's direction.

*Looking Forward—Driverless Cars.* Autonomous technologies make cars safer: fatalities involving 2011 model-year cars are nearly half as likely as fatalities involving those from 2008. As autonomous features become standard equipment, and the opportunity for unpredictable, distracted, and reckless human behavior narrows, these benefits should continue to accrue. Coordination *between* vehicles—vehicle-to-vehicle ("v2v") technologies—promises to make cars even safer. In a v2v system, all cars intelligently communicate with each other via short-range radio, and vehicle-to-vehicle collisions are ideally averted.

The autonomous car revolution promises other benefits as well, such as alleviating traffic. Where all cars play by the same rules and communicate, stop-and-go traffic will move faster. Where cars can be trusted to stay within lanes, highway lanes can be redrawn with narrower lane markings, thereby allowing additional lanes to carry more cars. Taken to its logical extreme, v2v technology may one day eliminate traffic congestion altogether: even a freeway packed to capacity would flow if all cars are able to accelerate and decelerate nearly simultaneously.

Companies are making large investments in pursuit of the driverless car. Since 2012, Google's fleet of driverless cars have together logged over 1.2 million miles, stopped at 200,000 stop signs, encountered 600,000 traffic lights, and "seen" 180 million vehicles. Uber recently hired 40 researchers and scientists from Carnegie Mellon's National Robotics Engineering Center to work on driverless car technology in Uber's cutting edge Pittsburgh research facility. Newcomer Faraday Futures, backed by a yet undisclosed investor to the tune of \$1 billion, hired Nick Sampson, the head of vehicle and chassis engineering for the Tesla Model S, as well as Dan Reckhorn, Tesla's former senior manufacturing executive. Faraday is actively looking for space to build its factory, with a high-end semi-autonomous car slated to hit the roads by 2017.

And Apple's car development project, Project Titan—while still shrouded in mystery—recently received a boost with the hiring of Jonathan Cohen, who was previously the director of Nvidia's deep learning program. Deep learning uses multi-layered neural computer networks to solve perceptual problems. Practical examples include vehicle, pedestrian and landmark identification for driver assistance. For these companies, it is the pursuit of a fully driverless car, as opposed to being merely driver-assisted, that continues to push their research and investment in autonomous vehicle technology.

### ***Patents and Patent Litigation***

It has been estimated that driver-assisted and driverless cars will be a \$42 billion market by 2025. As mobile phone manufacturers know all too well, where an industry enjoys a boom in technological innovation and product evolution, so, too, may that revolution (and accompanying market opportunity) become a target of intense patent litigation. As driver-assisted and driverless cars hit the road, the question is not *if* patent litigation will follow, but *who* will be filing the cases and *how* hardware and software suppliers in the automotive industry can protect themselves.

*Who Owns the Patents?* Patent ownership in the driver-assisted and driverless space ranges from automotive mainstays (like General Motors) to newcomers (like Google) to non-practicing entities (NPEs). According to a 2015 Thomson Reuters report, Toyota, General Motors, and Hyundai file the most “autonomous car” patents, with General Motors having taken the lead in the past two years. Google is an important player as well and, according to a different survey, received the most patents between 2009 and 2014, followed by a non-practicing entity, Eagle Harbor Holdings. With respect to patents on more incremental autonomous features—such as those discussed above—Bosch leads the pack, followed by Audi, BMW, Continental, Daimler, Valeo and Volkswagen.

*What Do These Patents Cover?* Automation in cars is not new. Issued patents reflect that the core of many autonomous features being implemented today was invented and patented decades ago. For example, in 1975, General Motors applied for U.S. Patent No. 4,082,158, on a “[d]ifferential pressure power road speed control system,” *i.e.*, cruise control. As another example, in the mid and late 1980s, General Motors applied for a patent on an adaptive cruise control system that uses video cameras to enable a vehicle to follow a second vehicle at a predetermined distance (U.S. Patent No. 4,987,357) and a patent on a lane detection system used for autonomous vehicle control

(U.S. Patent No. 4,970,653).

Today's patents continue to improve upon these concepts. Google's U.S. Patent No. 8,473,144, filed in 2012, predicts the lateral distance between two passing cars well before they are adjacent to each other, and then adjusts this distance based on the characteristics of the cars. A car with this autonomous feature may leave more room when passing a larger truck than when passing a passenger car. As another example, Google's U.S. Patent No. 8,195,394, filed in 2011, addresses not only the detection of moving objects near an autonomous vehicle, but using machine learning to identify the moving object, decide whether it is a car or a pedestrian, and control the vehicle based on this information.

*Recent Patent Litigation.* Patent litigation in the driver-assisted space is here. NPEs have sued on patents allegedly covering autonomous features against car manufacturers. For example:

- In July 2014, Adaptive Headlamp Technologies Inc. sued BMW on a patent directed to swiveling headlights “whose positions automatically change due to changes in steering angle and pitch of the vehicle after a threshold minimum is passed.” *Adaptive Headlamp Techs., Inc. v. BMW of N. Am., LLC*, 1:14-cv-962 (D. Del.).
- In December 2012, Cruise Control Technologies, a subsidiary of Empire IP, sued 15 car companies—including Porsche, Ford, BMW, and Hyundai—asserting patents allegedly covering cruise control systems. *Cruise Control Techs. LLC v. Toyota Motor N. Am.*, 1:13-cv-00086-GMS (D. Del.). Notably, in June 2015, claims of the asserted patents were found invalid as anticipated by prior art, including a 1989 report by the National Highway Traffic Safety Administration (“NHTSA”).
- In mid-2012, American Vehicular Sciences sued Toyota on two patents for automatic crash notification systems. *American Vehicular Sciences LLC v. Toyota Motor Corp., et. al.*, 6:12-cv-00404 (E.D. Tex.); *American Vehicular Sciences LLC v. Toyota Motor Corp.*, 2:14-cv-13015 (E.D. Mich.).

*Future Patent Litigation Landscape.* Many in the traditional automotive industry have indicated that they have no intention of asserting their driver-assisted and driverless patents. Earlier this year, Toyota announced that it was making available over 5,000 hydrogen fuel cell patents on a royalty-free basis, and Ford and BMW indicated that they are opening up their electric vehicle patent portfolios for licensing. Similarly, Elon Musk, CEO of Tesla, announced in June 2014 that Tesla will apply an “open source” philosophy to its patents. 2012 saw the birth of the Auto Harvest Foundation,

an IP consortium of over 250 manufacturing and R&D organizations from industry, government and academia, whose mission has been to facilitate patent open sourcing and cross-licensing deals.

In recent years, suits by NPEs against the automotive industry have spiked, increasing from 17 lawsuits in 2009 to 107 lawsuits in 2014. NPEs have presented a challenge to the car industry even as car technology evolved from its nascent days to today's modern cars. In 1911, Henry Ford defeated the original automobile NPE—patent lawyer George Selden—when Mr. Ford prevailed on appeal against Mr. Selden's combustion engine patent. NPEs will most likely continue to present a challenge as the technology advances from individual autonomous features to driver-assisted cars and, eventually, to driverless cars.

### ***Potential Patent Defensive Strategies***

Since the beginning of the 21<sup>st</sup> century, high technology products incorporating computer hardware and software have been a frequent target for patent litigation. There is no reason to believe that driverless and driver-assisted technology will be immune from such litigation. Fortunately, both long-standing and recent defensive strategies should work equally well in this arena.

*Patent Eligibility Attacks Under Alice.* One strategy car companies should consider is a patent eligibility attack under the Supreme Court's decision in *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014). In the realm of driver-assisted and driverless cars, many technological advances focus on automating acts previously performed by a human. Accordingly, patent claims on this technology may boil down to little more than instructing a computer to perform a task that human drivers have performed for decades (e.g., changing lanes). Such claims may be vulnerable to attacks under *Alice* because they arguably do nothing more than implement an abstract idea on general purpose computer equipment.

Of course, the actual claim language will drive the analysis. Entities that do not engage in substantial research may attempt to prosecute and later assert patents listing desirable features of a driver-assisted or driverless car ("a method of organizing human activity" under *Alice* and possibly an abstract idea) and merely instruct one of ordinary skill to implement these features with a computer. Under *Alice*, the mere recitation of computer implementation is insufficient to confer patent eligibility on an otherwise patent-ineligible abstract idea. On the other hand, entities that engage in research and development should be able to flesh out and claim the details of how a new autonomous feature

is implemented using, for example, a combination of sensors, software, and actuators. These claims would likely include substantive limitations in addition to generic computer implementation that may be sufficient to confer patent eligibility. Therefore, the application of *Alice* in the realm of driver-assisted and driverless cars has the potential to differentiate weak patents owned by non-practicing entities from legitimate patents claiming true technological advances owned by General Motors, Google, and the other pioneers in the field.

To illustrate, in the *Cruise Control Technologies* litigation mentioned above, claim 1 of the asserted patent, directed to a car's cruise control system, requires only that it would be desirable for a "human operator" to be able to engage cruise control at a particular speed, and to see the speed at which it is set. It may be argued that this is simply "human activity"—an abstract idea—ripe for an attack under *Alice*, and that requiring the speed to be maintained "automatically" does not transform this abstract idea into patent-eligible subject matter.

*Prior Art Attacks.* Some autonomous driving technologies date back a decade or more. Carnegie Mellon's first autonomous vehicle, "Terregator," was demonstrated publicly in 1984. The Eureka Prometheus Project dates back to the late 1980s. More recently, the 2004 Defense Advanced Research Projects Agency ("DARPA") Grand Challenge later demonstrated driverless car technology. Indeed, Ford recently invalidated enhanced cruise control patents by asserting prior art developed by the NHTSA in 1989.

*Attacks on Method Claims Under Limelight.* Car manufacturers should consider the Federal Circuit's *en banc* and unanimous decision in *Akamai Techs., Inc. v. Limelight Networks, Inc.*, 797 F.3d 1020 (Fed. Cir. 2015), holding direct infringement exists "when an alleged infringer conditions participation in an activity or receipt of a benefit upon performance of a step or steps of a patented method and establishes the manner or timing of that performance." This holding may render it more difficult for manufacturers to argue divided infringement where a driver performs one or more steps of a claimed method (manually drives around an obstacle) while the manufacturer's technology performs the other steps (analyzes data collected regarding the driver's action to teach the car to avoid such obstacles in the future). Plaintiffs may argue that the steps performed by the driver are necessary for the driver to benefit from the autonomous feature and so should be attributed to the manufacturer to show direct infringement.

On the other hand, defendant OEMs (who

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## “We’ve Been Hacked!”—New Developments in Cyber-Security Litigation

February’s *Business Litigation Report* advised clients that they could prepare for potential data breaches by conducting readiness audits and preparing cyber incident response plans. (See *Traversing the Breach*, February 2015.) This warning has now taken on new urgency. The Seventh and Third Circuits recognized civil causes of action by both public and private plaintiffs against companies that sustain cyber security breaches.

### ***Seventh Circuit Holds That Hacked Customers Have Standing***

In *Remijas v. Neiman Marcus*, 794 F.3d 688 (7th Cir. 2015), the Seventh Circuit held that retailers who expose their customers to a data breach can be sued even before such consumers suffer any tangible loss. Neiman learned in mid-December 2013 that a malware attack had compromised customer credit card information, leading to fraudulent charges. The plaintiffs asserted Neiman’s alleged misconduct exposed them to an increased risk of credit card fraud and identity theft in the future. They also asserted that they had lost time and money resolving the fraudulent charges and mitigating the risk of future identity theft and suffered financially because they would not have made purchases at Neiman had they known the risks involved. The district court held that the plaintiffs could not show standing because they alleged only speculative future injuries that could result from the data breach. Any allegations of impending or past harm were, the district court held, not concrete because any future loss was or would be compensated. The district court also rejected the plaintiffs’ contention that they had overpaid for goods, stating that such a holding would open the door to lawsuits against stores that failed to provide adequate physical security to customers based on an over payment theory even when they could show no physical injury.

On appeal, the Seventh Circuit disagreed and held that the complaint alleged sufficient past and future injuries to support standing. The plaintiffs argued on appeal that they suffered past injury in the form of “lost time and money protecting themselves against future identity theft and fraudulent charges.” They contended they need not wait until hackers commit fraud or identity theft to obtain class standing because they are likely to be injured in the future. Neiman responded that the plaintiffs’ claimed injuries were too speculative to provide standing to sue. After all, even though these customers’ information had been compromised, they had not yet suffered any ill-effects

from the use of that information, and it was uncertain that they ever would. According to Neiman, whatever costs the plaintiffs incurred trying to avoid fraud were not cognizable injuries. Neiman also argued that it was uncertain that the data breach had caused the plaintiffs’ injuries; another major retailer, Target, had suffered a data breach in the same time period.

The Seventh Circuit disagreed with Neiman’s arguments. The court stated, “[p]resumably, the purpose of the hack is, sooner or later, to make fraudulent charges or assume those consumers’ identities.” *Id.* The panel also concluded that the defendant had the burden “to prove that their negligent actions were not the ‘but-for’ cause of the plaintiff’s injuries.” *Id.* at 696 (internal citations omitted).

The court did reject the plaintiffs’ more speculative claims of injury. For example, the court held that the data breaches did not deprive consumers of their private information, as “private information” is not a property right under federal law. The court also rejected the argument that the plaintiffs “overpaid” because Neiman did not adequately expend resources building a secure system. Finally, the court rejected the quasi-unjust enrichment argument that Neiman pocketed more than its fair share by choosing to not build a robust security regime.

### ***Third Circuit Holds That Failure to Secure Data May Be an Unfair and Deceptive Trade Practice***

Potential liability from data breaches is not limited to class actions. Recently, the Third Circuit held in *FTC v. Wyndham*, 799 F.3d 236 (3d Cir. 2015), that the FTC could pursue claims against a hotel chain from whom hackers stole the information of 619,000 guests, leading to over \$10 million in fraudulent charges to stolen credit card numbers. The FTC sued Wyndham for engaging in “unfair” and “deceptive” practices under 15 U.S.C. section 45(a), alleging that Wyndham failed to provide appropriate security for its guests’ personal information. Because the hotel failed to follow its own advertised privacy policy, the court concluded that the plaintiffs had properly alleged unfair and deceptive business practices.

Each Wyndham branded hotel had a property management system that processed consumer information including names, home addresses, email addresses, telephone numbers, payment card account numbers, expiration dates, and security codes. Wyndham also operated a computer network in Phoenix that connected to all of these property management systems. The FTC claimed that Wyndham failed

## Entertainment Litigation Update

***Ninth Circuit Holds That Copyright Holders Must Consider Fair Use Before Sending Takedown Notifications.*** In *Lenz v. Universal Music Corp.*, No. 13-16106 (9th Cir. Sept. 14, 2015), the Ninth Circuit became the first federal court of appeals to address the question of whether fair use constitutes “authorization under the law” under the Digital Millennium Copyright Act (“DMCA”). Answering that question in the affirmative, the Ninth Circuit held that the DMCA requires copyright holders to “consider the existence of fair use before sending a takedown notification” under the DMCA.

*Lenz* involved a YouTube video posted by the plaintiff, Stephanie Lenz, which featured Lenz’s children dancing to a song by Prince. Universal flagged the video as infringing based on a number of guidelines, none of which expressly involved consideration of fair use. Universal sent a takedown notification to YouTube which, as required by the DMCA, included a statement that Universal had “good faith belief” that Lenz’s use of the song in her video was unauthorized. 17 U.S.C. § 512(c)(3)(A)(v). YouTube removed Lenz’s video.

Lenz sued Universal under 17 U.S.C. section 512(f) on the grounds that Universal had “material[ly] misrepresent[ed]” in its takedown notification that her video was infringing. In essence, Lenz asserted that Universal had failed to consider whether her video made fair use of the song and Universal had therefore misrepresented that it had formed a good faith belief that Lenz’s use was not “authorized by law.” Universal countered that a fair use is not “authorized by law” for purposes of the statute. The Ninth Circuit disagreed, concluding that because the statute defining fair use, 17 U.S.C. section 107, explicitly states that fair use is not infringement, *id.* at 11, “fair use is ‘authorized by law’ and a copyright holder must consider the existence of fair use before sending a takedown notification under § 512(c).” *Id.* at 15.

In addition to this landmark holding, *Lenz* is notable for its analysis of the means of assessing whether a copyright holder’s statement of good faith belief constitutes a “knowing” misrepresentation. The court explained that this is a *subjective* rather than *objective* inquiry: the question of the truth of Universal’s good faith belief statement turned not on whether the court itself would consider Lenz’s video fair use, but rather on “whether Universal formed a good faith belief that it was not.” *Id.* at 15, 17. The court noted that plaintiffs can establish this subjective belief via evidence that the copyright holder had actual

knowledge that it was making a misrepresentation in its takedown notification when it claimed to have a good faith belief that plaintiff’s work was infringing. The court held that evidence of a failure to consider fair use raises a triable issue of fact as to whether the copyright holder made a knowing misrepresentation. *See id.* at 15-17.

Intriguingly, and of interest to copyright holders, the court held that the consideration of fair use necessary to avoid liability under section 512(f) “need not be searching or intensive.” *Id.* at 18. In fact, the court suggested, without deciding, that the use of computer algorithms to flag for takedown content that is highly unlikely to constitute fair use, with human employees reviewing the small amount of remaining content, would likely be sufficient. *Id.* at 19.

The court also held that plaintiffs generally rely on the willful blindness doctrine to establish that a copyright holder made a knowing misrepresentation. That doctrine requires a showing that the copyright holder was aware of a high probability that the use in question was fair, but nonetheless took deliberate action to avoid learning that fact. However, because Lenz had failed to provide any evidence “that Universal was aware of a high probability the video constituted fair use,” the court held that she could not rely on willful blindness. *Id.* at 20-21.

It will be interesting to see whether other circuits follow the Ninth Circuit’s analysis. In the meantime, copyright holders should consider fair use before sending takedown notifications.

## International Arbitration Update

***Increasing Trend of Requiring Disclosure of Litigation Funding Agreements in International Arbitration.*** Third-party funding of litigation is a fast-growing industry, and funders have become increasingly active in funding international arbitration claims. This financing has been around for several years, but as it matures, litigants are pursuing disclosure of such third-party funding agreements. Parties contemplating third-party funding in the international arbitration context should be aware of recent decisions imposing disclosure obligations of such financing arrangements. A recent decision by an ICSID panel, and the ICC’s Dossier X: Third-party Funding In International Arbitration, has required or advocated for disclosure of third-party funding agreements to the funded party’s adversary and the arbitration panel.

In U.S. litigation, parties considering third-party funding typically enter into non-disclosure agreements with prospective or actual funders and view their communications, negotiations, and agreements with

litigation funders as immune from discovery. The limited case law addressing this issue tends to support the argument that information shared with litigation funders is protected from disclosure pursuant to the attorney work-product doctrine.

To get a funder to supply financing on favorable terms, the claim holder (typically through its attorney(s)) often must convince the funder of the merits of the case. Such negotiations may involve disclosure of the “lawyers’ mental impressions, theories and strategies about” the case, which constitute work product under the Federal Rules of Civil Procedure. Similarly, the terms of a funding agreement—such as the financing premium or acceptable settlement conditions—often reflect attorney analysis of the merits of the case.

U.S. courts generally hold that work product protection is waived by disclosure to a third-party only when that disclosure substantially increases the opportunities for adversaries or potential adversaries to obtain the information, and/or where a party has not taken reasonable steps to preserve the confidentiality of the information. Thus, where documents are shared with third-party funders subject to confidentiality or non-disclosure agreements, courts generally agree that work product protection is *not* waived.

In stark contrast to the disclosure protections afforded to third-party funding arrangements in U.S. litigation, in international arbitration some degree of disclosure of third-party funding agreements may become the rule rather than the exception. There are two significant reasons for this.

***Avoidance of Conflicts of Interest and Preservation of Arbitrator Independence.***

Private arbitrators, unlike judges or juries, often are senior partners or counsel at large international law firms that frequently do business with litigation funders. It is possible, for example, that an attorney acting as a neutral arbitrator in one case—in which one of the parties’ claims are being financed by a funder—may be representing a separate party in a separate case in which his fees are being paid by that same funder. Thus, absent disclosure of the identity of the funder at the outset, conflicts of interest may exist or arise that compromise (at least the perception, if not the reality, of) the arbitrator’s independence. If such conflicts are revealed only later in the arbitration, the legitimate constitution of the panel and its integrity may be placed in doubt and subject to challenge in the arbitration when the information is revealed, or in a subsequent collateral attack, such as in a motion to vacate or set aside the award (or seek its annulment in the ICSID context). This concern likely played a role in the International Bar Association’s decision to revise

Guidelines on Conflicts of Interest to include third-party funders as entities to be considered part of the same legal entity as the funded party to the dispute.

***Payment of Costs Awards.*** Although an award of costs can be seen in both U.S. litigation and international arbitration, such “costs” are often nominal in U.S. litigation, but substantial in international arbitration where the “costs” can include attorneys’ and experts fees as well as the fees of the arbitrators and can thus amount to millions of dollars. A party relying on a third-party funder to pay the cost of pursuing claims may not be able to pay a costs award if it loses, and if the agreement with the funder does not require the funder to pay a costs award, the adversary may be left empty handed.

These considerations led the ICSID tribunal in *Muhammet Çap & Sehil İnşaat Endustrive Ticaret Ltd. Sti. v. Turkmenistan* (ICSID Case No. ARB/12/6), to issue a sweeping procedural order requiring the Claimant to disclose: (1) whether its claims were funded by a third-party funder, (2) the identity and “details” of the funder, (3) and “the nature of the arrangements concluded with the third-party funder(s), including whether and to what extent it/they will share in any successes that Claimants may achieve in this arbitration.” The panel determined that these disclosures were necessary to protect the integrity of the proceedings by avoiding potential conflicts of interest, for transparency, and to address “Respondent’s concern that if it is successful in this arbitration and a costs order is made in its favour, Claimants will be unable to meet these costs and the third-party funder will have disappeared as it is not a party to this arbitration.”

\* \* \*

Funded parties that are concerned that agreements or information shared with third-party funders may be disclosed to their adversaries and/or the tribunal may take preemptive measures to avoid the need for disclosure. If conflicts of interest are a concern, for example, a party may disclose at the outset that its claims are being funded by a third-party and identify the third-party, without disclosing the funding agreement itself. If the ability to pay a costs award is the concern, the party may offer to post security for costs and/or represent (if true) that the funding agreement obligates the third-party to cover an award of costs.

In sum, parties to international arbitration—particularly those used to the protection of work product under the U.S. disclosure rules—should be mindful of the increasing trend in international arbitration to require disclosure of third-party funding relationships. Although some preemptive measures

may be taken to avoid disclosure of information that has particular strategic value, parties should be cautious in sharing information with funders and in structuring funding agreements, mindful of the possibility that an international arbitration panel may order the information and agreements be disclosed.

## Asia-Pacific Litigation Update

**The Trans-Pacific Partnership and Investor-State Dispute Settlement.** On October 4, 2015, the long-awaited Trans-Pacific Partnership (“TPP”) was concluded. The TPP is a free trade agreement among twelve Pacific Rim nations, which include Australia, New Zealand, Singapore, Malaysia, Japan and the United States, representing around 40% of global GDP and 33% of world trade. According to the Office of the United States Trade Representative (“USTR”), TPP’s goal is to “promote economic growth; support the creation and retention of jobs; enhance innovation, productivity and competitiveness; raise living standards; reduce poverty in our countries; and promote transparency, good governance, and enhanced labor and environmental protections.”

One of the most notable and controversial points of the TPP is the inclusion of an investor-state dispute settlement (“ISDS”) mechanism. Some commentators say the ISDS clauses allow investors of member states to bypass local courts, exposing them to liability (and millions in damages payouts) for actions and policy choices of sovereign states. The flipside, of course, is that ISDS protects foreign investors, where state measures and regulations infringe upon lawful business operations, prejudice foreign (over domestic) investors, or entirely take from or foreclose investors from reaping the rewards of their investment.

**Investor-State Dispute Settlement (“ISDS”).** Nowadays, ISDS is a common instrument of international investment protection treaties. ISDS grants an investor the right to sue a foreign government for violation of treaty obligations before a neutral and impartial tribunal. Various forms of ISDS are a part of over 3,000 agreements worldwide, including the North American Free Trade Agreement, the Energy Charter Treaty, and the China-Australia Free Trade Agreement.

**Controversy over ISDS.** The most significant concern over ISDS is the potential impact of ISDS rulings on a state’s internal public policy. The still-pending *Philip Morris v. Australia* case is an example frequently cited by the critics of ISDS. On December 1, 2011, the Tobacco Plain Packaging Act 2011 (“Act”) became effective in Australia as part of an effort to reduce the rate of smoking in Australia. Philip Morris, one of the world’s largest tobacco companies, challenged

the legislation under the 1993 Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments (“1993 BIT”). Phillip Morris argued that the measure amounted to an expropriation of its Australian investments, unfair and inequitable treatment, and deprivation of full protection and security in breach of several articles of the 1993 BIT. It was reported that the case has already cost the Australian government U.S. \$50 million in legal fees and expenses in defending its position. The case is often cited by critics to demonstrate that an ISDS mechanism can be used as a tool for private industry to undermine a government’s public policy and internal regulation.

**ISDS in TPP—Safeguards.** In order to deal with the concerns over ISDS, minimize the risk that a government’s internal policy will be negatively impacted by an investor’s suit and safeguard against potential abuses of ISDS, TPP has included the following “safeguard” protections:

1. Recognition of the inherent right of a government of the TPP member states to protect legitimate public welfare objectives, such as public health, safety and environment: Article 9.9.3 (d)
2. Full transparency of the arbitral proceedings: Article 9.23
3. Dismissal of frivolous claims: Article 9.28.4
4. Expedited review: Article 9.22.5
5. Three-year statute of limitation: Article 9.20.1
6. Appellate mechanism: Article 9.22.11
7. Binding effects of an interpretation of the treaty issued by a designated commission: Article 9.24.3
8. Tribunal’s right to appoint independent experts: Article 9.26

**ISDS in TPP—Intellectual Property.** In addition to the above safeguards, another notable provision of the TPP is Section 9.1, which lists “intellectual property” as an asset that can be subject to an ISDS procedure. That means investors of TPP members states could sue any of the other member states for introducing rules that unlawfully encroach on their intellectual property rights and interests. Critics say that this provision impedes on members states’ rights to enact intellectual property rules that benefit the public, in favor of the profiteering foreign investors. For example, in 2013, U.S. pharmaceutical company Eli Lilly brought suit against Canada for \$500 million, alleging that Canada violated similar NAFTA provisions by invalidating two of Eli Lilly’s drug patents. The Canadian courts



found that the drugs did not have the utility or benefits that the company claimed in seeking the patent. Such cases have an important impact on public health and economic policy because the grant of patents can preclude competition for lengthy periods.

Whatever the critics say, there is a large and powerful interest in having a neutral legal mechanism to uphold

the rule of law and resolve disputes, although the macroeconomic benefits of the TPP—and in particular the ISDS provisions—to member states' economies and foreign direct investment, remain to be seen. [Q](#)

*(Noted With Interest continued from page 5)*

to offer basic data security—for example by using easy passwords to limit access—to the hotels' property management systems and the Wyndham corporate network, and by failing to adequately deploy firewalls. In spite of this, Wyndham advertised: “We safeguard our Customers' personally identifiable information by using industry standard practices.”

The Third Circuit decision addressed: (i) whether the FTC has authority to pursue data security breaches as “unfair” practices, and (ii) whether Wyndham had sufficient notice that its conduct fell within that statute. First, the court held that Wyndham's failure to employ basic protection methods (such as encryption and firewalls) could amount to an unfair practice. This failure unnecessarily exposed consumers to financial injury and deprived them of the benefit of their purchase. Second, a finding of liability under the Federal Trade Commission Act did not violate guarantees of due process and fair notice. The court rejected Wyndham's claim it was entitled to know with “ascertainable certainty” the Commission's interpretation of the definition of adequate cybersecurity practices. The court reasoned that it is enough that the hotel chain had fair notice of what the Act requires, and that its conduct could fall within the bounds of the applicable statute, 15 U.S.C. section 45. Further notice was provided through FTC administrative complaints and ensuing consent decrees, which were published on the FTC's website and noticed in the Federal Register. Wyndham argued that allowing the FTC's unfairness authority to police their alleged security failures would be an unprecedented expansion of the FTC's regulatory authority. They argued that this was tantamount to allowing the FTC “to sue supermarkets that are sloppy about sweeping up banana peels,” but the court disagreed. “[W]ere Wyndham a supermarket, leaving so many banana peels all over the place that 619,000 customers fall hardly suggests it should be immune from liability under [section] 45(a).”

Following the decision, the FTC chairwoman

(and former Quinn Emanuel partner) Edith Ramirez released a statement: “Today's Third Circuit Court of Appeals decision reaffirms the FTC's authority to hold companies accountable for failing to safeguard consumer data. It is not only appropriate, but critical, that the FTC has the ability to take action on behalf of consumers when companies fail to take reasonable steps to secure sensitive consumer information.”

\* \* \*

*Remijas v. Neiman Marcus* and *FTC v. Wyndham* collectively have strengthened the ability of private and public plaintiffs to bring lawsuits against firms that are victims of hackers. Firms can expect civil litigation if their security measures are inadequate and hackers break into their networks, and should be particularly aware of “unreasonable” security policies. Examples from *Wyndham* include the use of simple passwords, absence of firewalls, use of unsecured networks, and failure to restrict access to networks and private information. Cyber incident response plans should include measures such as a legal response, notification, public communications, and specific measures to remedy the gap in the firm's security policies. Firms should keep abreast of the FTC's enforcement efforts to determine what data security measures are required under 15 U.S.C. section 45. One additional area (not addressed by the Third Circuit) that businesses should take note of is the FTC's decision to bring a claim against Wyndham for its allegedly misleading privacy policy. The FTC's actions are a warning that firms who market that they protect customer information must also implement policies that support that claim. [Q](#)

# VICTORIES

## Historic \$1.87 Billion Antitrust Victory

In one of the largest private antitrust settlements in history, Judge Denise L. Cote of the Southern District of New York preliminarily approved a \$1.87 billion settlement in a credit default swaps (“CDS”) case in which Quinn Emanuel represented the plaintiff class. The class is made up of investors in CDS, including pension funds, university endowment funds, hedge funds, insurance companies, corporate treasuries, fiduciary and depository institutions, small banks, and money managers. The court appointed Quinn Emanuel, along with Pearson, Simon & Warshaw, LLP, as co-lead counsel for the class in late 2013. In other words, it only took two years for private litigants to achieve a multi-billion dollar settlement even though both the Department of Justice and the European Commission had been investigating the same claims since 2009, but had not yet taken any action against a single bank dealer defendant. In just two years, Quinn Emanuel filed a complaint, defeated defendants’ motions to dismiss, and moved forward with an aggressive discovery schedule that involved the review of millions of documents and the depositions of over thirty witnesses. The firm also prepared and was ready to file class certification papers, including several expert declarations in support of class certification, but the defendants pulled the plug and settled the case on the eve of the deadline to file for class certification. As Judge Weinstein (Ret.) stated in a sworn declaration submitted in support of the settlement, in his 30 years of mediating complex disputes, “this was one of the finest examples of efficient and effective lawyering that I have ever witnessed.”

The case involved allegations that twelve Wall Street banks conspired between themselves and industry fixtures International Swaps and Derivatives Association and Markit, to ensure that CDS continued to be traded in the opaque “over-the-counter” market that the banks dominated, with 95% market share. They did this by collectively blocking the emergence of trading platforms that would, for instance, have allowed buy-side members to trade CDS with each other rather than having to always go through a dealer. For instance, in 2008 the Chicago Mercantile Exchange and Citadel Investment Group attempted to launch “CMDX,” a platform that would have had such exchange-like features. But the defendants prevented it from doing so by, among other things, conspiring to prevent CMDX from obtaining the licenses needed for it to launch.

This is an important victory for the class that, if approved by the court, will result not only in substantial

recoveries for class members (not just collectively but also, unlike in many class-actions, often individually as well), but also will help reform the CDS market going forward. The settlements include valuable injunctive relief that will help ensure the CDS market is allowed to evolve freely.

## Victory for the Academy of Motion Picture Arts and Sciences

On behalf of the Academy of Motion Picture Arts and Sciences, the firm recently vindicated the enforceability of the Academy’s right of first refusal to buy back Oscar statuettes for \$10. Doing so required Quinn Emanuel to litigate a rarely invoked aspect of property law, “equitable servitude,” as applied to a unique piece of personal property, the Oscar statuette.

The case found its genesis in 1951, when the Academy adopted a corporate bylaw that restricted the ability of any winner—and the winner’s heirs and successors in perpetuity—to sell the statuette without offering it first to the Academy for \$10. This restriction was implemented in two ways. First, all future nominees were required to sign a “winner’s agreement” that obligated them and their heirs. Second, the bylaw stated that any member of the Academy who had previously been awarded an Oscar was subject to the restriction whether or not they ever signed a “winner’s agreement.” The Academy’s stated goal was to prevent an Academy Award from becoming an article of commerce to be bought and sold—it had to be earned.

Over the years, various heirs and auction houses have challenged these restrictions on alienability. The most recent case, however, is the first time a court has addressed the enforceability of the bylaws as a contract for a right of first refusal without a signed winner’s agreement. More importantly, the court here affirmed as a matter of law that a restriction on alienability can run with the chattel, binding the winner’s successors to the Academy’s right of first refusal. The briefs and the court’s opinion cited cases and legal commentaries going back to the 16th century.

Last year, Sanders auction house, which was on notice of the Academy’s legal position because of prior attempts to auction Oscar statuettes, purchased for \$79,800 an Oscar awarded to Joseph Wright in 1942 for Best Color Art Direction in *My Gal Sal*. Sanders advertised the statuette for its own auction, seeking over one hundred thousand dollars. On behalf of the Academy, the firm threatened to seek a court order blocking the sale. Sanders withdrew the item from auction but sought a judicial declaration invalidating the Academy’s right of first refusal agreement entirely. The trial court, however, denied Sanders’ motion for

summary judgment and ruled in the Academy's favor. Restrictions on the alienability of personal property are rare, but citing an array of cases and authorities going back to the 16th century, the court affirmed the Academy's rights entirely. Shortly thereafter, with the Academy's affirmative summary judgment motion pending (and the judge's inclination now apparent), Sanders capitulated, signing a stipulated judgment and agreeing to surrender the Oscar to the Academy for \$10.

### Pro Bono Victory Results in Client's Immediate Release from Federal Prison

The firm along with co-counsel, Starnes Davis Florie in Birmingham, Alabama, recently obtained Luis Rivera's release after serving 30 years in federal prison. Mr. Rivera was serving a federal sentence of "life" plus a concurrent 80 years for drug trafficking offenses.


In 1985, a jury in the Eastern District of Oklahoma convicted Mr. Rivera of several drug offenses stemming from the seizure of cocaine. At the time, Mr. Rivera was 29 years-old, had no criminal history, and was a veteran of the United States Army National Guard. Nevertheless, the judge sentenced Mr. Rivera to "life without parole" plus a concurrent 140 years (later reduced to "life without parole" plus a concurrent 80 years).

Even though he had no realistic hope of ever being released from prison, Mr. Rivera was an exemplary inmate and, in 30 years, was never cited with a single disciplinary infraction. For this reason, a Bureau of Prisons psychologist took the extraordinary step of writing a letter in support of Mr. Rivera's release from

prison. Unfortunately, once a federal defendant's sentence becomes final, absent government cooperation or evidence showing actual innocence, the only avenue for an early release is a Presidential commutation of sentence. The odds of such relief are extremely long.

Thus, Quinn Emanuel decided to pursue a novel strategy on Mr. Rivera's behalf. One year ago, Judge Gleeson in the Eastern District of New York asked then-U.S. Attorney (now Attorney General) Loretta Lynch to vacate two counts from a defendant's conviction eighteen years earlier. Judge Gleeson based his request on the "fairness" that he said was "inherent in our system of justice." When Ms. Lynch agreed to do so, Judge Gleeson applauded her decision in an opinion and order releasing the defendant from prison. See *United States v. Holloway*, 68 F. Supp. 3d 310 (E.D.N.Y. 2014).


Relying on *Holloway*, the firm's strategy was to request that both the U.S. Attorney for the Eastern District of Oklahoma and Judge Seay (still on the bench 30 years later) follow the precedent set by Judge Gleeson. Quinn Emanuel met with United States Attorney for the Eastern District of Oklahoma, Mark Green, who agreed to the firm's proposal.

After the meeting, Quinn Emanuel filed a motion requesting Mr. Rivera's immediate release and citing *Holloway*. The government then filed a response supporting the firm's motion and citing *Holloway* as precedent. Judge Seay subsequently granted the motion, and Mr. Rivera was released a few hours later after serving thirty years in prison. 

(lead article continued from page 4)

manufacture sensors or other technology that perform one or more steps involved in an autonomous feature) may still be able to rely on the Supreme Court's holding in *Limelight Networks, Inc. v. Akamai Techs., Inc.*, 134 S.Ct. 2111 (2014), that indirect infringement requires a direct infringer who performs all claimed steps. An OEM may be able to argue that a driver is not required to perform the allegedly infringing step (processing data received from the OEM's sensor in the claimed manner) to benefit from other uses of the OEM's product (the data received from the OEM's sensor is also used by other, non-infringing features). Thus, the OEM may be able to argue that no indirect infringement exists because the plaintiff cannot attribute to a single entity the combination of steps performed by the OEM's product and those performed by the manufacturer or

driver.

*Post-Grant Proceedings.* Car companies in driverless and driver-assisted technology litigation can also take advantage of other "tried and tested" defensive strategies, such as post-grant patent challenges made available under the America Invents Act. For example, in both the *American Vehicular Sciences* and *Cruise Control Technologies* litigations, the defendants obtained dismissals aided by taking advantage of post-grant attacks that successfully invalidated patents asserted against the automotive industry. 

## business litigation report

# quinn emanuel urquhart & sullivan, llp

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