Oregon Chapter
Federal Bar Association
209 SW Oak Street, Suite 500
Portland, OR 97204

New FBA Members Welcome

Membership Eligibility. FBA membership is open to any person admitted to the practice of law before a federal court or a court of record in any of the states, commonwealths, territories, or possessions of the United States or in the District of Columbia, provided you are or have been an officer or employee of the United States or the District of Columbia, or you have a substantial interest or participate in the area of federal law. Foreign Associate Status is open to any person admitted to practice law before a court or administrative tribunal of a country other than the United States. Law Student Associate Status is open to any law student enrolled at an accredited law school. If you wish to join, please visit www.fedbar.org and click on the "Join" link.

Call for Submissions/Publication Schedule

For the District of Oregon welcomes submissions from everyone. The deadlines are March 15, 2014, June 15, 2014, September 15, 2014 and December 15, 2014. We ask only that you inform us in advance if you are preparing a submission. Please direct inquiries to **Nadine Gartner** at (503) 227-1600 or ngartner@stollberne.com.

A Quarterly Newsletter of the Oregon Chapter of the Federal Bar Association

For the District of Oregon

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IN THIS ISSUE

THE DISTRICT OF OREGON CONFERENCE *INNOVATIONS IN THE LAW: SCIENCE AND TECHNOLOGY*

By: Laura Salerno Owens, Federal Bar Association Treasurer

The 2013 District of Oregon Conference was an inventive and unique event. The Conference, entitled "Innovations in the Law: Science & Technology," took place at the Oregon Museum of Science and Industry (OMSI) in Portland, Oregon, on September 20, 2013. The Conference featured entrepreneurs and innovators from across the country who are using technology to transform the practice of law.

The Conference was inspired by ReInvent Law conferences organized and presented by University of Oregon alumnus and former Miller Nash law clerk, Daniel Katz. Professor Katz currently teaches at Michigan State University and is a 2013 ABA award-winning Legal Rebel. He is the cofounder and codirector of the ReInvent Law Laboratory, which, among other things, focuses on changing legal education to emphasize entrepreneurship and promote the use of the latest technology in the delivery of legal services. Professor Katz, who was the keynote speaker at the Conference, worked closely with **Chief Judge Ann Aiken** and other conference organizers to attract top thinkers and innovators in this field. He also graciously allowed the Conference to use his unique pop panel concept for its morning presentations.

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THE DISTRICT OF OREGON CONFERENCE *INNOVATIONS IN THE LAW: SCIENCE AND TECHNOLOGY*

Continued from page 1

Indeed, part of what made the Conference so dynamic was the pop panel presentation style. This style gives speakers 6 or 12 minutes to describe creative and futuristic uses of technology and their impact on the practice of law. For example, Nicole Auerback, of Valorem Law Group, who spent nearly 15 years working for large firms in Chicago presented fascinating statistics about the deleterious impact that the billable hour system has on the professional development of women. She discussed how lawyers can use technology to practice law outside of the paradigm of the large firm based on the billable hour. She ended her provocative talk with the admonition "Tick tock, it's time for women to break the clock."

Other speakers weighed in on how they personally have used technology to transform their delivery of legal services. One presenter discussed using publicly available government data to create a search engine for trademarks, which was then used to generate leads for his firm, making his small firm one of the most productive trademark firms in 2012. The founder of an online legal document site shared his vision for opening brick-and-mortar stores to sell fixed-price legal services. Several lawyers who practice at virtual law firms spoke about their development of mobile tools for delivering legal services. Other presenters focused on their development of software to analyze contracts and develop standard practices. Representatives from tech leaders such as Intel and Nike provided their perspectives about technology and the legal system.

In the afternoon, the use of technology in the courts was the focus. Lawyers learned how to use tablet technology, such as iPads, in their practice and in court. Judges from both state and federal courts discussed using technology to administer justice more efficiently and shared real-world experiences with electronic filing. A panel of experts on the corrections system highlighted the federal trends in evidence-based practices, data-tracking strategies, and new legislation designed to reduce population growth in prison.

A wide range of attorneys, law students, and community members attended the event. Various media representatives covered the event, including Bryan Denson from *The Oregonian* and Rachel Zahorsky from the American Bar Association.

There were also many enthusiastic comments posted on Twitter during the event using the #ORFBAConf twitter handle. Here are just a few:

> Jake Kamins @AnimalDDA
> Enjoying multiple (very fast + very informative) presentations this morning at #ORFBAConf! Great job @fbaoregon!

> Ed Walters @EJWalters
> If you're looking for some great legal problem solvers & thinkers, follow the speakers I've been highlighting at #ORFBAconf. #FF

> Eli Rosenblatt @pdxinvestigator
> Thanks to everyone behind #orfbaconf! So dynamic & well organized.

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And thank you to the following outgoing directors, who are moving on to new adventures:
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Missing Electronic Notices?

Change of Address? We have been sending the electronic notices via our listserv. Although we have made every effort to obtain our members' email addresses, we need your help to keep our list accurate and current. For those members without email, we are providing the electronic notices by fax. If you have an email address or fax number and have *not* been receiving electronic notices, or if your email address changes, please contact our listmaster at anelson@barran.com. For a change in physical address, please notify **Nadine Gartner**, ngartner@stollberne.com or **Nadia Dahab**, nadia_dahab@ca9.uscourts.gov to ensure you continue to receive mailings from the Oregon Chapter of the Federal Bar Association. All address changes will be forwarded to the national Federal Bar Association.

For the District of Oregon *is a quarterly newsletter of the Oregon Chapter of the Federal Bar Association. Editor Nadine A. Gartner, c/o Stoll Berne, 209 SW Oak Street, Suite 500, Portland, Oregon, 97204, 503-227-1600.*

ANNOUNCEMENTS

Thanks for a Great Young Lawyers Division Event!

On September 30, 2013, the Young Lawyers Division held a social connecting law students with federal practitioners and judges. The event was well attended and the students and practitioners alike enjoyed the opportunity to meet and make new connections. Special thanks to Barran Liebman for hosting the event and to Lewis and Clark Law School and the Oregon Chapter of the Federal Bar Association for sponsoring the food and drink.

Upcoming FBA Luncheons

The FBA monthly lunches take place on the third Thursday of each month at the University Club, 1225 SW Sixth Avenue, Portland, Oregon.

November 21, 2013	Judge Michael Simon
January 16, 2014	Judge Michael Mosman
February 20, 2014	Chief Judge Ann Aiken

Cost is $22 for FBA members and $24 for non-members. Please make reservations for either a vegetarian or meat lunch entrée by emailing Connie.VanCleave@MillerNash.com. The RSVP deadline is the Tuesday before each lunch.

The presentations were followed by a hosted cocktail hour, where participants were treated to wonderful music by The Tabor Trio and enjoyed the new cocktail lounge at OMSI. Then the conference moved to dinner in OMSI's turbine hall, where participants dined among OMSI's interactive exhibits.

The FBA extends a warm thank you to the wonderful speakers for helping to inspire and challenge us to embrace new approaches and new technologies. Many of the speakers have indicated a willingness to return to Oregon for further conferences and the FBA is already thinking of topics for future conferences. For now, we end with a warm thank you to the speakers of this conference, which is hopefully the first of many.

Thank you to our speakers: Raj Abhyanker; Judge John Acosta; Ajaz Ahmed; Chief Judge Ann Aiken; David Angeli; Ann Armstrong; Melissa Aubin; Nicole Auerbach; Ray Bayley; Will Blasher; Michael Bommarito; Kevin Colangelo; Andy Daws; Devin Desai; Ron Dolin; Barb Frederiksen-Cross; Judge Lisa Greif; Michael Haglund; Marci Harris; Bill Henderson; Sylvia Hodges Silverstein; Dwight Holton; Sol Irvine; Daniel Katz; Dr. George Keepers; Stephanie Kimbro; Amanda Marshall; Kingsley Martin; Judge Maureen McKnight; Jim Melamed; Heidi Moawad; Chief Judge Susan Oki Mollway; Charley Moore; Mary Moran; Teri Nafisi; Commissioner Steve Novick; Judge Beverly Reid O'Connell; Chas Rampenthal; Eli Rosenplatt; Mark Sherman; John Sherry; Ann Marie Shurden; Morgan Smith; Wilson Smith III; Chris Stone; Ed Walters; and Daniel Wilson.

THE ASHMANSKAS TRIVIA BOX

An FBA tribute to the memory and humor of Magistrate Judge Donald C. Ashmanskas

What famous judge wrote that free speech does not permit a person "in falsely shouting fire in a theatre and causing a panic"?

Answer on page 9.

THE PRESIDENT'S COLUMN

By: Jolie A. Russo
Federal Bar Association President

The 2013 District of Oregon Conference was an unforgettable event and it did not end with the last speaker on the OMSI stage. Participants continued to share ideas and make connections with each other in the days that followed, and I'm pleased to announce that we've received the following positive feedback from lawyers, judges, and sponsors:

"I write to thank you and congratulate you for a wonderful program! For those of us leading firms and shaping community policy, it was an idea-rich program with thought-provoking speakers." – Renee Rothauge, Partner, Markowitz Herbold

"You built an enormous bridge between the present and the future with this conference. I predict many positive ripple effects." – Marci Harris, Founder, PopVox

"The presentations at Oregon's district conference on Friday were almost dizzying--maybe shocking--in their portrayal of the changes occurring in the practice of law. I feel very fortunate to have been invited to attend; it was intellectually scintillating." – Richard Wieking, Clerk of Court, Northern District of California

"There are geniuses and then there are geniuses who change the world. You brought together so many of this latter type. I loved and appreciated the concept of having so many brilliant people who gave very quick-hitting talks. I can't begin to point to one or two favorites because, taken as a group, the speakers all contributed so much. It is going to take me a long time to process what I heard and experienced. I'm inspired." – Bill Sharp, Partner, Monks & Sharp Law Office

"It was an exciting and well-organized conference, full of engaging speakers." – Ellen Rosenblum, Oregon Attorney General

This success is a testament to the incredible lawyer volunteers, sponsors, court staff, and speakers that made the day. Each of you was instrumental in building this District Conference after an absence of many years. Thanks for your support.

I'd also like to acknowledge the partnership between the members of the District Court, the Ninth Circuit Representatives, and the Oregon Federal Bar Association, who devoted their time and talent in countless ways. A warm thank you, again, to our wonderful speakers for helping inspire and challenge us to embrace new approaches and new technologies. Finally, we are grateful to our many sponsors for their generous and important support of this groundbreaking event.

[2] In Andrew Niccol's 1997 feature film *Gattaca*, Vincent Freeman (played by Ethan Hawke) lives in a future society in which the government uses a compulsory genetic registry database to instantly identify and classify individuals in matters relating to professional employment and law enforcement. Genetic discrimination technically is prohibited, but frequent screening – in the form of urinalyses, buccal swabs, or blood draws – makes profiling based on an individual's genotype a widespread practice, and the practice permits enforcement of strict genetic standards. Professional employment, relationships, and individual success are all determined, dispositively, by one's allele makeup.

The Ashmanskas Trivia Answer

Justice Oliver Wendell Holmes in *Schenck v. United States*, 249 U.S. 47, 52 (1919).

THE FBA ANNUAL MEETING IN SAN JUAN, PUERTO RICO

By: Gosia Fonberg
Federal Bar Association President-Elect

This past September, five Oregon Chapter of the FBA board members—Chief Judge Ann Aiken, **Jolie Russo** (Chapter President), **Gosia Fonberg** (President-Elect) **Susan Pitchford** (Immediate Past President), and **Laura Salerno Owens** (Treasurer)—attended the FBA's annual meeting and convention in San Juan, Puerto Rico. Although it was hard to resist the beautiful sunshine and Caribbean beaches (as evidenced by the photo of Jolie and Gosia at the beach), it was worth staying inside to attend the CLE sessions. Judge Aiken and the Hon. Ruben Castillo, United States District Judge for the Northern District of Illinois presented on the status and future of re-entry court. Other CLE topics included presentations on gun policy, caring for our military, *Daubert* motions, class actions, the top ten bankruptcy cases of the past year, ethics relevant to the federal practitioner, and two very compelling panels on women and the law. The meeting and convention provided many opportunities for socializing as well, including a reception at the Antiguo Casino (a historic building originally built as a meeting ground for the Recreational Society of the Ponce Casino) generously sponsored by the Puerto Rico Chapter. The national council meeting, attended by Jolie and Gosia, offered good news about the national FBA's budget—they announced that cost-savings plans have resulted in the national FBA coming in under budget, described various grants available to local chapters, and revealed that the national FBA will have a push in 2014 to have each chapter present programs on the Civil Rights and CJA Act, both of which turn 50 in 2014. Finally, the national council meeting stressed the importance of growing chapter membership, so please encourage all your colleagues to join the Oregon Chapter of the FBA.

unsolved crimes database.

A majority of the Court found the Act to serve a separate, legitimate purpose, however—that is, to "safe[ly] and accurate[ly] process and identify the persons and possessions [law enforcement officers] must take into custody." *Id*. at 1970. According to the majority, the immediate identification of an arrestee through DNA testing upon booking serves five important law-enforcement purposes: First, it permits law enforcement officers to know "who has been arrested and who is being tried." *Id*. at 1971. (quoting *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cnty*., 542 U.S. 177, 191 (2004)). To that end, the majority found the Maryland police officers' ability to run an arrestee's DNA sample through the CODIS database no different than using the arrestee's fingerprints as a means to identify the individual. *Id*. at 1971-72.

Second, the majority noted that permitting DNA testing allows officers to ensure that the arrestee is not someone who would create "risks for facility staff, for the existing detainee population, and for a new detainee." *Id*. at 1972 (internal quotation marks omitted). Third, the majority found the use of DNA testing helpful to ensure that the individual arrestee does not flee the jurisdiction, rendering him or her unavailable for trial. *Id*. at 1972-73. Fourth, the DNA test will inform the "court's determination whether the individual should be released on bail." *Id*. at 1973. Finally, according to the Court, DNA testing serves the important governmental purpose of "freeing a person wrongfully imprisoned for the same offense." *Id*. at 1974. The majority concluded, "DNA identification of arrestee is a reasonable search that can be considered part of a routine booking procedure." *Id*. at 1980.

The dissent of course argued to the contrary. Its primary contention was that the purpose of the Maryland law is not "identification" at all, but rather is to permit "official investigation into a crime," a purpose that the Court never has sanctioned as a basis for a government search. *See id*. at 1980 (Scalia, J., dissenting). The dissent proceeded to point out facts that undercut the majority's reasoning in almost all respects: First, that the Court never has sanctioned fingerprinting as a reasonable search under the Fourth Amendment; second, that the time it takes to obtain DNA results itself defies the Court's identified purposes to swiftly make bail decisions and assess safety risks; and third, that the process of DNA testing has nothing to do with exonerating the innocent, given that the CODIS database consists only of DNA from unsolved crimes. *Id*. at 1988, 1984 n.2. The dissent directed the reader to the identified purpose of the DNA Collection Act—"official investigation into a crime"—and concluded that the purpose of this particular search was not at all to identify King, but to identify the person who committed the previously unsolved rape, a purpose that cannot be used to support the government's warrantless search.

Disagreements aside, the holding of *King* is clear: the government may collect DNA samples from those arrested but not yet convicted of a crime for the purpose of "identification." The opinion leaves a number of questions unanswered, however: Who must the government be seeking to identify when it collects the DNA sample? Certainly not only the arrestee, because in this very case, it was not King who was identified; rather, it was the perpetrator of the prior crime whose identity was uncovered. In that respect, the dissent identifies a very real tension between the majority's analysis and the facts of this particular case.

What is more unclear, however, is precisely what happens when science advances (as it will) and the information collected pursuant to CODIS standards begins to show more than just the identity of the individual arrestee (as they also will).[1] For example, when the sample begins to show other genetic traits or characteristics? Predispositions to disease? Or, as in *Gattaca*, an individual's educational shortcomings or lifespan?[2] Or what happens when CODIS standards change such that the information it collects reveals more than that of just "junk DNA"? The Court of course recognizes that one of those things might happen: "If in the future police analyze samples to determine, for instance, an arrestee's predisposition for a particular disease or other hereditary factors not relevant to identity, that case would present additional privacy concerns not present here." *Id*. at 1979. If so (or rather, when that happens), the question will be whether King should be extended, *see id*. at 1989 (Scalia, J., dissenting) (predicting, "We can find no significant difference between this case and *King*"), or whether—and how—the Court will define Fourth Amendment line to preserve *King*, yet protect against further, more intrusive government conduct.

[1] The current standard for DNA testing relies on taking DNA material from the nucleus of human cells—material that consists of "coding" and "noncoding" regions. *Maryland v. King*, 133 S. Ct. 1958, 1966-67 (2012). Non-protein "coding" regions historically have been referred to as "junk DNA," a phrase that refers to the DNA string's absence of biological function. While "junk DNA" can be used with near certainty to identify a person, it cannot reveal broader, more complex characteristics of a person, at least by the science described in the Court's primary source. *See* J. Butler, Fundamentals of Forensic DNA Typing (2009). Of course, as research progresses, the world of science presumably will learn more and more about the functions that "junk DNA" was previously thought not to have. *See, e.g., Hidden Treasures in Junk DNA*, SCI. AM. (Sept. 18, 2012), *available at* http://www.scientificamerican.com/article.cfm?id=hidden-treasures-in-junk-dna.

PLEADING PATENT INFRINGMENT IN THE DISTRICT OF OREGON

By: John Mansfield, Federal Bar Association Vice President

Lawyers from outside of Oregon are often taken aback when they discover that Oregon is a "code pleading" state. Oregon practitioners who appear primarily in state court can have a similar reaction to the federal "notice pleading" standard. Several years ago, the Supreme Court of the United States narrowed this gap by adopting a modified fact pleading standard in federal cases. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (collectively, "*Twombly/Iqbal*").

Although the *Twombly/Iqbal* standard does not adopt code pleading per se, it requires the plaintiff to plead plausible facts supporting a reasonable inference that the defendant is liable for the claimed misconduct.[1] Simply reciting the elements of a cause of action, supported only by conclusory allegations, will not get a complaint past a Rule 12 motion.[2] This heightened pleading standard applies to all civil actions.[3] For the last several years federal trial and appellate courts have grappled with the fine points of *Twombly/Iqbal*, namely, what facts must be pleaded to set forth a plausible prima facie case in any particular civil action?[4]

The United States Court of Appeals for the Federal Circuit, which has exclusive jurisdiction over patent infringement claims, recently reaffirmed a new wrinkle in the *Twombly/Iqbal* standard as applied to such claims. In *In re Bill of Lading Transmission & Processing Systems Patent Litigation*, 681 F.3d 1323 (Fed. Cir. 2012), defendants argued that because a claim for patent infringement is unquestionably a "civil action," plaintiff's patent complaint should be dismissed for failing to plead sufficient plausible facts under *Twombly/Iqbal*.

While the Federal Circuit agreed that the *Twombly/Iqbal* cases address "the civil pleading standards in a variety of civil contexts," it found that "[n]one addresses the sufficiency of a complaint alleging patent infringement or causes of action for which there is a sample complaint in the Appendix of Forms to the Rules of Civil Procedure."[5] The Court explained that the sample forms found in the Appendix to Federal Rule of Civil Procedure 84 conclusively establish the pleading standard for the causes of action they address. Relying on the Federal Rules Advisory Committee Notes and the Supreme Court's dictate that changes to the Federal Rules "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation,"[6] the Federal Circuit noted that the forms are "sufficient to withstand attack under the rules under which they are drawn."[7] Accordingly, to the extent that *Twombly/Iqbal* and their progeny "conflict with the Forms and create differing pleadings requirements, the Forms control."[8]

There is little debate that Form 18 is a bare-bones complaint that would not otherwise meet the *Twombly/Iqbal* standard:

COMPLAINT FOR PATENT INFRINGEMENT

1. <Statement of Jurisdiction>

2. On <Date>, United States Letters Patent No. <_____> was issued to the plaintiff for an invention in an electric motor. The plaintiff owned the patent throughout the period of the defendant's infringing acts and still owns the patent.

3. The defendant has infringed and is still infringing the Letters Patent by making, selling, and using electric motors that embody the patented invention, and the defendant will continue to do so unless enjoined by this court.

4. The plaintiff has complied with the statutory requirement of placing a notice of the Letters Patent on all electric motors it manufactures and sells and has given the defendant written notice of the infringement.

Therefore, the plaintiff demands:

(a) a preliminary and final injunction against the continuing infringement;

(b) an accounting for damages; and

(c) interest and costs.

Form 18 does "not require a plaintiff to plead facts establishing that each element of an asserted claim is met. Indeed, a plaintiff need not even identify which claims it asserts are being infringed." [10]

But Form 18 only applies to claims of direct patent infringement, *i.e*., claims in which the defendant itself has allegedly infringed by making, using, or selling

Continued on page 6

PLEADING PATENT INFRINGMENT IN THE DISTRICT OF OREGON

Continued from page 5

items that embody the patented invention.[11] Form 18 does not address indirect infringement claims, in which the defendant actively induces or contributes to a third party's direct infringement of a patent.[12] Because no form pleading addresses indirect infringement, the sufficiency of such claims must be considered under *Twombly/Iqbal*.[13]

The Federal Circuit's decision in *In re Bill of Lading* has been followed throughout the district courts in the Ninth Circuit, including in two cases from the District of Oregon.[14] Interestingly, though, in *In re Bill of Lading*, the Federal Circuit said this about the question of which law should apply in reviewing the sufficiency of a pleading:

> Because it raises a purely procedural issue, an appeal from an order granting a motion to dismiss for failure to state a claim upon which relief can be granted is reviewed under the applicable law of the regional circuit. *McNeal v. Sprint Nextel Corp*., 501 F.3d 1354, 1355-56 (Fed. Cir. 2007).[15]

The Court goes on to cite law of the Sixth Circuit, the regional circuit from which the case was appealed, on the standard for review.[16] In a later Federal Circuit case arising from a district court in the Ninth Circuit, *K-Tech Telecomms. Inc. v. Time Warner Cable, Inc*., the Court similarly cited Ninth Circuit law in its preliminary discussion of these issues.[17]

Despite announcing that the law of the regional circuit should be applied in reviewing an appeal of a Rule 12 motion to dismiss,[18] in practice the Federal Circuit has declined to follow its own rule. When the parties in *K-Tech* suggested that regional circuit law should determine what Form 18 requires in a particular case, the Federal Circuit disagreed:

> While we reviewed the district court's decision to dismiss the complaint in [*In re Bill of Lading*] under Sixth Circuit law, our decision regarding the requirements of Form 18 and its relationship to the pleading standards set forth in *Twombly and Iqbal* was dictated by Supreme Court precedent. Our analysis is no different where the case comes to us from the Ninth Circuit. Form 18 is a national form, and any argument that we should interpret it differently here than we did in [*In re Bill of Lading*] is without merit. [19]

This analysis is unsatisfactory. While Form 18 has national applicability, so does almost every other federal rule, statute, and regulation. That regional circuits may differ on the meaning of procedural rules is implicit in the Federal Circuit's acknowledgement that it must turn to other circuit's law for pleading standards. Although *In re Bill of Lading* cites Supreme Court precedent to argue that form pleadings cannot be changed by interpretation, the Supreme Court has never addressed the issue of whether a form pleading in an appendix to a rule will always control over arguably conflicting Supreme Court precedent.

Although the Federal Circuit acknowledges on one hand that the patent infringement pleading standard is not within its exclusive patent jurisdiction, on the other hand it appears to be peremptorily resolving regional circuit splits on procedural rules. The Supreme Court's prior treatment of similar doctrines from the Federal Circuit suggests that this issue may be ripe for review.

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[1] *Iqbal*, 556 U.S. at 678.

[2] *Id*. at 663.

[3] *Id*. at 684.

[4] *See, e.g., Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1323 (2011).

[5] *In re Bill of Lading*, 681 F.3d at 1334.

[6] *Id*. (quoting *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993)).

[7] *Id*.

[8] *Id*.

[9] Fed. R. Civ. Proc. 84, App'x. Form 18.

[10] *See In re Bill of Lading*, 681 F.3d at 1335 (internal citation omitted).

[11] *See* 35 U.S.C. § 271(a).

[12] *In re Bill of Lading*, 681 F.3d at 1336

[13] *Id*. at 1337.

[14] *Yufa v. Met One Instruments, Inc*., No. 1:08-cv-3016-CL, 2012 U.S. Dist. LEXIS 186358, at *2-3 (D. Or. Dec. 20, 2012); *Tranxition, Inc. v. Novell, Inc*., No. 03:12-cv-01404-HZ, at *8, 2013 U.S. Dist. LEXIS 74586 (D. Or. May 27, 2013). This author was counsel for plaintiff in *Tranxition*.

[15] *In re Bill of Lading*, 681 F.3d at 1331.

[16] *Id*.

[17] 714 F.3d 1277, 1282 (Fed. Cir. 2013).

[18] *E.g., C&F Packing Co. v. IBP, Inc*., 224 F.3d 1296, 1306 (Fed. Cir. 2000) (motion to dismiss for failure to state a claim is a purely procedural question not pertaining to patent law).

[18] *K-Tech Telecomms. Inc*., 714 F.3d at 1282 n.1.

SOME THOUGHTS ON *MARYLAND V. KING*

By: Anonymous

Under the Maryland DNA Collection Act, state law enforcement officers are authorized to collect DNA samples from individuals who are "charged with . . . a crime of violence or an attempt to commit a crime of violence; or . . . burglary or an attempt to commit burglary." Md. Pub. Saf. Code Ann. § 2-504(3)(i). Under that state law, law enforcement officers collect (by buccal swab) DNA samples from arrestees on charges of murder, assault, kidnapping, rape, and a number of other violent crimes. Once the arrestee is arraigned, the results of the sample are placed in a statewide DNA database, *id*. § 2-504(c)(i), one of the core purposes of which is for use in "official investigation into a crime," *id*. § 2-505(a)(2). If the arrestee is later acquitted, his or her DNA sample is destroyed. *Id*. § 2-504(d)(2). While the Maryland law purports to limit the DNA samples collected and recorded into the statewide database to only those records that "directly relate to the identification of individuals," it does not specify *which* individuals the sample can be used to identify—that is, the individual who has already been arrested, or some other, unknown suspect for some other, unsolved crime.

Last term, the propriety of the Maryland DNA Collection Act, at least with respect to the Fourth Amendment's protection against unreasonable government searches, was considered by the Supreme Court of the United States in *Maryland v. King*, 133 S. Ct. 1958 (2013). Justice Anthony Kennedy, writing for a five-Justice majority, announced that the practice of DNA sampling by buccal swab, and the further analysis of such samples in state DNA criminal databases, does not violate that constitutional guarantee. According to the Court, your buccal swab DNA sample is no different than your fingerprint: "[T]aking and analyzing a cheek swab of [an] arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment." *Id*. at 1980.

The facts of *King* are of course necessary to a complete understanding of that constitutional rule. In *King*, the defendant was arrested and charged with first- and second-degree assault. *Id*. at 1965. When he was taken into custody, Maryland police searched his person and, pursuant to the DNA Collection Act, collected a DNA sample. *Id*. After he was arraigned, which was three days after his arrest, the sample was sent to the Maryland State Police Forensic Sciences Division for processing and testing. The Forensic Sciences Division received the sample two weeks later, and the lab test results were available three to four months after that. The results from the test were then entered into Maryland's statewide DNA database. *Id*. at 1966.

King's test results were also transmitted to the FBI's national DNA database, CODIS (Combined DNA Index System), a database that connects DNA laboratories at the local, state, and national level and standardizes the way in which DNA is collected and analyzed across the country. As the dissent in King describes the CODIS database,

> The [database] consists of two distinct collections. One of them, the one to which King's DNA was submitted, consists of DNA samples taken from known convicts or arrestees. . . . The other collection consists of samples taken from crime scenes[.] . . . The Convict and Arrestee Collection stores 'no names other than personal identifiers of the offenders, arrestees, or detainees.' Rather, it contains only the DNA profile itself, the name of the agency that submitted it, and an identification number for the specimen. . . . [T]he CODIS system works by checking to see whether any of the samples in the Unsolved Crimes Collection match any of the samples in the Convict and Arrestee Collection.

Id. at 1984 (Scalia, J., dissenting). By way of the CODIS database, King's sample was matched with a sample taken from an unrelated, unsolved crime that had been committed years earlier. King was then charged with and convicted of rape, the earlier crime. It was the rape conviction that was at issue before the Court.

An understanding of those facts helps to establish the disagreement among the Justices with respect to the constitutionality of the Maryland Act. While all of the Justices agreed that using a buccal swab to obtain the DNA sample is indeed a "search," *see id*. at 1969, 1982, their disagreement surrounded the primary purpose of the search and whether, in light of that purpose, the search could be deemed "reasonable" under the Fourth Amendment.

All members of the Court straightforwardly acknowledge in *King* that the Fourth Amendment protects against government searches for the sole purpose of "detect[ing] evidence of ordinary criminal wrongdoing." *Id*. at 1978 (citing *Indianapolis v. Edmond*, 531 U.S. 32, 38 (2000)). In other words, government officers cannot collect a DNA sample simply to check that DNA sample against an

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