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UPCOMING SEMINARS:

2022 Artificial Intelligence (AI) Boot Camp

- December 6 M&A and Investment into AI Companies
- December 8 Patent and Trade Secret Protection for Inventions that Use AI
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- December 14 Hot Topics in AI Under Consideration by the Executive Branch
- January 11 Digital Health
- January 12 CFIUS Focus on Transactions Involving AI and AI Companies
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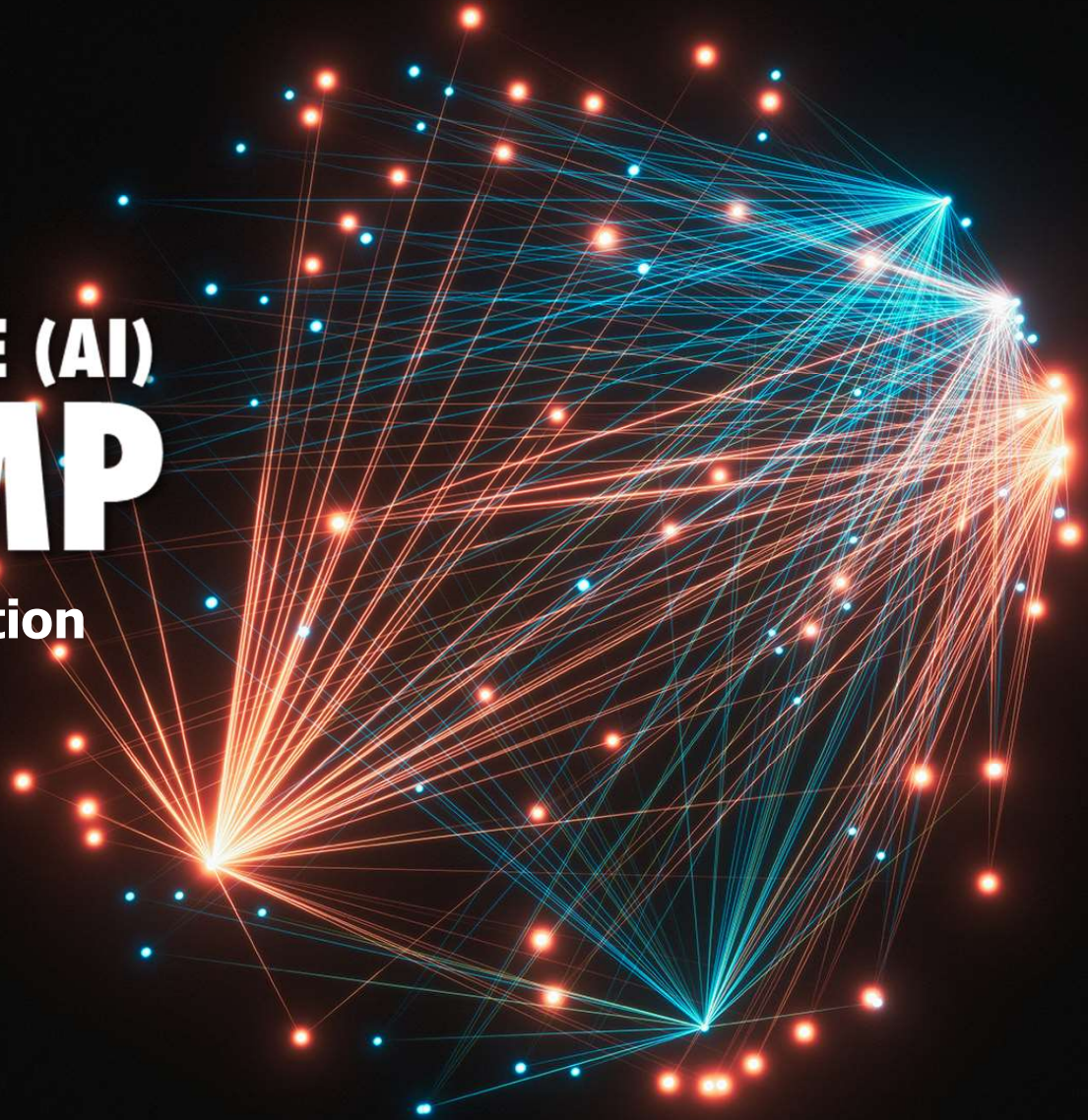
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**ARTIFICIAL INTELLIGENCE (AI)
BOOT CAMP**

Pretrial Practice for AI IP Litigation

December 1, 2022

Karon N. Fowler



Host



Andrew J. Gray IV

Presenter



Karon N. Fowler

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Litigating AI Patents: Pretrial Practice



Detecting and Pleading
Infringement



Developing and
Defending Against
Invalidity Theories



Discovery

Core AI Technologies

Machine Learning

- Deep Learning
- Predictive Analytics
- Classification

NLP

- Content Extraction
- Machine Translation
- Q&A

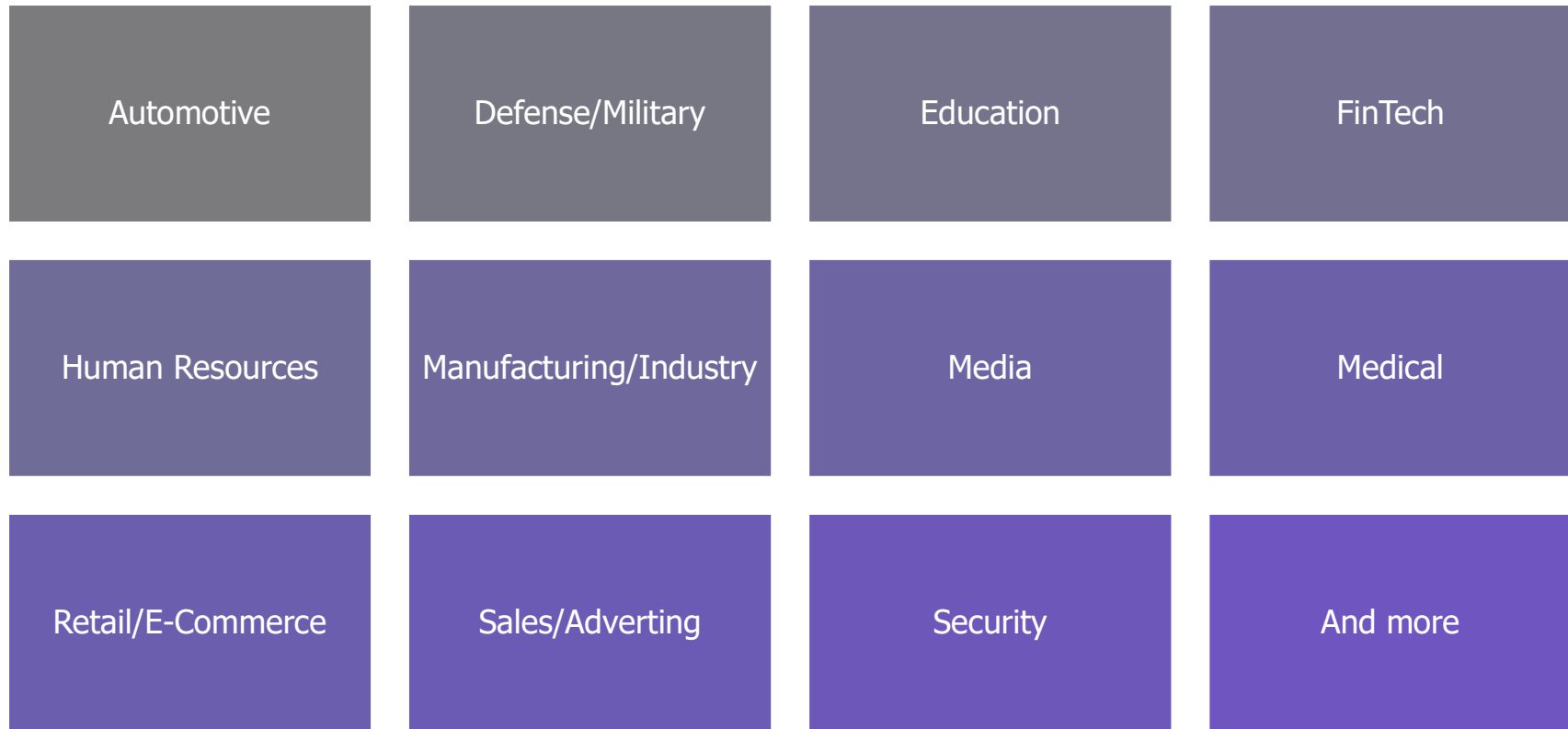
Speech

- Speech-to-Text
- Text-to-Speech

Vision

- Image Recognition
- Computer/Machine Vision

Core AI Technologies



Detecting and Pleading Infringement



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Detecting Infringement

Nature of claims may affect ability and method to detect infringement

Publicly available sources of certain information

Traditional methods may still be useful

Identifying the infringer

Detecting and Pleading Infringement Example



"I recognize that detailed structural information about the accused product is not publicly available. It would create a catch-22 if Volterra were required to know confidential facts to avoid the dismissal of its complaint. A party cannot shield itself from a complaint for direct infringement by operating in such secrecy that the filing of a complaint itself is impossible."

*Volterra Semiconductor LLC v. Monolithic Power Sys., Inc., No. CV 19-2240, 2021 WL 4476998, at *4 (D. Del. Sept. 30, 2021) (internal citations omitted).*

Detecting and Pleading Infringement Example



“[B]ased on the allegations in USC's Complaint, a reasonable inference can be drawn that Facebook's accused product includes an 'intent engine.' To the extent that Facebook argues that USC has not identified any specific feature of the accused product that constitutes an 'intent engine,' a plaintiff should not be barred at the dismissal stage 'when the operation of [the accused product] is not ascertainable without discovery.'”

*USC IP Partnership, L.P. v. Facebook, Inc., No. 6:20-cv-00555, 2021 WL 3134260, *1 (W.D. Tex. July 23, 2021) (internal citations omitted).*

Developing and Defending against Invalidity Theories



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Section 101

35 U.S.C. § 101

“Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.”

Alice/ Mayo Test

Step One: whether the claims are directed to ineligible subject matter

Step Two: if the claims are directed to ineligible subject matter, whether the claims recite additional elements that transform the ineligible subject matter into something “significantly more”—i.e., the “inventive concept” inquiry

Health Discovery Corp. v. Intel Corp. (W.D. Tex. 2021)

1. A computer-implemented method for identifying patterns in data, the method comprising:
 - (a) inputting into at least one support vector machine of a plurality of support vector machines a training set having known outcomes, the at least one support vector machine comprising a decision function having a plurality of weights, each having a weight value, wherein the training set comprises features corresponding to the data and wherein each feature has a corresponding weight;
 - (b) optimizing the plurality of weights so that classifier error is minimized;
 - (c) computing ranking criteria using the optimized plurality of weights;
 - (d) eliminating at least one feature corresponding to the smallest ranking criterion;
 - (e) repeating steps (a) through (d) for a plurality of iterations until a subset of features of pre-determined size remains; and
 - (f) inputting into the at least one support vector machine a live set of data wherein the features within the live set are selected according to the subset of features.

Health Discovery Corp. v. Intel Corp. (W.D. Tex. 2021)

Step One: abstract mathematical concept of SVM-RFE

Step Two: no inventive concept

- “That a specific or different combination of mathematical steps yields more accurate [data] than previously achievable under the prior art is not enough to transform the abstract idea in claim 1 into a patent eligible application.”
- “The Court is also not persuaded by HDC's allegations that SVM-RFE is ‘important,’ utilized across a ‘broad spectrum of application,’ and the original academic paper describing SVM-RFE has been cited more than eight thousand times. Even if true, these allegations cannot salvage the claims. ...[A] mathematical idea can be novel and even a ‘groundbreaking’ advance and still not be patent eligible.” (internal citation omitted).

Nuance Commc'ns, Inc. v. MModal LLC (D. Del. 2018)

Claim 1 of the '946 Patent

- Patent ineligible subject matter

Claim 9 of the '933 Patent

- Patent eligible subject matter

Claim 8 of the '034 Patent

- Patent eligible subject matter

Nuance Commc'ns, Inc. v. MModal LLC, No. 17-1484, 2018 WL 6584129 (D. Del. Dec. 14, 2018).

Nuance Commc'ns, Inc. v. MModal LLC (D. Del. 2018)

1. A computer implemented method for generating a report that includes latent information, comprising:
 - receiving an input data stream;
 - performing one of normalization, validation, and extraction of the input data stream;
 - processing the input data stream to identify latent information within the data stream that is required for generation of a particular report, wherein said processing of the input data stream to identify latent information comprises of identifying a relevant portion of the input data stream, bounding the relevant portion of the input data stream, identifying a predetermined class of information, and normalizing the relevant portion of the input data stream;
 - activating a relevant report template based on the said identified latent information;
 - populating said template with template-specified data;
 - processing the template-specified data to generate a report.

Nuance Commc'ns, Inc. v. MModal LLC (D. Del. 2018)

1. A computer implemented method for generating a report that includes latent information, comprising:
 - receiving an **input data stream**;
 - performing one of normalization, validation, and extraction of the **input data stream**;
 - processing the **input data stream** to identify **latent information** within the **data stream** that is required for generation of a particular report, wherein said processing of the **input data stream** to identify **latent information** comprises of identifying a relevant portion of the **input data stream**, **bounding the relevant portion of the input data stream**, identifying a predetermined class of information, and **normalizing the relevant portion of the input data stream**;
 - activating a relevant report template based on the said **identified latent information**;
 - populating said template with **template-specified data**;
 - processing the **template-specified data** to generate a report.

Nuance Commc'ns, Inc. v. MModal LLC (D. Del. 2018)

Claim 1 of the '946 Patent

- **Step One**: abstract idea of receiving data, recognizing words using well-known ASR technology, and storing data in the appropriate fields of a report template
- **Step Two**: “routine steps” and “[t]he claim language does not explain how the bounding and normalizing steps are performed, nor does it specify what is inventive about these particular steps”

Nuance Commc'ns, Inc. v. MModal LLC (D. Del. 2018)

9. A correction method (16) for the correction of incorrect words in text information (ETI) recognized by a speech recognition device (1) from speech information (SD), in which the following method steps are executed:

reception of the speech information (SD), the associated recognized text information (ETI) and link information (LI), which marks the part of speech information (SD) at which the word was recognized by the speech recognition device (1) for each word of the recognized text information (ETI);

allowing a synchronous playback mode, in which, during the acoustic playback of the speech information (SD) the word of the recognized text information (ETI), which word is marked by the link information (LI) for the speech information (SD) just played back is marked synchronously, while the word just marked features the position of an audio cursor (AC);

editing of the incorrect word with a text cursor (TC) according to editing information (EI) entered by a user, the editing of the incorrect word being possible with the synchronous playback mode activated in the correction device (10).

Nuance Commc'ns, Inc. v. MModal LLC (D. Del. 2018)

9. A correction method (16) for the correction of incorrect words in text information (ETI) recognized by a speech recognition device (1) from speech information (SD), in which the following method steps are executed:

reception of the speech information (SD), the associated recognized text information (ETI) and link information (LI), which marks the part of speech information (SD) at which the word was recognized by the speech recognition device (1) for each word of the recognized text information (ETI);

allowing a synchronous playback mode, in which, during the acoustic playback of the speech information (SD) the word of the recognized text information (ETI), which word is marked by the link information (LI) for the speech information (SD) just played back is marked synchronously, while the word just marked features the position of an audio cursor (AC);

editing of the incorrect word with a text cursor (TC) according to editing information (EI) entered by a user, the editing of the incorrect word being possible with the synchronous playback mode activated in the correction device (10).

Nuance Commc'ns, Inc. v. MModal LLC (D. Del. 2018)

8. A method of assisting in correcting text information recognized by a speech recognition device from speech information, the method comprising:

receiving the speech information, the text information recognized from the speech information, and link information that associates portions of the text information with portions of the speech information from which the portions of the text information were recognized by the speech recognition device;

providing an audio cursor for display during acoustic playback of the speech information, the audio cursor highlighting portions of the text information synchronous with the playback of the speech information according to associations provided by the link information such that, when displayed to the user, the audio cursor highlights the portions of the text information as the associated portions of the speech information are being acoustically played back; and

providing a text cursor for display to facilitate editing the text information, the text cursor indicating a position in the text information where at least one edit will be performed upon receiving editing information entered by the user; and automatically synchronizing the text cursor and the audio cursor, wherein automatically synchronizing the text cursor and the audio cursor comprises automatically positioning the text cursor at a predetermined position relative to a location of the audio cursor and automatically moving the location of the text cursor synchronous with the movement of the audio cursor during the acoustic playback until an editing operation is performed.

Nuance Commc'ns, Inc. v. MModal LLC (D. Del. 2018)

8. A method of assisting in correcting text information recognized by a speech recognition device from speech information, the method comprising:

receiving the speech information, the text information recognized from the speech information, and link information that associates portions of the text information with portions of the speech information from which the portions of the text information were recognized by the speech recognition device;

providing an audio cursor for display during acoustic playback of the speech information, the audio cursor highlighting portions of the text information synchronous with the playback of the speech information according to associations provided by the link information such that, when displayed to the user, the audio cursor highlights the portions of the text information as the associated portions of the speech information are being acoustically played back; and

providing a text cursor for display to facilitate editing the text information, the text cursor indicating a position in the text information where at least one edit will be performed upon receiving editing information entered by the user; and automatically synchronizing the text cursor and the audio cursor, wherein automatically synchronizing the text cursor and the audio cursor comprises automatically positioning the text cursor at a predetermined position relative to a location of the audio cursor and automatically moving the location of the text cursor synchronous with the movement of the audio cursor during the acoustic playback until an editing operation is performed.

Nuance Commc'ns, Inc. v. MModal LLC (D. Del. 2018)

Claim 9 of the '933 Patent and Claim 8 of the '034 Patent

- **Step One**: “not directed to an abstract idea, but instead recite[s] solutions to problems rooted in automated speech recognition technology”
- **Step Two**: need not reach

Section 112(f)

An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof.

Gradient Enters. v. Skype Techs. (W.D.N.Y. 2015)

27. A system for detecting, reporting and responding to network node-level occurrences on a network-wide level, the system comprising:

a plurality of mobile agents, each of the mobile agents is hosted by one of a plurality of nodes in a network which each detect for one or more events;

a designation system that designates one of the mobile agents hosted at one of the nodes as a controlling mobile agent and designates another one of the mobile agents hosted at another one of the nodes as the controlling mobile agent when the one of the mobile agents previously designated as the controlling mobile agent is unavailable;

an event detection system that communicates network event information associated with an event detected at one or more of the nodes in the network to the controlling mobile agent; and

a reporting system that disseminates from the controlling mobile agent information describing the detected event to one or more other nodes.

Gradient Enters. v. Skype Techs. (W.D.N.Y. 2015)

27. A system for detecting, reporting and responding to network node-level occurrences on a network-wide level, the system comprising:

a plurality of mobile agents, each of the mobile agents is hosted by one of a plurality of nodes in a network which each detect for one or more events;

a designation system that designates one of the mobile agents hosted at one of the nodes as a controlling mobile agent and designates another one of the mobile agents hosted at another one of the nodes as the controlling mobile agent when the one of the mobile agents previously designated as the controlling mobile agent is unavailable;

an event detection system that communicates network event information associated with an event detected at one or more of the nodes in the network to the controlling mobile agent; and

a reporting system that disseminates from the controlling mobile agent information describing the detected event to one or more other nodes.

Gradient Enters., Inc. v. Skype Techs. S.A., No. 10-cv-6712, 2015 WL 5567926, at *2 (W.D.N.Y. Sept. 22, 2015).

Gradient Enters. v. Skype Techs. (W.D.N.Y. 2015)

“[T]he claim does not set forth any algorithms needed to perform those functions. The patent also states that the system ‘utilizes at least one of a voting and an artificial intelligence algorithm’ to carry out certain tasks, but it does not disclose those algorithms.” (internal citations omitted).

“Those claims are written in general terms, but they provide virtually no guidance as to how the desired result is to be achieved. Special programming is required to permit the system to do what the patent teaches.”

“It is not enough to show that a person of skill in the art might be able to choose an appropriate algorithm and program it into a computer; the patent itself must still disclose such an algorithm.”

Discovery



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Written Discovery

Preparing written discovery requests to capture:

- Past behavior
- Context clues and circumstantial evidence
- Intended functionality

Defending against written discovery requests:

- Burden
- Relevance

Third party discovery

Rensselaer Polytechnic Inst. v. Apple Inc. (N.D.N.Y. 2014)

Interrogatory No. 2:

Identify each of Siri's functional blocks involved in any task performed as part of Siri's natural language processing function, including Siri's natural language interface function, including by listing: the name, code name, nickname, or other identifier of the functional block; the name of every data structure, object, method, property, library, function, procedure, or other pertinent block of source code that is an instance, implementation, description, or definition of all or a portion of the functional block; for each source code file that includes an instance, implementation, description, or definition of the functional block, the location of the pertinent block of source code within each file; and each document (by production number) that contains a full or partial description of the functional block.

Rensselaer Polytechnic Inst. v. Apple Inc. (N.D.N.Y. 2014)

Response To Interrogatory No. 2:

... Subject to and without waiving the foregoing General and Specific Objections, Apple responds as follows: Pursuant to Rule 33(d), Apple identifies the source code made available pursuant to Patent L.R. 3–4(a) and documents labeled with Bates numbers APLDynAdv_00000001 through APLDynAdv_00000371.

Rensselaer Polytechnic Inst. v. Apple Inc. (N.D.N.Y. 2014)



“The court agrees with Apple that the appropriate vehicle for discerning the information sought is to make available, for plaintiffs’ review, Apple’s source code, which Apple has agreed to do, and to provide one or more witnesses for deposition in order to permit plaintiffs to probe the functionality and explanation for everything that remains unclear after a review of the source code. While plaintiffs argue that the prerequisites for invoking Rule 33(d)(1) of the Federal Rules of Civil Procedure have not been satisfied in the case, I conclude that the foregoing procedure represents the most efficient and effective means of obtaining the information sought.”

Additional Discovery Considerations

Retaining experts

Litigation holds

Data import/export issues

Amending pleadings or contentions

Word to Info Inc. v. Facebook Inc. (N.D. Cal. 2016)

1. A method of processing natural language, which comprises steps providing electronically encoded data which is representative of said natural language,

providing a dictionary data base wherein said dictionary data base contains a plurality of entries which are comprised of one or more of syntax usage data, associated word sense numbers having associated state representation data and/or function codes,

lexically processing said electronically encoded data to access said dictionary data base,

providing a grammar specification,

utilizing said syntax usage data which are from entries of said dictionary data base and which are associated with words of said natural language with reference to said grammar specification to produce output data representative of a grammatical parse of said natural language, said output data including selected syntax usage.

Word to Info Inc. v. Facebook Inc. (N.D. Cal. 2016)

- October 2015: WTI began reviewing Facebook's source code
- December 30, 2015: WTI served amended infringement contentions
- February 3, 2016: WTI served revised version of its infringement contentions
- March 31, 2016: WTI filed motion for leave to amend contentions - granted
- July 12, 2016: Claim Construction Order
- July 25-27, 2016: WTI conducted supplemental inspection of source code
- August 16, 2016: WTI to make final election of asserted claims
- August 31, 2016: WTI filed motion for leave to amend contentions

Word to Info Inc. v. Facebook Inc. (N.D. Cal. 2016)



“Under the date-of-disclosure rule, WTI's obligation to diligently pursue amendment was triggered on March 18, 2016 when Facebook disclosed its proposed claim constructions. WTI did not begin taking steps to coordinate a supplemental source code review, which was necessary for its amendment, until after the claim construction order in late July, 2016 – four months later. It did not inform plaintiffs that it intended to amend its infringement contentions until August 16, 2016 – five months after Facebook disclosed its proposed constructions.”

Word to Info Inc. v. Facebook Inc., No. 15-CV-03485, 2016 WL 6276956 (N.D. Cal. Oct. 27, 2016), *aff'd*, 700 F. App'x 1007 (Fed. Cir. 2017).

Word to Info Inc. v. Facebook Inc. (N.D. Cal. 2016)



“There are many steps WTI could have taken, short of preparing and serving claim construction charts, that would have helped demonstrate diligence. It could have reached out to Facebook prior to the claim construction hearing to discuss conducting a supplemental review of its source code. Once the parties submitted their joint claim construction statement it could have informed Facebook that if Facebook's “word sense number” and “syntax usage data” constructions were adopted it would be amending. And at the claim construction hearing it could have informed Facebook and the court that, if the tentative ruling held, it would need to amend its infringement contentions. It did none of these things. Instead, it chose to wait until after the final claim construction order to even begin investigating whether it could formulate alternative infringement contentions.”

Word to Info Inc. v. Facebook Inc., No. 15-CV-03485, 2016 WL 6276956 (N.D. Cal. Oct. 27, 2016), *aff'd*, 700 F. App'x 1007 (Fed. Cir. 2017).

Conclusion

Biography



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Karon N. Fowler litigates intellectual property disputes involving utility patents, design patents, unfair competition, licensing issues, and trade secrets. Representing clients in US district courts, the US International Trade Commission, and the US Court of International Trade, Karon has experience managing or contributing to all stages of a case's lifecycle, including pleadings, fact and expert discovery, motion practice, claim construction, and trial. She also represents clients in appellate proceedings and contributes to AIA post-grant proceedings before the US Patent and Trademark Office.

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Biography



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Serving as the leader of the firm's semiconductor practice and as a member of the firm's fintech and technology industry teams, Andrew J. Gray IV concentrates his practice on intellectual property litigation and prosecution and on strategic IP counseling. Andrew advises both established companies and startups on AI, machine learning, Blockchain, cryptocurrency, computer, and Internet law issues, financing and transactional matters that involve technology firms, and the sale and licensing of technology. He represents clients in patent, trademark, copyright, and trade secret cases before state and federal trial and appellate courts throughout the United States, before the US Patent and Trademark Office's Patent Trial and Appeal Board, and before the US International Trade Commission.

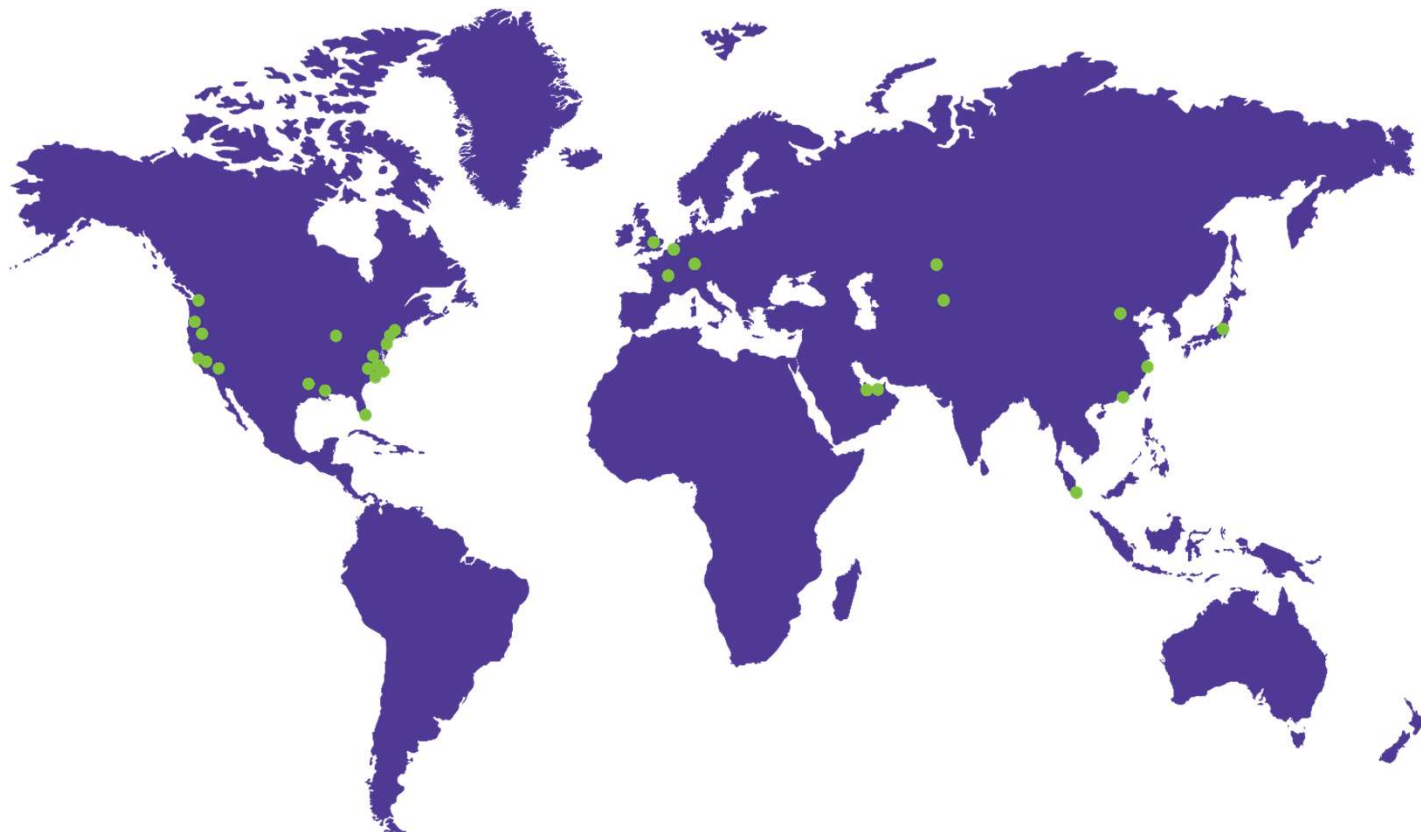
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