The recent IPO judges controversy must be the last

Should judges attend conferences put on by organisations whose members make regular use of the courts in which they sit? This is a perennial point of debate and one brought into sharp focus in the US recently following a judicial event held by the Intellectual Property Owners Association in Washington DC in October.

The IPO billed the event as the Fourth International Judges Conference on Intellectual Property Law and stated that it followed on from similar conferences organised by the Court of Appeal for the Federal Circuit (CAFC) in 1989, 1994 and 1999. Delegates were able to mix with judges from 30 countries, including the US, Japan, Germany, South Africa and China.

As part of the programme, conference attendees were bussed over to the CAFC to hear oral arguments being made in four cases. After the fact, photos of members of the CAFC who attended various parts of the programme were posted on the IPO website. Chief Judge Paul Michel, as well as Judges Pauline Newman and Richard Linn, were all pictured. Additionally, Michel gave one of the conference's luncheon addresses and Judge Arthur Gajarsa was a member of a panel of international judges that discussed patent litigation around the world.

One of the conference seminars focused on cross-border and extra-territorial patent issues, and promised that trends would be discussed "in light of currently pending cases before the European Court of Justice and the US Court of Appeals for the Federal Circuit". This June, the IPO submitted an *amicus* brief in the only case pending before the CAFC raising trans-border issues – *Voda v Cordis Corp,* Fed Cir App No 05.1238.

The case involves a patent infringement suit an Oklahoma cardiologist brought against Johnson & Johnson subsidiary Cordis Corporation of Miami Lakes, Florida. Dr Jan Voda had charged Cordis with infringing both US and foreign patents and asked the court to consolidate all his worldwide infringement claims into one single case. In 2004, a federal court in Oklahoma allowed Dr Voda to add foreign patents to his original case. Cordis appealed and the case is now before the CAFC. Many court-watchers have deemed *Voda* one of the most important pending patent cases and it certainly is of huge interest to multinational corporations.

Given the significance of the case, some observers have expressed dismay that the only two speakers at the IPO event's trans-border patent seminar were Willem Hoyng and Jon Michaelson. Hoyng is an Amsterdam-based partner in Howrey LLP and, according to the firm's website, is IP litigation counsel to Dutch multinationals and many large foreign corporations, including major pharmaceutical and biotech companies. Michaelson, meanwhile, is a litigation partner in the Palo Alto offices of Kirkpatrick & Lockhart, Nicholson, Graham LLP; over the years he has represented a number of high-tech companies including Taiwan Semiconductor Manufacturing, Pioneer Standard Electronics, Rational Software, ESS Technology and Cylink Corporation.

In other words, it was pointed out, both speakers generally represent the kinds of large corporations that are typical of IPO members. A group of legal academics, led by Professor John R Thomas of Georgetown Law Center, which had submitted a brief in opposition to the IPO's point of view in *Voda* was not invited to submit a speaker at the session. In fact, neither Thomas nor any of the other signatories to the brief were anywhere to be found on the programme.

The widely read IP newsletter *PatNews* – edited by San Francisco-based IP gadfly Greg Aharonian – noted the trans-border seminar and asked, in the light of *Voda*, if the IPO was illegally lobbying federal judges. Aharonian flat-out said that the conference was "wrong and hurts the public". (Information about Aharonian's newsletter can be found at

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http://www.bustpatents.com/.)

Members of the CAFC bench, of course, are regularly seen at meetings of various bar groups with IP agendas, such as the American Intellectual Property Law Association and the American Bar Association's Section of Intellectual Property Law. They frequently sit on panels or give keynote addresses at such events. A significant number of the judges on that court are former IP practitioners themselves, and it is only natural that they would retain an interest in the issues raised at the various meetings of the specialty bar groups. It is equally true, however, that issues that come up regularly before that court, such as *Markman* questions of the scope of patent claims, are frequent topics of discussion at such bar meetings.

US case law seems to find this kind of judicial activity acceptable. In 2000, the Second US Circuit Court of Appeal denied a request for a New York federal judge to stand down from a case after he attended an expenses-paid seminar offered by a non-profit foundation that received funding from the defendant. The Court noted that the Administrative Office of US Courts has a code of conduct for judges that is not mechanical but "requires an exercise of reasoned judgment".

More than a decade ago, a federal judge from New York wrote a far-reaching paper for the *Arizona Law Review* about judges' participation in conferences. Jack B Weinstein said the model of "judges living in a hermetically sealed granite tower with no outside influences of any kind is unrealistic and unwise". Most practitioners agree.

Weinstein did offer some cautious guidance for judges about attending educational programmes, though. He said that ethical issues for judges arise "when such conferences may cause concern because the sponsor is a group that participates regularly in litigation". That said, judges "should not be deterred from attending conferences that espouse a certain viewpoint, as long as the funding of the programmes is balanced and any potential bias is disclosed".

The problem with the IPO conference was one of appearance rather than reality. Although the brochure said the conference was continuing on a series of conferences begun by the Federal Circuit Court, it differed from the previous three in that it was sponsored solely by the IPO. The conference was in no way connected with or endorsed by the Court. Additionally, there was no representation that members of the CAFC would actually attend the trans-border case seminar or even that the cases to be discussed over the three days included *Voda*.

The careless design and wording of the original promotional brochure caused unnecessary misunderstanding and embarrassment, and potentially cast aspersions on an appellate court whose importance to the IP world cannot be overstated. The IPO cannot be condemned for wanting to put the best possible speakers in front of its members but, if it does not do so already, maybe in future it should allow judges and courts whose reputations are being used to attract paying delegates to approve wording specifically before brochures are made public.

For their part, at a time when intellectual property issues are more high profile – and controversial – than they have ever been before, judges will have to continue to be very careful about the events they attend and what they do when they are at them. After all, it is vital for all concerned that not only the reality but also the appearance of an independent judiciary is maintained.