



MEMORANDUM

TO: All IP Group Attorneys **DATE:** December 30, 1997
FROM: Raymond L. Sweigart
RE: Some Roots to Chew Upon

Isaac Bashevis Singer was quoted as having said: "If you write about the things and the people you know best, you discover your roots. Even if they are new roots, fresh roots, they are better than no roots."

I recently encountered some history on the Cushman Darby & Cushman firm that was prepared in connection with that firm's 1992 centennial celebration. Since not all of us came to Pillsbury from Cushman and some of us who did were not with that firm in 1992, it seems appropriate as we approach this season of "Auld Lang Syne" to pass along a few historical tidbits to aid in fashioning new, fresh and shared roots for our combined IP Group operations. I hope you find this as interesting as I did.

Arlon V. Cushman was born in Amherst, Massachusetts on January 17, 1869. He attended Amherst College, studied law at George Washington University, and was admitted to the District of Columbia bar in 1892. The earliest record of his intellectual property work was securing a registered trademark, "NON-TOX," for "carbonated root and herb extract." Patent work followed, and in 1900, Cushman filed an application and obtained U.S. Patent No. 664,132 entitled "Mount for Entomological Specimens." By 1901, we find Arlon Cushman involved in a reported patent interference, and by 1904 he appears in a reported litigation matter related to a patent for a feed mechanism. The early volumes of the Commissioner's Decisions find Arlon Cushman in various and sundry matters in both the Patent Office and Court of Appeals for the District of Columbia involving cotton bales, shoe machines, corset-stays, knitting machines, incandescent lamps, registers, bed pans, and calculating machines . . . no such thing as "Specialty Teams" in those days.

As early as 1906, the reports reflect that Arlon Cushman had joined with two other lawyers in the firm of Meyers, Cushman & Rea. For the cigar aficionados lurking among us, Meyers, Cushman & Rea was instrumental in registration of the famous "Antonia Y. Cleopatra" mark. The firm continued under the name Meyers, Cushman & Rea through 1921.

In 1921, Arlon Cushman was joined by Arthur L. Bryant and John J. Darby, Jr., and the firm became Cushman, Bryant & Darby. Darby had attended Georgetown Law School and was admitted to the bar in 1921. The firm's practice was described as "Practice before the U.S. Patent Office and the Federal Courts." In 1928, Arlon's son William M. Cushman joined the firm after receiving his law degree from Georgetown. By 1932, the firm's name appeared as Cushman, Bryant, Darby & Cushman, and moved its offices to the American Security Bank Building, at the corner of 15th Street and Pennsylvania Avenue, N.W., where it remained until 1971. If you look carefully at the back of a \$10.00 bill, you will see the firm's former offices to

the right beyond the Treasury Department Building. The firm became known simply as Cushman, Darby & Cushman in 1934.

During the "Roaring Twenties", the Cushman firm began its long association with the automotive industry that continues to this day. Interestingly, Cushman's early automotive work also involved gasoline products; an association that is coming full circle as Pillsbury expands its representation of Chevron into IP.

Arlon Cushman also was successful on an early patent for making motion pictures, referred to by the reviewing court as an "obscure and highly technical art." Trademark work continued for Toledo Scales, "Suncrush" for California citrus fruits, "Arrow" for collars and shirts, "3 in 1" for boiler valves. In 1940, the firm successfully enforced a patent for an x-ray machine used for the treatment of deep-seated growths and cancers. "Cutting-edge" stuff for the times.

Arlon Cushman died in 1950, the year Allen Kirkpatrick (Richard's father) and a few years after Paul Kokulis joined the firm. So, despite this 100 plus years of intervening history, we still maintain a direct link to our earliest forebears. Paul also provides a vital and continuing link to ICI, one of our most significant institutional clients. In 1951, Imperial Chemical Industries Ltd. retained Bill Cushman to handle its entire U.S. patent docket. Paul and a number of our other chemical team lawyers continue to represent ICI today.

One of our late Cushman partners, John Malley, was instrumental in bringing P.J. Federico from the PTO to the firm. Federico along with Giles Rich had authored much of the 1952 Patent Act. Mr. Malley also arranged a luncheon introduction for Giles Rich that ultimately led to Judge Rich's appointment to the bench in 1956.

John Malley was also instrumental in turning the anti-patent tide that then prevailed. In *Lyon v. Bausch & Lomb Optical Co.*, 224 F.2d 530, 535, (2d Cir. 1955), Malley argued for the new patentability standard that Pat Federico and Judge Rich had successfully included in section 103 of the 1952 Patent Act which specifically required patentable inventions to be "non-obvious" as well as novel and useful. Judge Learned Hand was on the bench, and he extended Malley's argument time for an additional hour to permit him to discourse at length on the historical background of section 103. The resulting ruling not only sustained that particular patent as valid, but coming from Judge Hand, effectively signaled to other courts that holding patents valid was the right thing to do. This victory was hailed at the time as one of the "all time" most significant rulings for the patent system, and much of the value perceived in our present area of practice today can be directly traced to John Malley's effective advocacy for patent rights at a crucial turning point in patent history.

George Sirilla, Warren Taltavull and Pete Gowdey were involved in successfully upholding as valid, enforceable and infringed two Reynolds Metal patents on the now ubiquitous stay-on-tabs for beverage cans. Just imagine if you can the royalties that have flowed to Reynolds over the years on billions of tabbed cans. "♪ They said it couldn't be done, they said nobody could do it, but ♪..." Bill West won a hard fought and important trial victory on behalf of Burlington Industries and a consortium of 19 major textile firms in 37 consolidated actions

that came to be known as the "false twist" yarns patent/anti-trust cases, invalidating or avoiding in the process no less than 23 asserted patents. You might also ask Bill about the "Hey, Mabel, Black Label!" trademark case he worked on for Carling Brewing. Allen Kirkpatrick and Kevin Joyce were instrumental in locating and establishing the claims of the true inventor of the first digital, electronic computer, which ultimately led to the invalidation of Sperry Rand patents on the "UNIVAC" as derivative, much to the delight of our client Control Data. Allen also was involved in patent litigation covering the environmental protection systems used on the Alaska Pipeline. And, did you know that retired Cushman partner Jim Dooley worked on the trademark for the ubiquitous, jolly little "Pillsbury Doughboy"? In one case for Pillsbury, Jim tendered an affidavit from Astronaut Buzz Aldrin, and thereafter claimed to be the first attorney to introduce evidence from outer space. Ted Prince obtained a patent for Elizabeth Galloway on her "Betty's Bubble Toy." Betty was 7 years old when the application was filed and 10 when U.S. Patent No. 3,395,481 issued. The National Geographic Society recognized Betty as the youngest female inventor, and she went on to stump the panel on the television program "What's My Line?" Ted also won a suit for Colonel Sanders against Old Kentucky House Fried Chicken. To celebrate, they sat down to a meal prepared by the venerable Colonel himself, but found the chicken was burnt. There's a moral there somewhere, I'm sure.

More recently, and more seriously, Paul Kokulis played a pivotal role in the international conflict between the United States and France over the first successful HIV testing protocols. Carl Love and Jeff Simenauer were champions in the "Nutrasweet" aspartame artificial sweetener wars. By now, you have all heard of our "Three Hundred Million More Reasons to Call Us" campaign that celebrated George Sirilla's and Bill West's smashing string of victories enforcing the pioneering Haworth patents. I cannot fail to mention the resounding thumping we administered to one of our local (both Washington and Silicon Valley) IP rivals in our defense of Lydall-Westex that both avoided infringement and invalidated asserted patents for automotive heat shields. That one was named by the National Law Journal as one of the ten most significant defense jury verdicts of 1996.

We also know, of course, that the Pillsbury firm has a long and illustrious history extending back to 1874, when Evans Pillsbury who had been born in Maine in 1839 moved to San Francisco and set up a law practice there. The firm had various names during this period, Greene & Pillsbury, Pillsbury & Titus, Wallace Pillsbury & Blanding. One early member of the firm, Clarence Greathouse, became principal advisor to the King of Korea, where he established the Korean postal system and revamped its judiciary. Greathouse died in Seoul and was buried there with highest honors in 1899. Oscar Sutro came along in 1901 and authored much of the legal code imposed upon the newly acquired Phillipines. So from its earliest days, the firm was much more than a California firm, it had a broad Pacific Basin focus.

By 1905, the firm was known as Pillsbury Madison & Sutro and boasted clients such as Wells Fargo, Pacific Coast Oil, George Hearst, the J. D. Rockefeller interests, and the California Wine Association. In 1911, the Supreme Court issued orders that broke up the Standard Oil Trust. The firm incorporated, Standard Oil of California (SOCAL), now known as Chevron. Our late partner Francis Kirkham first came to prominence in 1931-35 while serving as law clerk to Justice Sutherland and Chief Justice Hughes of the Supreme Court, while at the same time acting as Director of the Judicial Council of the United States (now the Administrative Office of

the U.S. Courts). Kirkham also co-authored the well-regarded "Jurisdiction of the Supreme Court of the United States." In 1938, while an associate of the firm, he revamped the United States' General Orders in Bankruptcy (298 U.S. 695) at the request of the Chief Justice. In 1935, Oscar Sutro died while on SOCAL business in Washington, D.C. In 1936, Pillsbury formed "Calabria" now known as ARAMCO. In 1944, Pillsbury's OSS operative, Jim O'Brien, rescued Werner Van Braun and other German rocket scientists from Soviet capture.

Pillsbury opened its Washington office in 1979. In 1984, it managed the then-largest ever cash merger of Gulf Oil with Chevron. In 1991, the largest law firm merger ever combined Pillsbury with Lillick & McHose of Los Angeles. Of course, we cannot forget the momentous 1996 combination of Pillsbury with the Cushman IP firm, significantly expanding the firm's East Coast presence and IP capabilities, and signifying the firm's continuing transition from the age of industry into the age of information. Most recently, we have added the collective history of our new Los Angeles partners and associates who joined us from Loeb & Loeb.

This strong foundation provides our IP Group attorneys with an unrivaled system of collective "roots" that should make each of us feel part of a team that has a recognized and established place in this country's legal history.

"For auld lang syne, my dear, We'll take a cup o' kindness yet . . ." Happy New Year!



Cushman...

In Brief



Volume 2 Number 10 August/September Edition 1991 Washington, D.C

A BRIEF HISTORY OF CUSHMAN, DARBY & CUSHMAN
The Early Years
 by Bill Bullinger

Cushman, Darby and Cushman is preparing for its centennial birthday party! We want to share with you some of the events of the past 100 years.

The history of Cushman Darby & Cushman began with Arlon V. Cushman, who was known as "A.V." He was born on January 17, 1869, in Amherst, Massachusetts. He received his preparatory education at Amherst College in Massachusetts. Mr. Cushman then studied law at George Washington University in Washington, D.C. In 1892, he was admitted to the Bar of Washington D.C. and began practice in the District of Columbia.

Ongoing research has not as yet discovered much about those pre-1900 years of the practice of law by A.V. Cushman. We do know, however, that on June 6, 1898 a trademark application was filed by A.V. Cushman in the United States Patent Office to register NON-TOX for "carbonated root and herb extract." The Examiner in the Patent Office refused registration based on a prior registered mark to ANTI-TOX for "medicinal liquor or tonic for the speedy removal of the effects of over-indulgence in drink." A.V. Cushman, on behalf of the applicant MacDonald, petitioned the Commissioner, who reversed the decision of the Examiner. Based on evidence supplied by A.V. Cushman, the Commissioner wrote that the "evidence . . . tends

very strongly to show that the registered mark is dead" and "in view of the circumstances, the differences in the marks, the differences in the articles to which they are intended to be applied, and the registered mark seemingly having been used but to a small extent and being unknown to the trade." Accordingly, the Commissioner ruled in favor of MacDonald. (Reported at 1898 Comm. Dec. 642 (1898)).

The mark registered by A.V. Cushman appeared as follows:

TRADE - MARK

No. 32070

Registered Oct. 18, 1898

NORMAN JOHN MACDONALD.
 A MEDICINAL BEVERAGE.
 (Application filed June 6, 1898)

NON - TOX

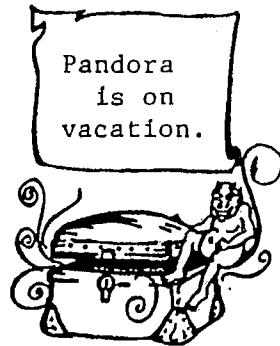
The NON-TOX case is the first reported decision of which we are aware in which A.V. Cushman appeared.

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PANDORA'S BOX



CENTENNIAL from page 1

As to patents, we find that on September 15, 1900, A.V. Cushman filed a patent application on behalf of William and Robert Denton, of Wellesley, Massachusetts, which issued as U.S. Patent No. 664,132, on December 18, 1900, entitled "Mount for Entomological Specimens" containing eight claims. The specification presents a rather scholarly treatment of the difficult problems facing amateur collectors desiring to mount and preserve delicate entomological specimens, as well as other collectibles.

The next reported case in which A.V. Cushman appears was a patent interference, Denton v. Riker, 1901 Comm. Dec. 15 (1901). Here, A.V. Cushman unsuccessfully sought to have a patent interference dissolved. The Commissioner disagreed, and we presume the patent interference went on. Perhaps A. V. Cushman was successful in the interference.

In 1904, we find A.V. Cushman assisting a fellow lawyer from Massachusetts in McBride v. Kerrys, 1904 Comm. Dec. 89, a case related to a lawsuit in Massachusetts on a patent for a feed mechanism. The Commissioner of Patents refused to suspend a co-pending interference, so both cases continued. In the early years, A.V. Cushman had a substantial practice assisting lawyers from his home state of Massachusetts in the courts of Washington, D.C.

In 1905, A.V. Cushman was successful on a motion in a patent interference, see Baltzey v. Seeberger, 1905 Comm. Dec. 120. He successfully moved to dissolve the interference on the ground that his client's patent was not patentable, a rather drastic solution but highly effective.

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CUSHMAN In Brief

Editor
Cherie Fisher

Assistant Editor
Linda Malcolm

Contributing Editors
Susan Brown
Bill Bullinger

Staff Writers
Bill Bullinger
Sheila Cox
Tony Davis
Jennifer Dolan
Carl Love
Carolyn Stevens

Graphics & Layout
Cherie Fisher
Linda Malcolm

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EDITORIAL POLICY

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It shall be the responsibility of any contributing writer to obtain written permission from the author and indicate the source of the material, should writers wish to copy an article or portion of an article for our publication.

The views expressed in CUSHMAN In Brief do not necessarily reflect the views of the Firm. The editor maintains the right to edit and print any copy submitted to her. Remarks should be directed to Cherie Fisher at x3780.

Further cases in which A.V. Cushman appeared are reported in volumes of the Commissioner's decisions for the years 1905, 1906, 1907, 1908, 1909, 1910, 1912, 1913, 1914, 1915, 1917, 1918 and 1919, involving both the United States Patent Office and the Court of Appeals for the District of Columbia. The subject matter involved sundry types of intellectual property ranging from cotton bales, shoe machines, corset-stays, and knitting machines to incandescent lamps, registers, bed pans, calculating machines and even trademark matters.

As early as 1906 the firm of Meyers, Cushman and Rea began appearing in reported intellectual property cases. This firm continued to practice under that name until 1921.

The earliest professional listing for A.V. Cushman appears in Martindale's American Law Directory, in 1916. This listing continued through 1917. In 1918, Martindale lists the firm as Meyers, Cushman and Rea. Nothing was found about the ages of Mr. Meyers and Mr. Rea. Research has located several reported cases involving Mr. Meyers, beginning in 1904 and regularly thereafter. Mr. Rea appears in reported litigation beginning in 1896 and regularly thereafter.

An interesting case by Meyers, Cushman and Rea was Ex Parte Havana-American Co., 1908 Comm. Dec. 61 (1908). In this case, it was successfully argued by Meyers, Cushman and Rea that the Examiner erred in refusing registration of "Antonia Y. Cleopatra" for cigars. Meyers, Cushman & Rea made new law in arguing that since the United States Supreme Court had held the 1870 Trademark Act to be unconstitutional, an applicant should not carry the burden of overcoming a mark registered under that Act in seeking registration of a mark under the Trademark Act of 1905. Two prior decisions thus were overruled by the Commissioner!

A.V. Cushman apparently made a break with the past sometime in 1920. In that year he formed a new firm. In 1921, there appears a listing in Martindale for Cushman, Bryant & Darby located in the Washington Loan and Trust Building, Washington, D.C. This was located across the street from the Patent Office building which is now the Smithsonian Portrait Gallery. We will return to the 1921 firm in a moment.

At least as early as 1910, there also was a Boston firm of Roberts, Roberts and Cushman as well as Meyers, Cushman and Rea (Washington), see Harris v. Kennedy, 1910 Comm. Dec. 238 (1910). John Malley, our respected leader and

senior partner for a great number of years here at Cushman, said that Robert Cushman (Boston) was A.V. Cushman's cousin. He understood that there was a very close relationship between the two firms for many years through the 1940s. Consequently, there are many reported decisions showing the two firms aligned. There also was by that time a firm called Darby and Darby (New York). Any relationship to this firm is not known to the writer.

A.V. Cushman, Arthur L. Bryant and John J. Darby, Jr. joined forces in 1921. Mr. Bryant was born a year later than A.V. Cushman, on January 30, 1870. Like Mr. Cushman, he was a graduate of George Washington University Law School and was admitted to the bar in 1891. John J. Darby, Jr. was born on August 24, 1897. He was a graduate of Georgetown Law School, and was admitted to the bar in 1921. Thus, in 1921, we have two experienced lawyers, A.V. Cushman at age 52 and Arthur Bryant at age 51, and young John Darby, Jr. at 24. We all can safely presume who was sent out for the coffee and sandwiches!

Cushman, Bryant and Darby continued in practice according to Martindale's Law Directory, through 1922, 1923, 1924, 1925, 1926, 1927 and 1928. In 1929, Martindale published the names of Cushman associates as well as the names of the partners. The associates that year included Carroll T. McGuire, Max C. Louis, Louis W. Helmuth, William M. Cushman, Gorham F. Freer and James W. Dent. The legal service offered by the firm was "Practice before the U.S. Patent Office and the Federal Courts."

With the addition of Bill Cushman, all of the pieces were beginning to fall into place. Young Bill was born in Washington, D.C. on August 21, 1899. His father was A.V. Cushman. Bill attended Philips Andover Academy (1915-1918) and Brown University (Ph.B). He received his law degree from Georgetown University in 1928. He was admitted to the bar of the District of Columbia in 1929. At that time, the firm was still located at the Washington Loan and Trust Building.

In 1931, the separate publishers, Martindale and Hubbell (founded in 1870) merged, greatly expanding the information published on the firms. That would be the last year that the Cushman firm maintained offices at the Washington Loan & Trust Building. In 1932, the Cushman firm moved to the American Security Bank Building, at the corner of 15th and Pennsylvania Avenue, N.W. where it was to remain until the seventies. The name of the firm in 1932 was Cushman, Bryant, Darby and Cushman.

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An item worth noting is the good job Tom Jackson has done with the Equity Fund. Lipper has rated the fund #1 in its category for the past year (thru 7/25). A comparison with some of the other large, well-known funds in its category are:

Equity Fund	+16.46%
Fidelity Magellan	+14.11%
Growth Fund of America	+14.47%
Washington Mutual	+10.78%
Investment Co. America	+11.07%
Windsor	+ 7.15%
S & P 500	+ 5.49%

Also on July 31, The Wall Street Journal again chose Greg Smith as the #1 long-term strategist on Wall Street. Greg manages the Flexi Strategy Fund (formerly Flexi Aggressive). For those of you in that fund, the current mix is 60% stocks, 20% bonds and 20% cash, reflecting his somewhat cautious stance.

Please don't hesitate to call if I can be of service at 1-800-527-1320. For account balances and information or fund changes, you may call Kathleen Pigut at 1-800-848-4015.

I hope everyone's summer is going well and I hope to see you all soon.

NOTE: Information contained herein is based upon data obtained from statistical sources, issue reports, or other sources believed to be reliable. However, such information has not been verified by us and we don't make any representations as to its accuracy. Prices and yields are subject to change daily.

Submitted by: Marty Clark

CENTENNIAL from page 4

The formation years of the firm of Cushman, Darby and Cushman were almost complete.

The firm became Cushman, Darby & Cushman in 1934, and it has continued its distinguished history with that identity ever since. But that is getting ahead of our story. We must return to 1928, and January 2, 1928 to be exact. On that day, a young lady reported for work at Cushman, Bryant and Darby. Her name? Our beloved Martha Lacey.

(To be continued.)

As A Matter Of...Fax!

by Tony Davis

The other day, Betty Rabenhorst sent me a news article from the August '91 issue of The ABA Journal. It was a very interesting, and somewhat coincidental, piece of news.

An inadvertent fax transmission caused the largest asbestos liability trial to be postponed. It appears that a temporary secretary working for the defense lawyers accidentally sent a fax which detailed their strategy for jury selections to a lawyer for one of the plaintiffs.

The judge presiding over the case ordered the selection of a new jury after ruling that receipt of the confidential material had given the plaintiffs an unfair advantage.

In this case, the fax sheet clearly identified the fax as privileged and confidential information and provided instructions for returning the material if it was received inadvertently.

Coincidentally, CD&C has been for quite some time working on a "confidentiality statement" to be placed on all faxes and telexes. Hence, it is forthcoming.

WHO ARE OUR CLIENTS?

- * *Our clients are the most important people ever in this office...in person, by mail or by telephone.*
- * *Our clients are not dependent on us...we are dependent on them.*
- * *Our clients are not interruptions of our work...they are the purpose of it. We are not doing a favor by serving our clients ...they are doing us a favor by giving us the opportunity to do so.*
- * *Our clients are not adversaries to match wits with. Nobody ever won an argument with a client.*

Cushman...

In Brief



Volume 2 Number 11 October/November Edition 1991 Washington, D.C

CUSHMAN, DARBY & CUSHMAN - THE FIRM'S MID-YEARS
by Bill Bullinger

For perspective and to briefly review the firm's early years, we first will return to the year (1892) the firm was founded by A.V. Cushman. Reported decisions of the United States Courts in patent cases during that era were published annually by the United States Commissioner of Patents. CD&C's law library contains reported decisions going back to 1869. The 1892 volume has the inscription "George W. Rea Patent and Trade-Mark Causes. Washington, D.C." Mr. Rea was one of A.V. Cushman's early partners, beginning at the turn of the century.

In 1892, the United States Supreme Court decided the famous case of Topliff v. Topliff, 145 U.S. 156, 36 L. Ed. 658 (1892), in which the Court upheld a patent to an improvement in connecting springs for horse drawn carriages. This is a sample of the technology in the world of intellectual property when A.V. Cushman began the practice of patent law a hundred years ago.

A.V. Cushman was admitted to the Bar of the District of Columbia in 1892. The earliest record of his office in the District of Columbia is dated 1894. The office was located at 501 F Street, N.W., a building long since gone.

The oldest recorded decisions, involving George W. Rea, occurred in 1896, see Ross v. Loewer, 1896 Comm. Dec. 665. A.V. Cushman appeared in a case in 1898, Ex Parte McDonald, 1898 Comm. Dec. 642. And there is a 1904 record of Arthur L. Bryant, another future partner of A.V. Cushman. Mr. Bryant had an office in a building at 918 F Street, N.W., which still exists. Another

future partner of A.V., John Grenville Meyers, Jr. appears in a 1904 decision. Mr. Meyers, Jr. had an office at 606 F Street, N.W.

The U.S. Patent Office at that time (a building begun in 1840 and completed in 1870) was located between F & G Streets and 7th & 9th Streets, N.W. That building now serves as the Smithsonian Portrait Gallery. Meyers, Cushman and Rea all had offices nearby.

By January 3, 1906, the three had joined forces to form the firm of Meyers, Cushman & Rea, which firm was successful in a petition to the Commissioner in In re The New York Woven Wire Matters Co., 1906 Comm. Dec. 101. In 1907 the firm was located at 908-912 G Street, N.W. where it remained until 1916 when it moved to the Washington Loan and Trust Building, which it occupied until 1932. That building also remains today.

The firm was known as Meyers, Cushman & Rea from 1906 to 1920. In 1921, the name of the firm was changed to Cushman, Bryant & Darby. In 1932, the firm became Cushman, Bryant, Darby & Cushman. It relocated that year to the American Security Bank Building at 730 15th Street, N.W. near Pennsylvania Avenue, N.W., the Treasury Building and the White House. Finally, in 1934, the firm's name became CUSHMAN, DARBY & CUSHMAN. The firm remained at the American Security Bank Building until 1970.

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RECEIVED OCT 15 1991

A.V. Cushman successfully enforced a patent in Sawyer-Smith Co. v. John Dittmar & Sons, 204 Fed. 673 (D. Md. 1939), where the opinion is a classic in patent law which will endure forever.

From this record it appears that for more than a decade inventors had been unsuccessfully seeking a solution of the problem to which Sawyer addressed himself. He solved it. He succeeded, when others failed, not merely by using different material from that which they had employed, but by using new material in such a different position or relation to the wooden portion of the pin as to secure, to some extent, at least, a different method of operation. What he accomplished, perhaps, did not require the exercise of a grade of inventive genius much above the lowest, but it did call for that. Ordinary mechanical skill would not have sufficed. Defendants had been in the business of making bowling pins for more than 30 years. For a considerable portion of that time there was a demand for a pin which had the properties the witnesses would say plaintiff's has. Defendants were not able to furnish such a pin until plaintiff showed them how it could be done. They knew the plaintiff had applied for the patent. By its direction they had stamped a notice to that effect on everyone of the 4,000 or 5,000 pins which they had made for it. Nevertheless, they apparently found that plaintiff's pin was so much better than anything which they had the right to make for themselves that they could not resist the temptation to imitate it.

During the "roaring twenties", A.V. Cushman was involved in the new wave of inventions relating to automobiles and gasoline, see Jay v. Couloire, 1921 Comm. Dec. 162. He also continued to practice trademark law, see In Re Toledo Scale Co., 1922 Comm. Dec. 139. In the latter case he was unable to convince the Commissioner of Patents that "Honest Weight," a trademark applied to scales, was not descriptive as the Commissioner stated:

Now it seems to us that if it is proper to speak of a scale or measure as honest, it is equally proper to speak of weight as honest, meaning that the weight is fair, real - not deceptive. A scale which does not weigh accurately is deceptive. It leads a person to believe that the weight it indicates is accurate when it is not. Any person reading the mark in question on a scale would, in our opinion, interpret it as signifying that the scale, when employed to weigh an article, denoted its correct weight,

and we think the appellants intended by its use to convey that idea to the purchasing public. In our opinion, the mark is clearly descriptive and, as such, is not registrable.

The term "Honest Weight" was thus need to be part of the English language not entitled to be appropriated as a trademark.

A.V. Cushman was back in Court in In Wescott, 1923 Comm. Dec. 234, in connection with an invention for making motion pictures. The Court, referring to the invention as relating to an "obscure and highly technical art," reversed the Patent Office's refusal to grant a patent and held for A.V.'s client.

A.V. won the battle but lost the war in Orange Crush Co. v. California Crushed Fruit Co., 1924 Comm. Dec. 321. A.V. convinced the Patent Office examiner that "Suncrush" for citrus fruits was registerable over "Orange Crush." However, the Court found the marks confusingly similar and reversed the Patent Office examiner. Shortly thereafter, A.V. bounced back with a victory on the trademark "President" for suspenders in a successful opposition as to the same mark used for underwear and shirts, Oppenheim v. President Suspender Co., 1925 Comm. Dec. 183. He also was successful in registering "3 in 1" for boiler valves despite opposition from the Three in One Oil Co., see 1928 Comm. Dec. 74, 75.

A.V. also was successful in having the registration to "Arrow" for collar buttons cancelled in view of a prior registration to "Arrow" for collars and shirts, Cluett, Peabody & Co. v. Samuel Hartogensis, 1930 Comm. Dec. 342. A.V. was ahead of his time, and therefore unsuccessful, in another 1930 case in which he attempted to obtain registration of the configuration of an article as a trademark, see In Re Dennison Mfg. Co., 1930 Comm. Dec. 318.

Any discussion of the mid-years of the Cushman firm (1920-1950) must include the prudent decisions of the then named partners, A.V. Cushman, Arthur Bryant and John Darby to hire three associates who would fuel the fire of the firm. They were Max Louis (born 1897, admitted to the bar 1930), C. Willard Hayes (born 1902, admitted to the bar 1928), and John W. Malley (born 1906, admitted to the bar in 1934). Each of these gentlemen enjoyed an illustrious career at Cushman, Darby & Cushman, and each contributed mightily to the firm's growth and the development of intellectual property law.

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A practical side to Max Louis, who joined the firm originally as a secretary, was his ability to take shorthand with either hand. Willard Hayes became a famous trial lawyer and President of the American Patent Law Association (now known as the American Intellectual Property Law Association). John Malley, a graduate of the Naval Academy, also became a famous trial lawyer and served with distinction in the Navy during World War II. He enjoyed saying that he made at least three court appearances in his officer's uniform to deliver oral argument during the war years on behalf of the firm's clients. His successes were many including an appearance before Judge Learned Hand in Lyon v. Bausch & Lomb Optical Co., 224 F.2d 530 (2nd Cir. 1955).

In 1936, Crown Cork & Seal successfully sued for patent infringement before the District Court, 14 F. Supp. 255 (E.D.N.Y. 1936). John Darby was one of Crown's attorneys. However, the Second Circuit Court of Appeals reversed the District Court's decision, 86 F.2d 698. Notwithstanding that the eminent Judge Learned Hand agreed with the Court of Appeals' majority opinion, John Darby persuaded the Supreme Court to reverse the appellate court (304 U.S. 159) and to find in favor of the firm's client. For a lawyer and a law firm, it was a tremendous victory. Cushman, Darby & Cushman surely celebrated that happy day, May 2, 1938.

On the litigation side, the firm in 1940 successfully enforced a patent for an x-ray machine used for the treatment of deep seated growths and cancers, 46 USPQ 408 (E.D. Ky. 1940). Cushman has always been in the forefront of advancing technology.

Near the close of the firm's mid-years, in a landmark case dated December 6, 1948, Fauber v. United States, 81 F. Supp. 218 (Ct. Cl. 1948), the Court awarded the firm's client damages for patent infringement. The patents in suit, relating to hydroplane boats, were granted in 1910 and 1912, but a petition for compensation was not filed until April 26, 1932, see 37 F. Supp. at 434. It took an act of Congress to allow a recovery but, in the end, Willard Hayes and the firm prevailed for Mr. Fauber's widow!

A.V. Cushman died in 1950, about the same time that the firm hired three new associates, Irvin Rimel, Allen Kirkpatrick and Paul Kokulis. Irv came by way of the University of Illinois. Allen ("Kirk") was a graduate of MIT and came from the Patent Office. Paul was a graduate of Worcester Polytechnic Institute and was a student at George Washington University Law School when he was

hired. Kirk was to become patent counsel for Control Data Corporation, while Paul would begin a career of service on behalf of the firm's principal client, ICI.

Both Paul and Kirk remain today as vital participants in the modern stage of the growth of Cushman, Darby & Cushman.

(To be continued.)

CD&C ATTORNEYS OFFER STANDARDS FOR LACHES DEFENSE

by Jennifer Dolan and Michael Roll

The U.S. Court of Appeals for the Federal Circuit, hearing appeals in banc in A.C. Aukerman, Co., v. R.L. Chaides Construction Co., requested input regarding the conditions for using the "laches" and estoppel defenses.

A team of five CD&C attorneys joined with the Federal Circuit Bar Association (FCBA) in drafting an amicus brief concerning appropriate use of a laches defense in mid-September.

Larry Hymo, Ken Colton, Lynn Eccleston, Jay Berquist and Michael Dzwonczyk contributed to the response. Of several submissions, FCBA's was the only brief granted time for oral argument.

"The court seemed serious about soliciting guidance from the both parties and amici," commented Michael Dzwonczyk.

Below are the three questions posed by the CAFC followed by a summary of the FCBA's response:

- 1) In a patent infringement suit, should a presumption of undue delay or a presumption of material prejudice or both arise in connection with a laches defense where the delay in filing suit exceeds six (6) years?

FCBA sided with the presumption of undue delay, where it is appropriate to presume that the delay is reasonable and there is an absence of prejudice.

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Cushman...

In Brief



Volume 2 Number 12 December/January Edition 1992 Washington, D.C

CD&C History - The Conclusion

by Bill Bullinger

Our review of the firm continues in the late 1940s, after World War II, when John Malley returned to the firm from service with the U.S. Navy. A.V. Cushman, John Darby and Bill Cushman were the only partners in the firm, which had adopted the name Cushman, Darby & Cushman in 1934. However, shortly after Mr. Malley's return, he, Willard Hayes, Gorham Freer, Rodger Gessford and Max Lewis were made junior partners.

In 1950, CD&C consisted of ten lawyers. A.V. Cushman and J.J. Darby passed away that year. Messrs. Malley, Hayes, Freer, Gessford, Lewis and Bill Cushman spearheaded the growth of the firm in the 50s and 60s. In 1950, Paul Kokulis and Allen Kirkpatrick were associates with CD&C.

In 1951, seven years after the United States government had filed a civil action in the Southern District of New York, a decision was handed down. The case was United States v. Imperial Chemical Industries, Ltd. The Court required ICI to retain independent patent counsel. However, in expectation of this, ICI had been looking around for a patent firm to act as its attorneys in applications and matters before the United States Patent Office and courts and in 1948 Peter Ball, the head of the ICI Patent Department, asked Bill Cushman, who was not a chemist, whether CD&C could handle the entire ICI patent docket. Bill Cushman said "yes" and the deal was done. Suddenly over 300 active ICI patent files arrived on the firm's doorstep, an event which forever changed the life of Paul Kokulis. From then on, Paul, who had joined the firm in May of 1946, had at least one ICI file on his hip wherever he went. As we approach our 100th firm anniversary and Paul's forty-sixth anniversary

with CD&C, we are grateful to ICI, to Paul and to the colleagues he has mentored to take good care of ICI matters.

The present nucleus of the firm grew when Paul Kokulis, Allen Kirkpatrick, David Varner and Irv Rimel became partners in 1954. Alvin Gutttag and Ray Lippitt came in 1953. Lloyd Knight followed in 1954. Carl Love came in 1956. George Sirilla followed in 1957. Larry Hymo joined in 1959. David Brinkman came in 1961. Ned Martin, Bill West and Kevin Joyce joined in 1962. Ted Prince and Don Deaver came in 1963. Bill Cushman, the last name partner, passed away in 1964.

During this period the firm went from a single Office Manager, Florence Graham to several key people including Katherine Bitter, Martha Lacey's sister, a loveable person who made you turn in your old pencil to receive a new one, to a staff of persons, complemented by Florence Bear, and Mrs. Winchester, who only recently passed away. CD&C

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OUR JENNY—
by David Brinkman

*Vibrancy and enthusiasm.
And in a moment, gone.
Memories flung down in exchange.
Intolerable cost,
for the peace of a friend.*

CENTENNIAL from page 1

went from wet copiers to thermocopiers; and from a single telephone to installing a switch board. CD&C were getting ready to join the 21st century!

By 1967 CD&C had grown to 24 lawyers listed in Martindale-Hubbell (with a comparably growing efficient staff). All contributed greatly to the growth of the firm. Other lawyers no longer with us also contributed greatly: Max Louis, Gorham Freer, Rodger Gessford, Irv Rimel, Joe Street, George Mobbille, Jim Dooley, and Akin Davis.

By 1970, CD&C had grown to a listing of 32 lawyers in Martindale-Hubbell Law Listing; by 1981, CD&C listed 41 lawyers; and by 1991, CD&C listed 67 lawyers. Next year, starting with A.V. Cushman, the firm will have been listed for 100 years.

On March 10, 1966, a patent application was filed on behalf of Elizabeth Galloway by Ted Prince. Ted made a bit of history on this one, because, in receiving U.S. Patent No. 3,395,481 on August 6, 1968, for a "Toy for Forming Bubbles" Elizabeth was recognized as the youngest female inventor to receive a patent and was noted in the National Geographic Society's 1971 book "Those Inventive Americans." Elizabeth went on to stump the panel on the television program, "What's My Line."

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Seasons Greetings

**CUSHMAN
In Brief**

Editor

Cherie Fisher

Assistant Editor

L.K. Malcolm

Contributing Editors

Susan Brown

Bill Bullinger

Staff Writers

Bill Bullinger

Shella Cox

Tony Davis

Carl Love

Carolyn Stevens

Graphics & Layout

Cherie Fisher

L.K. Malcolm

Cushman

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EDITORIAL POLICY

Our goal is to provide an enjoyable, informative publication for all staff. In an effort to provide a positive means of communication, we will report stories, issues and events of interest with fairness and honesty.

It shall be the responsibility of any contributing writer to obtain written permission from the author and indicate the source of the material, should writers wish to copy an article or portion of an article for our publication.

The views expressed in CUSHMAN...In Brief do not necessarily reflect the views of the Firm. The editor maintains the right to edit and print any copy submitted to her. Remarks should be directed to Cherie Fisher at x3780.

In 1978, the law firm experienced the death of Willard Hayes, who practiced law with the firm for fifty years. He had been a devoted fan of the bow-tie and the jaunty straw hat. Willard was President of the predecessor organization of the American Intellectual Property Association in 1957-1958. His work contributed substantially high regard for the firm.

The seventies also saw the arrival of Mr. P.J. Federico at CD&C, who was "Mr Patent Law" to all lawyers because of his devotion and contribution to the patent system. He and Judge Giles Rich were the principal authors of the 1952 Patent Act under which Patent Law is practiced today. Retiring from the PTO in 1970, Mr. Federico was to practice law at CD&C, instruct young lawyers and counsel old lawyers, and contribute to CD&C and the patent bar until his death in 1982.

While at CD&C, Mr. Federico contributed in many ways. He was instrumental in having reopened a district court decision that had previously upheld as valid and infringed a patent of a competitor of one of our clients. After the new trial, the district court rendered a bench decision invalidating the patent on the basis of a newly discovered Belgian patent whose effective date as prior art was determined through Mr. Federico's research. That decision was affirmed on appeal.

Late in Mr. Federico's life, a small luncheon was arranged for Mr. Federico, Judge Rich and John Malley by CD&C and hosted by Carl Love. Judge Rich and Mr. Federico had been patent advocates for many years. John Malley introduced Judge Rich in Washington to Secretary Rodgers when then Giles Rich was seeking appointment as a Judge in 1956. Judge Rich took his oath of office on July 20, 1956 and has served ever since with great distinction. The luncheon was a momentous gathering of three old friends. P.J. Federico's name appears along with CD&C in several reported cases, at 178 USPQ 207; 178 USPQ 220; and 188 USPQ 448, 449.

Throughout the one hundred-year history of CD&C, the firm has been involved in court cases involving intellectual property rights. Previously, we have discussed court cases pre-1950. We begin here with Bill Cushman and Willard Hayes' significant victory in McCormick & Co. v. B. Manishewitz Co., 206 F.2d 744 (6th Cir. 1953). Faced with an adverse decision below, Bill and Willard prevailed on appeal in protecting the mark "Mc" against use of the mark "BMc." In this landmark decision, the appeals court recognized that a trademark may be infringed

because of similarity which is more apparent to the ear than to the eye.

In 1955, the firm had one of its greatest victories, in Lyon v. Bausch & Lomb Optical Co., 224 F.2d 530 (2nd Cir. 1955). John Malley and Willard Hayes prevailed for an independent single inventor and his patent. At that time, there was a pronounced and recognized judicial hostility towards patents. Judge Learned Hand, one of the greatest patent jurists of all time, was on the bench and John Malley was asking Judge Hand to sustain the patent. Judge Hand had been reversed in holding a patent valid by the U.S. Supreme Court in the famous case of Jungerson v. Ostby, 335 U.S. 560 (1949), with one dissenting justice who wrote of the "strong passion" of the Supreme Court to strike patents down "so that the only patent that is valid is the one which this Court has not been able to get its hands on." The one principal change in the law since Jungerson was decided in 1949, was that Pat Federico and Judge Rich had spearheaded the passage of the 1952 Patent Act which stated for the first time that patents were presumed to be valid and that a Court, in order to hold a patent invalid, must first find the invention to have been "obvious to a person having ordinary skill in the art." During oral argument in the Lyon case, John Malley referred to the historical and constitutional background to 35 U.S.C. Section 103, the then new section of the Patent Act of 1952 that explicitly brought the issue of obviousness into play. John said he was prepared to argue that background but that it might take an hour, far longer than the time permitted. Judge Learned Hand, the presiding judge on the panel, said he wanted to hear what John had to say about that aspect of Section 103. John then discoursed for the next hour and, after oral argument was completed, John won a resounding victory. In his written opinion, Judge Learned Hand penned the now famous, often quoted passage, 224 F.2d at 535, in finding the patent valid:

The most competent workers in the field had for at least ten years been seeking a hardy, tenacious coating to prevent reflection; there had been a number of attempts, none satisfactory; meanwhile nothing in the implementary arts had been lacking to put the advance into operation; when it appeared, it supplanted the existing practice and occupied substantially the

Continued on page 4

whole field. We do not see how any combination of evidence could more completely demonstrate that, simple as it was, the change had not been "obvious * * * to a person having ordinary skill in the art."

Review by the Supreme Court was denied, 350 U.S. 911 (1955). John and Willard had prevailed in the most important case following the passage of the 1952 Patent Act. It was written up in Law Journals and cited extensively. It was welcomed by patent practitioners and scholars alike with open arms. Their victory turned the tide of holding patents invalid, and was precisely what the drafters of the 1952 Act, Pat Federico, Judge Rich, and Congress had sought to do. It took a creative lawyer like John Malley to finally convince the Courts that holding patents valid was the right thing to do.

Willard Hayes, Bill Cushman and George Mobile won another big case for the firm in Reddy Kilowatt, Inc. v. Mid-Carolina Elec. Corp., 240 F.2d 282 (4th Cir. 1957). There Willard convinced the Court to find that the trademark "Reddy Kilowatt" was not infringed by the use of the mark "Willie Wiredhand," which were two cartoon-like characters.

The following year, 1958, John Malley and Allen Kirkpatrick won what was one of John's favorite and most appreciative victories, Seismograph v. Offshore Raydist, 263 F.2d 5 (5th Cir. 1958). Here, John and Allen represented the small company, Hastings. The Court found that the opponent was "playing 'cat and mouse" game with Hastings" and had "led Hastings through a tortuous path laden with deception, knavery and misrepresentation." On rehearing, the Court refused to delete the above references in its opinion and refused to disturb its award for attorney fees to Hastings because of the exceptional nature of the case and the "gross injustice" to Hastings.

Beginning in the sixties, a significant contribution to the law was made by the firm by John Malley, Willard and Carl Love, Triumph Hosiery Mills, Inc. v. Alamance Ind. Inc., 299 F.2d 793 (4th Cir. 1962). Their legal opponent was no less than Simon Rifkind, a former federal judge of great skill.

Also in the sixties, John Malley, Allen Kirkpatrick, Carl Love and Bill West successfully defeated 3M in a patent contest against Norton Co. 280 F. Supp. 674 (N.D. Ohio 1968). It was one of the hottest and hardest fought patent contests of the

sixties. George Mobile won an important victory that upheld the validity of a patent on a metal treating process after an eleven week trial in Chicago. Allied Research Prod. Inc. v. Heatbath Corp., 161 USPQ 527 (N.D. Ill. 1969). Paul Kokulis and Larry Hymo appeared in the CCPA in the case where the Supreme Court finally overturned the "rule of doubt" in patent cases. 363 U.S. 612 and 389 U.S. 5. Carl Love and George Sirilla successfully enforce a patent in 1969 in Stamicarbon N.V. v. Escambia Chem. Corp., 160 USPQ 815 (N.D. Fla. 1969). Paul Kokulis, recognized today as one of the most knowledgeable experts in patent interference law, was successful in Storchheim v. Daugherty, 161 USPQ 679 (CCPA 1969). Paul and Larry Hymo combined in United States v. Glaxo Group, to demonstrate the firm's capabilities in patent-anti-trust matters, which case went all the way to the Supreme Court, 410 U.S. 52, 35 L.Ed 2d 104, 727. John Malley and Ned Martin successfully defended General Electric in Strong v. General Electric Co., 163 USPQ 395 (N.D. Ga. 1969), against a most tenacious opponent.

The 1970s were only nine days old when Allen and Kevin Joyce received a favorable decision in Technitrol, Inc. v. Control Data Corp., 164 USPQ 552 (D. Md. 1970). This was rapidly followed by a victory for George Mobile and Ted Prince in Kentucky Fried Chicken Corp. v. Old Kentucky House Fried Chicken, Inc., 164 USPQ 500 (N.D. Ky. 1970). In perhaps the only reported case of its kind, the firm represented both appealing parties in In re Beatrice Foods Co. and In re Fairway Foods, Inc., by permission of the parties, because of the firm's expert knowledge concerning appeals, 166 USPQ 431 (CCPA 1970). Bill West became principal counsel in the "false twist" litigation involving multi-defendants, multi-trials, and multi-appeals which lasted for years involved synthetic fibers, see Duplan v. Deering, Milliken, 171 USPQ 742, 197 USPQ 342 (S.D.C. 1977). John Malley was so proud of this case. Larry Hymo persuaded the Court on a motion for summary judgment that the basic "bathtub" patent was not infringed and could not justify the licensing scheme complained of, see 370 F. Supp. 769 (S.D.C. 1973).

On the prosecution side, the firm generally has succeeded in the PTO. However, when it must, appeal will be taken, just as Paul Kokulis and Ned Martin were successful in Vogel v. Jones 179 USPQ 425 (CCPA 1973); Paul was also successful in Storchheim v. Daugherty, 161 USPQ 679 (CCPA

Continued on page 10

1969); and Lloyd Knight was successful in In re Castaing, 166 USPO 550 (CCPA 1970). Alvin Gutttag was successful in In re Noznick, 178 USPO 43 (CCPA 1973) and In re Tiffin, 170 USPO 88 (CCPA 1971). The demonstrative show Alvin put on during oral argument was so convincing that Judge Rich returned to his chambers to fetch his camera in order to take photographs. David Varner was successful in In re Muller, 163 USPO 641 (CCPA 1969), and 179 USPO 39 (CCPA 1973).

George Mobbille, George Sirilla and Don Bird were successful in having three patents of W.R. Grace & Co. upheld as valid, enforceable and willfully infringed, also securing an award of treble damages, attorney's fees and an injunction in W.R. Grace & Co. v. Park Manufacturing Co., 378 F. Supp. 976 (E.D. Ill. 1974). Carl Love teamed with Susan Brown to successfully defeat an adverse claimant's patent ownership in GAF Corp. v. Amchem Prod. Inc., 188 USPO 205 (E.D. Pa. 1975). George Sirilla and Pete Gowdey won the first case where the Court of Customs and Patents Appeals considered the issue of patent validity on an appeal from a decision of the United States International Trade Commission. Solder Removal Company v. The United States International Trade Commission, 582 F.2d 628 (CCPA 1978). George and Pete were successful in having the patent in suit held invalid as obvious.

Then, in 1981, George Sirilla teamed with Warren Taltavull and Pete Gowdey to successfully uphold as valid, infringed and enforceable two patents of Reynolds Metals Company on the now ubiquitous stay-on-tabs for beverage cans, while in the same suit having Continental Can Company's patent held invalid, not infringed and unenforceable. Reynolds Metals Co. v. The Continental Group, Inc., 525 F. Supp. 950 (N.D. Ill. 1981). After that victory, and up to the present time, the entire beverage can industry has been paying royalties under those patents for the 60 billion beverage cans sold each year in the United States with stay-on-tabs.

The firm has definitely handled a host of unusual cases such as drydocks (Allen Kirkpatrick, Kevin Joyce, 187 USPO 733 and 184 USPO 373); off-track horse betting (Allen Kirkpatrick, 181 USPO 808); nuclear fuel (George Mobbille, 181 USPO 41); Spiro Agnew wrist watch (David Brinkman, 181 USPO 331); toy LEGO blocks (Ned Martin, 187 USPO 580); "DAMN I'M GOOD" trademark (Ted Prince, 212 USPO 684); "Sunshine Tree" trademark (Jim Dooley, Don Bird 171 USPO 66); "Black Label" trademark (Jim Dooley, Bill West 160 USPO 303); Scoreboards (Kevin Joyce, 213 USPO 475); stay-on tabs for pop-top cans (George Sirilla, 210 USPO 911); Balloons over Washington (Susan Brown, 542 PTCJ 13); "7-11" trademark (Jim Dooley, Don Bird, 161 USPO 562); Alaskan

pipeline (Allen Kirkpatrick, 218 USPO 468); copper recovery (Larry Hymo, 215 USPO 314); radio stations (Ted Prince, 217 USPO 1207); swimsuits (David Brinkman, 223 USPO 1109); and beer (Warren Taltavull, 230 USPO 675).

Cushman attorneys have been involved in the front line and also the largest patent litigation going on such as:

false twist yarns (John Malley, Bill West, Larry Hymo, Warren Taltavull);
antibiotics (Paul Kokulis, Larry Hymo);
genetics (Paul Kokulis, Terry Scott, Mary Wilson);
doxycycline (Ned Martin, Don Deaver);
mining chemicals (Larry Hymo, Bill Bullinger)
solder removal (George Sirilla, Peter Gowdey);
candy space sticks (Jim Dooley);
breast cancer treatment (Paul Kokulis, Larry Hymo);
aluminum cans (George Sirilla, Warren Taltavull);
office equipment (Bill West, George Sirilla, Nancy Linck);
mixing resins (Carl Love, Bill West, Peter Gowdey);
circuits (Bill West, Larry Harbin, Lynn Eccleston); and
artificial sweeteners (Carl Love, Jeffrey Simenauer).

CD&C has been blessed with an extraordinary number of dedicated and loyal employees over the years. Available records do not allow us to research the firm's early years. We can begin, however, with the date of January 2, 1928, which is the date Martha Lacey began work at CD&C. Others who followed her in rendering prolonged distinguished service include Ramona Britt, Carol Cascio, Bernice Collier, Maebelle Davis, Tony Davis Linda Evans, Cherie Fisher, Eleanor Goumis, Patricia Johnson, Jane Kidwell, Josephine Lee, Francoise Martin, Bruce Nash, Marie Nguyen, Betty Pauley, Heather Petroni, Edith Rephsis, Janice Sullenberger and Mary Whiston, to mention some of those who are with us today.

The firm has expanded tremendously since 1950. From a modest and simple arrangement of lawyer-secretary-office manager we have expanded to include more types of lawyers and legal personnel, including counsel, consultants, law clerks and legal assistants. The secretaries of the firm have greatly expanded their skills, capabilities and contribution to handling the ever increasing daily services provided by the firm.

CD&C approaches its 100th anniversary with the strongest team ever assembled, from "stem
Continued on page 11

Concerning applications of genetic engineering, Prof. Falkinham mentioned the leaching of metals in mining, combustible gases from garbage, water treatment and detoxification, rapid growth, high yield agricultural crops, alcohol production, microbial-enhanced recovery of oil from reserves and innovative vaccine production.

In the area of animal genetic engineering, Prof. Falkinham noted that injection of rat growth hormone into mice embryos led to the formation of larger mice, some of which were giant "by mouse standards." The mice carried the enhanced size characteristic to a second generation, suggesting the possibility of developing sheep, cattle and pigs capable of more rapid growth. He also noted that it is possible to patent a transgenic animal (i.e., an animal carrying a foreign DNA sequence).

Prof. Falkinham concluded the Seminar with discussion of hybridoma technology which has yielded specialized cells which, unlike mammalian cells in culture, function like non-stop small factories producing a single type of antibody molecule called a monoclonal antibody. Such hybridomas are the result of fusing a normal cell producing antibodies with a cell isolated from a type of malignant tumor called myeloma. The medical and commercial applications of hybridomas include measurement of the presence of hormones (pregnancy test kits), detection of malignant conditions, identification of viruses and targeted destruction of malignant cells.

The Seminar book, "Biotechnology: Science and Commercial Applications," plus audio and video tapes of the program, are available in the library.

TOYS FOR TOTS

Recent news articles have stated there are many homeless children staying in shelters in our area. Unless there is an extraordinary turnaround, many children in the Washington area may receive no toys at all.

If you would like to contribute to this effort, please drop your new, unwrapped toy (no gift wrapping) toy in either Betty Rabenhorst Greene or Cherie Fisher's Office by December 20, 1991.

to stern" as Mr. Malley might have said. We are now over 200 individuals, working together towards our common goal of providing the best legal advice and service to each of the firm's clients. A future generation will someday be looking back and writing about what we do today and tomorrow. Let us be thankful for our heritage and predecessors and do our very best to continue to provide good services and add to the preeminence of the firm.

We conclude this brief three-part history of the firm with warmest thanks to those who helped put this history together. This series is intended for everyone here at CD&C and we thank one and all for contributing to the firm.

CONTINUING LEGAL EDUCATION (CLE)

The increasing complexity of the practice of law has fostered and indeed, required, some back-to-school sessions for lawyers, taught by lawyers. Nancy Linck recently became the teacher to a group of lawyers gathered together by the Practising Law Institute in New York City. As part of a multi-faceted program on "Patent Litigation 1991", Nancy lectured on the trial of liability issues. Nancy called it a definite challenge, a lot of hard work and a learning experience for herself. She is now going through the "I'm glad I did it and it's over" phase, but she is ready to study and present a new topic when the opportunity arises.

HERMAN JAMES UNGER



"Your resume says you spent four years at college."

Cushman Darby & Cushman Great Cases Series

by Chris Comuntzis

Some of you may have noticed the recent obituaries of Dr. John V. Atanasoff in the press. A Washington Post article referred to Atanasoff as the father of the digital computer and mentioned his involvement in patent litigation concerning the ENIAC computer in the late 1960s. In that litigation patents covering the ENIAC computer, owned by Sperry Rand and issued to Dr. John Mauchly and J. Presper Eckert, were invalidated and Atanasoff was proclaimed to be the first to invent a digital computer.

But did you know that the evidence and case against the Sperry Rand patents was developed by CD&C lawyers Allen Kirkpatrick and Kevin Joyce? At the time, the firm's client, Control Data Corporation, had been sued by Sperry Rand for patent infringement of Mauchly and Eckert patents, including one relating to a regenerative memory for storing digital information. In preparing Control Data's defenses, Kirk came across an obscure reference to earlier work of Atanasoff involving a regenerative memory for use in a computer and immediately set out to investigate the matter.

Kirk located Atanasoff, who during World War II had taken a position in the Washington, D.C. area, and visited his home near Frederick, Maryland. After reviewing extensive records, which Atanasoff had maintained for 30 years, Kirk and Kevin were able to piece together that Mauchly had been shown Atanasoff's computer during a lengthy visit with Atanasoff at Iowa State University in 1941. Thereafter, Kirk and Kevin developed iron clad deposition testimony that Mauchly (and Eckert) had derived their "inventions" from the earlier work of Atanasoff. In applying for their patents, Mauchly and Eckert gave absolutely no credit to Atanasoff for the development of their computer and did not inform the Patent Office about Atanasoff's prior work.

Mauchly (and Sperry Rand) lost credibility as a result of Kirk's grueling interrogation of Mauchly. After initially obtaining statements from Mauchly that Atanasoff's work had been elementary and of no real value, Kirk confronted him with a blizzard of documentary evidence, including letters written by Mauchly himself, that proved the great value of Atanasoff's development. Imagine Mauchly's panic when confronted with his own letters extolling the worth of Atanasoff's work, letters which Mauchly had incorrectly assumed no longer existed. Kirk also confronted Mauchly with Atanasoff's long kept documents which described his computer and which gave substance to the charge that Mauchly had copied Atanasoff's work. In response to Kirk's withering examination, Mauchly was reduced to blaming his own poor memory for his false testimony.

The Sperry Rand v. Control Data Corporation trial lasted many weeks, but it was never decided. Several years later, Control Data entered into a very favorable settlement with Sperry Rand, resulting from the fact that the evidence that Kirk and Kevin developed had been used by Honeywell's attorneys, in a companion case involving the ENIAC computer, to invalidate Sperry Rand's basic computer patent and firmly establish Atanasoff as the father of the digital computer.

Details about the Control Data and Honeywell cases are contained in two books in our library:

The First Electronic Computer

by Alice R. Burks and Arthur W. Burks; and

Atanasoff: Forgotten Father of the Computer

by Clark R. Mollenhoff.

QA 76.5 B825 1988

QA 76.2 .A75 1988

Of course, you can gain even greater insights to the cases by talking to Kirk and Kevin. In fact, you may even get Kevin to tell you about Atanasoff's concern for his own well-being and the suicide Kevin investigated at Atanasoff's request.

RIDDLE CONTEST

Can you name the CD&C litigator who has handled two "number one" cases on Professor Donald Chisum's Annual Top Ten Lists of important cases for the patent bar?

The winner gets to take Chris Comuntzis to lunch.

Note: Bill West and members of his immediate family are not eligible for this contest.