LEGAL ISSUES

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Legally Speaking — John Doe and the PATRIOT Act

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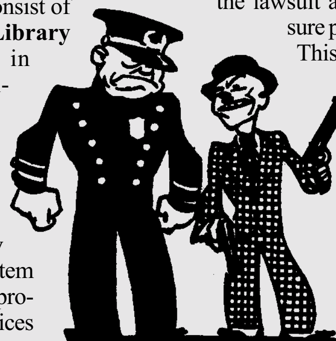
There have been two cases where the **NSL** provisions of the **PATRIOT Act** have been challenged. Technically, both cases involved the **Foreign Intelligence Surveillance Act (FISA)**,[1] which is the statute that deals with **National Security Letters**. However, in both cases the courts were dealing with that portion of **FISA** which had been amended by section 215 of the **PATRIOT Act**.[2] One case, *Doe v. Ashcroft ("Doe I")*, was from New York, and involved an Internet service provider.[3] The second case, *Doe v. Gonzales ("Doe II")*, was from Connecticut and involved a library.[4] In both cases, the **District Courts** found the challenged provisions of **FISA** and the **PATRIOT Act** to be unconstitutional. The two cases were consolidated for the purposes of appeal to the **2nd Circuit**.[5] This column will discuss the now-declassified history of the Connecticut case *(John Doe II)*, along with the consolidated ruling of the **Court of Appeals**.

The Connecticut *John Doe* Case

Monday, June 26, 2006, dawned bright in New Orleans. The **American Library Association** was holding its annual conference in the Crescent City, and I was scheduled to attend a meeting of the **American Library Association Intellectual Freedom Committee**. As co-chair of the **Access to Information Committee** of the **Reference & User Services Association (RUSA)**, it was my duty to represent **RUSA** and report on this meeting to the rest of the committee. However, due to a dramatic legal development, the briefing meeting was canceled. Instead, the meeting was replaced by a last-minute program entitled "Meet John Doe."[6] This program involved the *John Doe* case from Connecticut challenging the receipt of a **National Security Letter (NSL)**.

In May 2006, the **FBI** announced that it was dropping the case and was partially releasing *John Doe* from the gag order; however, talking about the case was still prohibited. On Friday, June 23, the **Court** officially closed the case and lifted the gag order in its entirety as of 9 a.m. EST on Monday, June 26. The "Meet John Doe" program took place at 8 a.m. CST, which was 9 a.m. on the East Coast (i.e., the very minute the gag order was lifted). Therefore, the program at **ALA** was the first time that these individuals have been able to tell their story to anyone. There are still restrictions on the information that can be told, but the four *John Does* and the **ACLU** are currently negotiating over these aspects of the sealed court records.

John Doe turned out to consist of four individuals from the **Library Connection Cooperative** in Connecticut. The four individuals are **George Christian**, **Barbara Bailey**, **Peter Chase**, and **Janet Nocek**.[7]



Library Connection is a cooperative in Hartford County, Connecticut. They run the integrated library system for the entire county, and also provide telecommunications services to over half their members. **George Christian** is the executive director.

The situation began on May 19, 2005. **Kenneth Sutton**, the Systems and Telecommunications Manager for **Library Connection**, was informed by the **FBI** that they were going to be serving an **NSL** and asking who had the positional authority to order the release of Internet access logs.[8] **NSLs** are issued to an individual, not an entity, so the **National Security Letter** had a specific name on it. Although the **NSL** was originally addressed to **Kenneth Sutton**, the name was quickly changed to **George Christian** as the executive director of **Library Connection**. The **NSL** directed **Library Connection** "to provide to the . . . **FBI** any and all subscriber information, billing information and access logs of any person or entity related to" an IP address at a specific time on one particular day.[9]

Although it was technically breaking the law, **George** felt that it was only appropriate for him to let the executive committee of the Board of Directors know what was happening. Thus **Peter**, **Barbara**, and **Jan** became part of the *John Doe* situation, and were covered by the gag order. After all, as the director, **George** was simply a servant of the organization, which is legally the Board. But it was not feasible or prudent to inform the entire board. Luckily the **Library Connection's** bylaws allow the Executive Committee to act on behalf of the entity when the Board is unable to do so.[10]

On August 9, 2005, the Connecticut *John Does* filed a case under seal (a legal term meaning that the name of the plaintiff will not be released publicly) in the **District Court** of Connecticut. In addition to requesting a protective order in order to avoid releasing the records, the lawsuit also challenged the non-disclosure provisions of the **PATRIOT Act**. This case was filed after consulting with the **ACLU**.

George filed an affidavit to accompany the pleadings. Before this affidavit was filed with the **Court**, the **FBI** had to approve it. They redacted a lot of information, but forgot to redact his name. Thus the case was initially filed with his name on the docket.

As soon as the **ACLU** realized that **George's** name was on the docket, they amended the pleadings to refer to *"John Doe"* instead. However, the earlier docket was still available. Between information in the affidavit and the early docket, newspapers were able to figure out who *John Doe* was, and it was an open secret in Connecticut. However, the four *John Does* were unable to either confirm or deny that they were the ones who were involved in the case.[11]

One very scary event that occurred was a telephone call from the *New York Times*. The day before the first story came out in the *Times*, the reporter called **Peter** at home and asked him questions. **Peter** was being interviewed because he was chair of the Intellectual Freedom Committee for the **Connecticut Library Association**. They had a long conversation in which **Peter** did not reveal any information about the case, and just gave general answers to questions about the library scene in Connecticut. However, at the end of the phone call, the reporter asked **Peter** if he had seen the court hearing. **Peter** instantly realized that answering either yes or no would reveal that he was *John Doe*. He handled this situation by telling the reporter, "don't make any suppositions as to who *John Doe* is."[12] (In fact, he was quoted in the story as saying that.)

After getting off the phone, **Peter** called his **ACLU** lawyer. The lawyer was afraid that the story would come out and reveal a name. Since he had been on the phone for a long time with the reporter at his home, the lawyer was afraid

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that the **FBI** would conclude that he had given the name, thereby exposing **Peter** to criminal **Obstruction of Justice** charges. As a result, the **ACLU** hired a criminal defense lawyer for **Peter** in case it was necessary.

The gag order turned out to be a real ordeal. After the story came out, the phone began to ring off the hook at **Library Connection**. Ordinarily the staff was supposed to answer by the second ring, as their calls were usually from member libraries. However, **George** had to instruct his staff not to answer the telephone at all, but to let the calls transfer to voice mail. And, of course, he couldn't tell them why they couldn't answer the phone. Eventually the story died down and the staff could return to answering phone calls as usual.[13]

According to **George**, the hardest thing was to face the Board. He couldn't explain why he wasn't answering the phone or why he was sometimes absent from work. He couldn't even tell the Board (who guessed what was going on anyhow) that he wasn't spending the organization's money to fight the **NSL** because the **ACLU** was paying for the attorney.[14]

Peter, **Barbara**, and **Jan** also had to be absent from work, but could not explain why. When the 2nd Circuit was hearing the case, **Peter** had to tell his wife "I'm not going to work today. I'm going to New York, but I can't tell you why." Needless to say, his wife was not happy about this evasiveness.[15]

Peter, **George**, **Barbara**, and **Jan** were also prevented from talking about the **PATRIOT Act** at all. Although they supposedly had the Constitutional right to speak, the gag order prevented them from doing so. This was especially difficult on **Peter**, who as chair of the Intellectual Freedom Committee of the state association was suddenly unable to speak out on the issue. Prior to the issuance of the **NSL**, **Peter** had been outspoken about the need to let the **Act** expire. However, suddenly he was silenced — just as the **PATRIOT Act** was coming up for renewal. They were not even able to repeat anything that had already been printed in the newspaper.[16]

The gag order even affected the **ACLU** and its ability to oppose the renewal of the **PATROT Act**. Since the **ACLU** was representing *John Doe*, their ability to speak was curtailed. According to a board member of the **ACLU** Oregon chapter, they received a memo from the national board saying that no one in the **ACLU** or its chapters could repeat anything that was in the newspaper. They would instead have to tell audiences to read the newspaper.[17]

When the first hearing occurred in **Federal District Court**, the four *John Does* were not allowed to give their names to the judge. They were put into a locked room for the hearing. The **Federal District Court** ruled that the **PATRIOT Act** was unconstitutional, and that *John Doe's* free speech rights were being abrogated. However, the order was stayed so that the **FBI** could appeal to the **2nd Circuit Court of Appeals**. All of the documentation and court records were sealed.

When the **2nd Circuit** heard the case, the four *John Does* were not allowed to attend. The **FBI** kept them locked in a room in the courthouse in Bridgeport.[18] After the **FBI** agreed to drop the case in May 2006, they requested that all court records be expunged. The four plaintiffs were allowed to attend that hearing. However, they were under strict orders from the **FBI** not to walk in or out of the courthouse together, not to speak or sit with one another, and not to speak with or make eye contact with their lawyer. According to the **FBI**, violation of these terms would subject the four to **Obstruction of Justice** charges.

The **2nd Circuit** did not grant the **FBI's** motion to expunge the record. Nor have they allowed the **FBI** to redact the court records. The **ACLU** is currently negotiating in an attempt to have all of the records made public. Currently the court opinion and the **National Security Letter** are both available to the public online.

John Doe in the 2nd Circuit

For the purposes of appeal, the Connecticut *John Doe* case was consolidated with *John Doe I*, which had also found the portions of **FISA** amended by the **PATRIOT Act** to be unconsti-

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Endnotes

1. 50 U.S.C. 1861 *et seq*.
2. *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Public Law Number 107-56 (October 26, 2001), available at *http://www.ins.gov/graphics/lawsregs/PATRIOT.pdf*.
3. *Doe v. Ashcroft*, 334 F.Supp.2d 471 (S.D.N.Y. 2004). (Hereinafter "Doe I.")
4. *John Doe, et. al, v. Alberto Gonzalez*, Civil Action No. : 3:05-Cv-1256 (JCH), Ruling On Plaintiffs' Motion For Preliminary Injunction [Docket No. 33] at 3 (September 9, 2003, D.C. Connecticut), Quoting *Redacted Exhibit A to Redacted Complaint*. Available at *http://www.ctd.uscourts.gov/Opinions/090905JCH.DoeOP.pdf*. (Hereinafter "Doe II.")
5. 1 United States Court Of Appeals For the Second Circuit August Term, 2005 (Argued: November 2, 2005 Decided: May 23, 2006) Docket Nos. 05-0570-cv(L), 05-4896-cv(CON), Cardamone, Circuit Judge, Concurring. Available at *http://www.ca2.uscourts.gov:8080/isysquery/irl657a/3/doc*. (Hereinafter "Doe Appeal.")
6. **George Christian**, **Barbara Bailey**, **Peter Chase**, and **Janet Nocek**, Address at the **American Library Association Annual Conference**, (June 26, 2006). (Hereinafter "ALA Talk.")
7. ALA Talk.
8. **National Security Letter** from **Michael J. Wolfe**, Special Agent in Charge, FBI New Haven Division, to **Kenneth Sutton**, Systems and Telecommunications Manager, Library Connection, Inc. (Federal Bureau of Investigation May 19, 2005), available at *http://www.aclu.org/images/nationalsecurityletters/asset_upload_file924_25995.pdf*. (Hereinafter "Connecticut NSL.")
9. Connecticut NSL. See also, Doe II.
10. ALA Talk.
11. ALA Talk.
12. ALA Talk.
13. ALA Talk.
14. ALA Talk.
15. ALA Talk.
16. ALA Talk.
17. ALA Talk. This information came from an audience member during the question-and-answer session. The person identified herself as a board member of the Oregon **ACLU** chapter and explained that they had received a memo from the national **ACLU** office.
18. ALA Talk.
19. Doe I at 494-495. See, *U.S. Const. Amend. IV; United States v. Streifel*, 665 F.2d 414 (2d Cir. 1981). See also, *United States v. Morton Salt Co.*, 338 U.S. 632, 651-52, 94 L. Ed. 401, 70 S. Ct. 357, 46 F.T.C. 1436 (1950).
20. Doe I at 495, citing *United States v. Bailey* (in re *Subpoena Duces Tecum*), 228 F.3d 341, 348 (4th Cir. 2000).
21. Doe I at 506.
22. Doe I at 511.
23. Doe Appeal.
24. id. at 4.
25. Doe Appeal at 6.
26. Doe Appeal at 8-9.
27. 109 P.L. 177; 120 Stat. 192; 2006 Enacted H.R. 3199; 109 Enacted H.R. 3199.
28. 109 H.R. 3199 § 3511(b)(2).
29. 109 H.R. 3199 § 106(d)(1)(A) and 106(d)(2)(C).
30. 109 H.R. 3199 § 106(d)(2)(C).
31. 109 H.R. 3199 § 118(d). See also, H.R. 3199 § 119(g), pertaining to auditing reports to Congress. This section uses the same definition for **National Security Letters**.
32. ALA Talk.
33. P.L. 109-177 § 3199(b)(2).
34. Doe Appeal.
35. ALA Talk.

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tutional. Since the **NSL** process is not subject to court supervision as a search warrant would be, the New York court ruled that **National Security Letters** were unconstitutional as a violation of the Fourth Amendment prohibition on issuing a search warrant without probable cause.[19] According to the court's opinion:

> While the Fourth Amendment reasonableness standard is permissive in the context of administrative subpoenas, the constitutionality of the administrative subpoena is predicated on the availability of a neutral tribunal to determine, after a subpoena is issued, whether the subpoena actually complies with the Fourth Amendment's demands. In contrast to an actual physical search, which must be justified by the warrant and probable cause requirements occurring before the search, an administrative subpoena "is regulated by, and its justification derives from, [judicial] process" available after the subpoena is issued.[20]

It was this lack of subsequent judicial review that the **District Court** criticized. According to the opinion, the language of the statute "has the effect of authorizing coercive searches effectively immune from any judicial process, in violation of the Fourth Amendment."[21] The judge also ruled that the nondisclosure provisions were unconstitutional because they constituted both a prior restraint on speech and a restraint on speech because of the content.[22]

The government appealed *John Doe I* to the 2nd Circuit, where it was consolidated with *John Doe II*.[23] While the appeal was pending, the **PATRIOT Act** was amended, so the **Court of Appeals** requested that the parties provide supplemental briefs addressing the impact of the changes on their cases.[24]

According to the **Court of Appeals**, because the **PATRIOT Act** amendments allow judicial review of **NSLs**, and because these provisions are retroactive, the Fourth Amendment claims in *John Doe I* are now moot. However, there are still issues related to the gag order and the First Amendment. These issues have been remanded back to the **District Court** to "have the opportunity to receive amended pleadings, request new briefs, conduct oral arguments, and, in due course, furnish its views on the constitutionality of the revised version. . . ."[25]

The government requested that the **Court of Appeals** vacate the judgment from Connecticut in *John Doe II*. This would have had the effect of causing the decision to be moot. However, the **2nd Circuit** did not grant this request. According to the opinion, "[g]iven the concession of the Government . . . that *John Doe II* can disclose its identity, the Government no longer opposes the relief granted by the District of Connecticut in its preliminary injunction ruling. Thus, the Government has effectively rendered this appeal moot by its own voluntary actions. This voluntary forfeiture of review means that the Government has failed to meet its burden of demonstrating that it is entitled to vacatur of the District of Connecticut's preliminary injunction ruling."[26] [Citations omitted.]

The importance of the **Court of Appeals** ruling in *John Doe II* is that the **District Court's** ruling of unconstitutionality still stands and is the law in the District of Connecticut. Rather than overturn this ruling, the **2nd Circuit** simply dismissed the appeal. Thus, future litigants now have persuasive authority to cite.

The PATRIOT Act Standard for Challenge

The renewed **PATRIOT Act**[27] has been revised to clarify that recipients of **National Security Letters** will be able to request judicial review and may challenge the non-disclosure provisions of the **NSL**.[28] In addition, the new language does allow the type of consultation that occurred, where **George** informed the executive committee of his Board of Directors,[29] as well as speaking with an attorney.[30] (Although the individual recipient must disclose to the **FBI** the names of the individuals consulted, he or she does not have to disclose the name of the attorney.)

Many types of library functions are now exempt from the **NSL** provisions in Section 505 of the **PATRIOT Act** because of a better definition of when an **NSL** may be issued. However, libraries are not entirely out of the woods, as some library functions may still be subject to an **NSL**.[31] (For more information, see my "Legally Speaking" column in the June 2006 issue of ***Against the Grain***.)

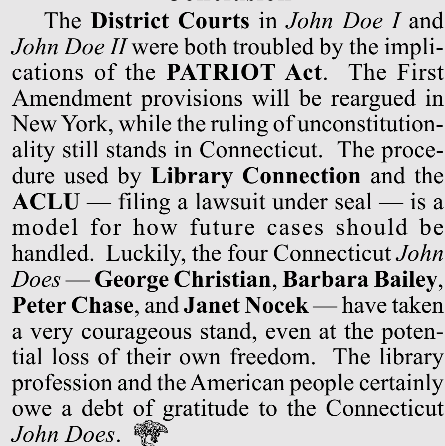
One issue involving **National Security Letters** that still needs to be addressed is the standard for challenge. According to **George Christian**, "The revised language makes it almost impossible for anyone to do what we did."[32] This is because the new provisions of the **PATRIOT Act** allow the government to certify that disclosure of the name of the **NSL** recipient will endanger national security. "If, at the time of the petition, the Attorney General, Deputy Attorney General, an Assistant Attorney General, or the Director of the **Federal Bureau of Investigation**, or in the case of a request by a department, agency, or instrumentality of the Federal Government other than the **Department of Justice**, the head or deputy head of such department, agency, or instrumentality, certifies that disclosure may endanger the national security of the United States or interfere with diplomatic relations, such certification shall be treated as conclusive unless the court finds that the certification was made in bad faith."[33]

In the Connecticut *John Doe* case, the government asserted that "national security" required that the gag order be enforced. However, the **FBI** later dropped the case and allowed **George**, **Peter**, **Barbara**, and **Jan** to identify themselves as being *John Doe*. The concurring opinion in the **2nd Circuit** noticed the irony of the **FBI** seeking to maintain a permanent ban, even after the names had been revealed in the press. The concurring opinion also noted the problematic request of the **FBI** to expunge the court records.[34]

According to **George** and **Peter**, a future **NSL** recipient can use this case as a specific precedent of an instance where the **FBI** has used the "national security" argument in bad faith.[35] Perhaps this may assist those who receive **NSLs** in the future.

Conclusion

The **District Courts** in *John Doe I* and *John Doe II* were both troubled by the implications of the **PATRIOT Act**. The First Amendment provisions will be reargued in New York, while the ruling of unconstitutionality still stands in Connecticut. The procedure used by **Library Connection** and the **ACLU** — filing a lawsuit under seal — is a model for how future cases should be handled. Luckily, the four Connecticut *John Does* — **George Christian**, **Barbara Bailey**, **Peter Chase**, and **Janet Nocek** — have taken a very courageous stand, even at the potential loss of their own freedom. The library profession and the American people certainly owe a debt of gratitude to the Connecticut *John Does*.



Cases of Note — Piling on Ebay via Patent Litigation

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EBAY INC., et al., Petitioners v. Mercexchange, LLC., Supreme Court Of The United States, 126 S. Ct. 1837; 2006 U.S. Lexis 3872 (2006).

Well, with our finger ever on the pulse of legal trends in USA, we've been chattering in ***ATG*** about the **Supreme Court** reining in frivolous patent suits, and here we have one. *See — "The End of Automatic Injunctions in Patent Litigation," Bet You Missed It, **ATG** v.18#3, June, 2006, p.72.*

Ebay of course you know for its Internet Website where goods may be listed for sale and perused by really bored people in work cubicles. **Mercexchange** sought to license a business method patent to **Ebay** but no contract was formed. **Ebay** used the method anyhow.

Mercexchange sued and got a jury verdict of patent infringement. The **District Court** said an award of money damages would be just dandy, but declined to issue an injunction against using the method. (1) A willing-

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ness of **Mercexchange** to license the patent, and (2) lack of use of the patent by **Mercexchange** itself eliminated any irreparable harm to **Mercexchange** by **Ebay** continuing to use it.

*Which is quite interesting and goes to the prior **ATG** discussion of patent disputes forcing an exchange of money, but allowing useful inventions to go on serving the common good. And would prevent questionable patents from ham-stringing Blackberry type businesses while the dispute was settled. See — "Chaos Theory Ripples Out of the USPTO," **ATG,** v.18#3, June, 2006 p.72.*

The **Court of Appeals** reversed finding a "general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances." 401 F.3d 1323, 1339.

And the **Supreme Court** reversed them.

How Come?

Injunctive relief lies within the equitable discretion of the **Federal District Courts** but must follow traditional principles of equity.

Disputes arising under the **Patent Act** (35 U.S.C.S. §§ 1 et seq.) are no exception. (a) 35 U.S.C.S. §283 clearly states that injunctions "may" issue "in accordance with the principles of equity. This is consistent with **Supreme Court** holdings on injunctions under the **Copyright Act** (17 U.S.C.S. §§ 101 et seq.). Which is to say an injunctions should not automatically issue following a finding of copyright infringement. "[A] major departure from the long tradition of equity practice should not be lightly implied." *Weinberger v. Romero-Barcelo,* 456 U.S. 305, 320, 102 S. Ct. 1798.

And of course there's a four factor test. Which is even worse than a three pronger.

To obtain a permanent injunction, a plaintiff must show (1) irreparable injury; (2) remedies at law, i.e., money damages, will not compensate for the injury; (3) balance of hardships tilts in favor of plaintiff; (4) public interest will not be disserved.

Brief refresher to avid Cases of Note Lay-readers: once upon a time there were two English court systems, law and equity. Law courts had a remedy of money damages. Equity had a remedy of injunction growing out of the power of the king to order any old thing he pleased. Now the two systems are merged, but we still talk of "law" and "equity."

The only confusion arises from the **Patent Act** declaring patents to have the "attributes of personal property," § 261, including "the right to exclude others from making, using, offering for sale, or selling the invention," § 154(a)(1). The **Court of Appeals** felt this required a mandatory injunction.

And of course, that's consistent with the treatment of a copyright holder who has "the right to exclude others from using his property." *Fox Film Corp. v. Doyal,* 286 U.S. 123, 127, 52 S. Ct. 546 (1932). But in copyright the issuance of injunction is again a "may issue" based on principles of equity. See, e.g., *New York Times Co. v. Tasini,* 533 U.S. 483, 505 (2001). Which is to say you have to apply the four factors.

*If **Tasini** accomplished nothing else, he's certainly made himself into a boring footnote for future generations of law students.*

And What about that Willingness to License Business?

While the **Supremes** rejected the **Appellate Court's** automatic injunction, they likewise did not care for the **District Court's** broad brush stroke of no injunction where a **Mercexchange** is willing to license and not using the invention itself.

Inventors might prefer to license their patents themselves rather than have every **Tom**, **Dick** and **Ebay** come along and grab the thing and force a fight over damages. See, *Continental Paper Bag Co. v. Eastern Paper Bag Co.,* 210 U.S. 405, 422-430 (1908).

The **District Court** was focusing on (4) serving the public interest. Presumably, they would have been okay if they had just applied the four factors and come down heavily on (4) to justify the result in that particular case.

The brain teaser is that both patents and copyright are personal property. If a curmudgeonly author can refuse to publish his genius work, then a curmudgeonly inventor should likewise be able to deprive the American public of his invention. Or is this always the case using the four factor test? Could either one be forced to license if factor (4) was strong enough?

And of course in the infuriating way of the **Supreme Court**, they don't rule on whether permanent injunctive relief is applicable, but send the thing back to the **District Court** to apply the four factor test.

And There's Concurrence

In a concurring opinion by **Roberts**, **Scalia** and **Ginsburg**, factor (4) is discussed. These three note that "[a]n industry has developed in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees. See FTC, To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy, Ch. 3, pp 38-39 (Oct. 2003), available at *http://ftc.gov/os/2003/10/innovationrpt.pdf*.

For these firms the bargaining leverage of shutting down an industry is an enormous edge leading to exorbitant licensing fees. See *ibid.* This seems doubly unfair when the patented method is a very small component of the finished product to be marketed. And then there are the growing number of patents on business methods that heretofore did not exist. Vagueness and suspect validity of these patents may force a rethinking of the weights of the four factors. *See — "Chaos Theory Ripples Out of the USPTO," **ATG,** v.18#3, June, 2006 p.72, noting the famous patents for making a peanut butter and jelly sandwich and the method of swinging on a swing.*

So now we can have a fifth factor — shaking down a company through dubious patents.