




# Adam Kessel

## Principal

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## Overview

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### About Adam

Adam Kessel is a principal in the Boston office of Fish & Richardson P.C. His practice focuses on intellectual property litigation, particularly cases involving patent, copyright, and related claims pertaining to medical devices, software, computer networks, and electronics. He also specializes in open source and other software licensing. Adam has substantial courtroom and trial experience, including work on several cases at trial and on appeal in the U.S. courts, the U.S. International Trade Commission, and in the post-grant procedures before the Patent Trial and Appeal Board. He also handled nearly 200 criminal cases as a “lawyer on loan” to the Suffolk County district attorney’s office (2009-2010), several of which he took to trial as first chair. Adam is active in local attorney and IP-related organizations and appears frequently in the U.S. District Court for the District of Massachusetts, having argued and won motions and claim construction arguments before most of the judges on the bench, and has tried cases to a jury before several judges in the district. He has also argued appeals before the First, Fourth, and Federal Circuit courts of appeals.

Adam has previous IP law firm experience, and served as a judicial intern for the late Honorable Reginald Lindsay of the U.S. District Court for the District of Massachusetts (2003). Adam has a degree in chemistry from Princeton University. Prior to law school, he had many years of experience with software development and also conducted research for an academic biochemistry lab involving protein structure and nuclear magnetic resonance spectroscopy.

# Focus Areas

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## Services

- Copyright
- Litigation
- Domain Names and Internet
- Digital Millennium Copyright Act
- Transactions and Agreements
- False Claims Act and Qui Tam
- ITC Litigation
- Patent Litigation
- Trade Secret Litigation
- Trademark, Copyright, and Media Litigation

## Industries

- Chemicals
- Digital Media and E-Commerce
- Hardware
- Internet
- Life Sciences
- Software
- Telecommunications

## Education

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J.D., Northeastern University School of Law (2004)

B.A., Chemistry, Princeton University (1998)

## Experience

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## Representative Patent Cases

Represented Taiwanese golf ball manufacturer in patent dispute brought by one of its largest competitors based in the United States; matter resolved favorably for client (2015-2016).

*EveryScape, Inc. v. Adobe Systems Incorporated* – D. Mass. (2010 – 2015) Represented defendant Adobe in case involving multiple patents relating to photo editing software. Following two week trial, jury rendered verdict after less than three hours of deliberations, finding all claims asserted against Adobe invalid as both anticipated and obvious.

*American Superconductor Corporation v. S&C Electric* – D. Mass. (2011 – 2013) Represented plaintiff AMSC in case involving multiple patents relating to reactive power compensation devices. Case settled following favorable claim construction order adopting AMSC's positions.

*ZOLL Medical Corporation v. Philips* – D. Mass. (2010 – 2014) Represented ZOLL as both plaintiff and defendant in several cases in multiple judicial fora involving over two dozen patents relating to cardiac defibrillators. Following twelve-day trial, jury found ZOLL's asserted patents infringed and not invalid.

*DataTern v. MicroStrategy et al.* – D. Mass. (2011 – Present) Represent defendant MicroStrategy in case involving patent related to object-oriented programming and relational database systems in district court and on appeal. Case pending.

*SynQor, Inc. v. Vicor Corporation* – E.D. Tex. (2011 – Present) Represent defendant Vicor Corporation in case involving multiple patents related to DC-DC power converters. Case pending.

*Robocast, Inc. v. Microsoft Corp.* – D. Del. (2011 – 2014) Represented defendant Microsoft in case relating to automated web browsing tools. Case settled.

*Trading Technologies International, Inc. v. TradeStation Securities, Inc. et al* – N.D. Ill. (2009 – Present) Represent defendant TradeStation Securities in case involving multiple patents relating to electronic trading system software in district court and on appeal. Case pending.

*Infineon Technologies AG v. Fairchild Semiconductor Corporation* (D. Del., D. Maine. 2008-2009) – Represented semiconductor manufacturer Infineon in infringement case involving eleven patents covering various aspects of power transistors in parallel proceedings in Delaware and Maine. Case settled.

*In the Matter of Certain Sucralose, Sweeteners Containing Sucralose, and Related Intermediate Compounds Thereof*– (I.T.C. 2007-2009) Represented Chinese manufacturer in case involving artificial sweeteners in case before the International Trade Commission. Won decision of non-infringement and patent invalidity after seven day trial on the merits. Decision affirmed by the

Commission in precedential opinion presenting a novel jurisdictional issue.

*Achates Reference Publishing Inc. v. Microsoft Corp.* – (E.D. Tex. 2007-2009) Represented Microsoft in patent infringement lawsuit relating to Microsoft Product Activation. Case settled.

*Medtronic v. Abbott, et al.* – (N.D. Cal. 2007-2009) Represented Boston Scientific Corporation in patent infringement lawsuit relating to cardiovascular stents. Case settled.

*Bose v. Phitek, et al.* – (D. Mass. 2007-2009) Represent Bose in patent infringement action involving noise-reducing headphones. Case settled.

### **Representative Appellate Cases**

*DataTern v. MicroStrategy et al.* (Fed. Cir. 2014) Represent appellee MicroStrategy in appeal of patent infringement case involving claim construction issues. Case pending.

*VRCompliance LLC et al v. HomeAway, Inc. et al.* – (4th Cir. 2012) Represented appellee HomeAway in appeal from litigation in E.D. Va. relating to unauthorized website access. Appeal resulted in complete affirmance for HomeAway in a precedential opinion on federalism issue of first impression in the circuit.

*Airframe v. L-3 Communications Corp. et al.* – (1st Cir. 2011) Represented appellee L-3 in appeal from copyright infringement lawsuit in D. Mass. Appeal resulted in complete affirmance for L-3.

*Omura v. Shafer et al.* – (Fed. Cir. 2011) Represented appellee Shafer in appeal from patent interference. Appeal resulted in complete affirmance.

*Allvoice Computing PLC. v. Nuance Communications, Inc.* – (Fed. Cir. 2007) Represented appellee Nuance on appeal in patent infringement lawsuit in S.D. Tex. involving computer speech recognition software on appeal. Case settled.

### **Representative Software and Internet Cases**

*HomeAway, Inc. et al v. Eye Street Solutions et al* (Travis County Court, Texas and E.D. Va., 2011 – 2013) Represent HomeAway in co-pending litigations in state and federal court relating to unauthorized website use and related claims. Case settled favorably for HomeAway following successful appeal argument.

*L-3 v. Airframe* – (D. Mass. 2007-2011) Represent L-3 as a defendant in multiple copyright infringement actions involving computer source code. Plaintiff asserted damages claim of \$132 million. Argued motion for summary judgment in July 2010, at which the District Court granted final judgment in L-3's favor on all claims. Also argued appeal to First Circuit which affirmed the District Court in all respects in precedential opinion dated September 2011.

*Cambridge Research & Instrumentation Inc. v. Ruan et al.* – (Mass. Superior Court 2009)

Represented Cambridge Research & Instrumentation as plaintiff in case involving trade secret theft and breach of contract claims relating to computer source code. Court entered consent judgment enjoining defendants from using plaintiff's technology.

Advised numerous clients on a wide range of software and Internet matters. Examples include copyright and patent issues implicated by use and distribution of open source software; ownership and licensing issues related to software development; Internet service provider immunity under the Communications Decency Act; computer fraud and identity theft liability under state and federal statutes; and electronic privacy and data protection issues under HIPAA and state laws.

Represented several trademark owners in more than a dozen domain name arbitrations, all of which have resulted in transfer of the domain name to the trademark owner.

### **Trademark and Copyright Cases, Dispute Resolution**

*Bose Corporation v. Vidabox, LLC* – (D. Mass. 2008) Represented Bose in trademark infringement action involving speakers. Case settled.

*Bose Corporation v. BTS* – (D. Mass. 2008) Represented Bose in trademark infringement action involving stereo systems. Obtained permanent injunction and judgment in Bose's favor.

Represented photographer in copyright and contract litigation against large consumer products manufacturer regarding use of photographs. Case settled.

Defended office product supply company in defamation case. Successfully defeated preliminary injunction.

Represented poet in dispute with publisher regarding copyright issues. Matter settled.

Represented graphics layout artist in dispute with publisher regarding copyright and contractual issues. Matter settled.

### **Pro Bono Cases**

*Glovsky v. Roche Bros. Supermarket* – (Mass. 2014) Drafted *Amicus Curiae* brief on behalf of American Civil Liberties Union in case before Massachusetts Supreme Judicial Court involving the constitutional right to collect signatures for ballot access. Opinion substantially followed the position set out in the *amicus* brief.

*Jonathan Hurley v. Town of Sandwich* (2014) Represented teacher terminated from public school for off-work free-speech activities that pre-dated employment. Town agreed to compensate teacher and train administrators and teachers about teachers' rights to speak as citizens outside of school.

*In Re Matter of Search Warrant Executed on March 30, 2009.* Successfully represented Riccardo Calixte, a Boston College student, in the District Court and then before the Massachusetts Supreme Judicial Court in a bid to quash a search warrant executed on his premises, on the ground that the warrant was invalid for lack of probable cause. Single justice opinion was highest state court opinion to date to address the issue of potential criminal liability for Internet users who violate terms of service.

*Massachusetts Bay Transportation Authority v. Anderson, et al.* – (D. Mass. 2008) Represented three M.I.T. students charged with violating the Computer Fraud and Abuse Act in connection with a security analysis they designed showing vulnerabilities in the Massachusetts Bay Transportation Authority's fare collection system. Defeated preliminary injunction motion brought against students. Case settled after preliminary injunction was denied.

*WHDH v. Doe* – (Mass. Supp. Ct. 2007) Represented anonymous poster to craigslist.org in motion to quash subpoena served on Internet Service Provider to discover the poster's identity. Identity of the anonymous poster was successfully protected. Case settled.

*Kohn v. Barker* – (Mass. Supp. Ct. 2006) Represented noted writer and speaker on educational issues who had been prevented from speaking at a conference by the Massachusetts Department of Education in First Amendment case. Plaintiff prevailed and was awarded attorney's fees.

Advised graduate student creators of videos critical of creationism on copyright issues including fair use and First Amendment rights.

Assisted student with autism in Brockton Public School in obtaining funding and placement in a school specializing in autistic children.

Advised nonprofit organization that provides free books to children in Africa on trademark issues and obtained trademark registration for organization.

Advised nonprofit public health policy organization on copyright issues including Creative Commons licenses.

## Insights

## Speaking Engagements

“Licensing 101,” co-speaker, *Fish Cross-Practice Webinar* (December 3, 2020).

“Open Source Software: Practical Ideas for Protecting Your Intellectual Property,” co-speaker, *Fish Litigation Webinar* (September 10, 2020).

“Patent Litigation for the Non-Specialist: How It Works and What to Expect,” co-speaker, *Fish Litigation Webinar* (May 28, 2020).

“Petrella: Supreme Court Takes on Laches,” Paper and Presentation at Joint Patent Practice Continuing Legal Education, New York City, April 23, 2014.

“DMCA Anti-Circumvention and Trafficking Provisions,” Webinar presented, March 2, 2011.

“IP Licensing: Burgeoning Internet Topics,” Presentation at Licensing Executives Society Annual Meeting, with M. Albert, September 14, 2006.

“Self-Help, Free Software, Privacy-Enhancing Technologies, and Cryptography,” Berkman Center for Internet & Society at Harvard Law School, Privacy and Cyberspace Online Course, December 2003.

## Publications

“IP Trends and Hot New Issues in 2007,” *Mass High Tech*, December 29, 2006.

“Why eDiscovery Rules Will Change the Litigation Game,” *Managing Intellectual Property*, October 2006.

“New E-discovery Rules Change Realities of Patent Litigation,” *New England In-House*, October 2006.

“When in Doubt, Save the Data,” Q&A in *Legal Times*, October 16, 2006.

“‘Phillips’ Leads to a Different Result in ‘Nystrom’” with J. Foster, *National Law Journal*, December 5, 2005.

“Why They’re Wrong About Critical Mass,” in *Critical Mass: Bicycling’s Defiant Celebration*, edited by Chris Carlsson, San Francisco: AK Press, 2002: 105-112.

“Peroxidase Activity in Heme Proteins Derived From a Designed Combinatorial Library,” with D.A. Moffet; L.K. Certain; A.J. Smith; K.A. Beckwith; and M.H. Hecht, *J. Am. Chem. Soc.* 122, 7612-13 (2000).

## Recognition

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Named to the Massachusetts Supreme Judicial Court 2019 Pro Bono Honor Roll, 2019.

Certified as a Legal Specialist in open source code auditing by *Black Duck*.

Selected by peers for inclusion in *The Best Lawyers in America*© 2015, 2018-2021.

Recognized as one of “The World’s Leading Patent Professionals” in Massachusetts by *IAM Patent 1000*, 2018-2020.

Named a “Boston Rising Star” by the *National Law Journal*, 2014.

Named a Massachusetts Super Lawyers *Rising Star*, 2010-2013.

Selected as an “Up and Coming Lawyer” for 2012 by Massachusetts Lawyers Weekly, in conjunction with the Massachusetts Bar Association. This award is presented annually to twenty “lawyers who have been members of the bar for ten years or less, but who have already distinguished themselves in some way and appear poised for even greater accomplishments.”

## Memberships & Affiliations

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Board Member of American Civil Liberties Union of Massachusetts.

Advisory Committee and Former Board Member of nonprofit organization Jewish Alliance for Law and Social Action.

Former President of Board of two nonprofit organizations developing low-income housing.

Active with fundraising and other support for Greater Boston Legal Services and Massachusetts Legal Assistance Corporation.

Cooperating Attorney with American Civil Liberties Union and Electronic Frontier Foundation.

## Languages

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- English



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