



THE NEW YORK INTELLECTUAL PROPERTY LAW ASSOCIATION

BULLETIN

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PRESIDENT'S CORNER

Happy New Association Year! For my first President's Corner column, rather than the traditional recitation of how I foresee the coming year, I would like to provide the top ten list of why our Association is the bargain of bargains among bar associations, while at the same time, provides fantastic benefits.

Reason 10. Our annual dues are only \$75. The dues are intentionally kept low so that members can enjoy all of the benefits of membership, without having to choose between our Association and national and international intellectual property law associations. Enjoy and participate in both types, and tell non-members of the bargain they are missing.

Reason 9. Our annual survey of legal developments in patent law, co-sponsored with the New Jersey, Connecticut and Philadelphia Intellectual Property Law Associations. This provides, in one day, the most complete review of new developments in patent law now available anywhere. Eminent practitioners impart this knowledge in pithy, easy-to-understand, ten minute segments. Furthermore, we now provide the *NYIPLA Intellectual Property Law Annual*, which discusses the prior year's developments in the major areas of patent, trademark, copyright, computer, antitrust, licensing and international intellectual property law. The *Annual* is provided free to all members. There's nothing like it. Other free publications for members include the *Greenbook*, which includes short biographies of the Court of Appeals for the Federal Circuit Judges and a directory of the NYIPLA membership, and the *Bulletin*, a bi-monthly newsletter which provides current information of interest.

Reason 8. Our monthly CLE luncheon series and occasional dinner meetings. The luncheons cover, in an in-by-12-out-by-2

format, presentations on the current legal issues of the day. This September, we will host a joint seminar with the New Jersey Intellectual Property Law Association at which Commissioner Lehman will be the speaker.

Reason 7. Input to Congress and the PTO. Ever since our Association was instrumental, through President Giles Rich, in drafting 35 U.S.C. in 1952, we have provided input on intellectual property legislation and regulations, where appropriate. We are currently considering whether to provide input on legislation involving invention marketers and PTO consideration of allowing law firms per se to be counsel of record.

Reason 6. Substantive consideration of all aspects of intellectual property law through our committee system. We have 28 committees, covering everything from substantive patent, trademark and copyright law (both U.S. and foreign) to ethics and judicial appointments. Join a committee and enjoy!

Reason 5. Supplemental insurance. Many of our members have insurance through their employers, but many have expressed a desire to supplement what is provided. We are considering a proposal



for supplemental disability insurance for those who would like it.

Reason 4. The William C. Conner writing competition. Each year, students from local law schools provide papers on interesting intellectual property subjects.

Reason 3. Inventor of the year award. Each year we honor an inventor from the metropolitan area who has made a significant invention. If you have anyone to suggest for this honor, please let me know. Formal solicitations are distributed later in the year.

Reason 2. Substantial input to international intellectual property issues provided by our Association. Our Association is the

CALENDAR OF EVENTS

September 14, 1995

"Current Developments at the United States Patent & Trademark Office" Joint Dinner Meeting of the New York Intellectual Property Law Association and the New Jersey Intellectual Property Law Association, Cornell Club, New York City

Sept. 28-Oct. 5, 1995

Licensing Executives Society, LES USA/Canada 32nd Annual Meeting, El Conquistador, Puerto Rico

October 24-26, 1995

American Intellectual Property Law Association, Annual Meeting, J.W. Marriott Hotel, Washington, DC

only regional association in the world which has been granted observer status at WIPO meetings in Geneva. As such, our representatives had significant input into the recent treaty negotiations. Our members also participate in the joint meetings between the Japanese and U.S. Patent and Trademark Offices and attend annual meetings with the European Patent Office.

Reason 1. The Judges' Dinner to honor the federal judiciary. What need be said? This event grows in popularity every year, setting new attendance records. It is the largest event at the Waldorf every year. This year we had over 140 honored guests, with over 2500 attending.

In closing, I would like to express appreciation to all the members who make

these events happen. We have no paid employees. All of the above are done by volunteers in the truest spirit of pro bono giving.

I look forward to a terrific year. Please let me know if you have any suggestions of any kind.

— Thomas L. Creel

JOINT DINNER MEETING OF THE NEW YORK INTELLECTUAL PROPERTY LAW ASSOCIATION AND THE NEW JERSEY INTELLECTUAL PROPERTY LAW ASSOCIATION

Thursday, September 14, 1995

Cornell Club
6 East 44th Street
(between Madison and Fifth Avenue)
New York, New York

Cash Bar 6:00 P.M.
Dinner and Program Begins at 7 P.M.

CURRENT DEVELOPMENTS AT THE UNITED STATES PATENT & TRADEMARK OFFICE

BRUCE A. LEHMAN
Assistant Secretary of Commerce and
Commissioner of Patents and Trademarks

Please reserve early to assure your place at this very special evening meeting with our New Jersey colleagues.

Please return the attached reservation form by September 11, 1995, to avoid the possibility of not being served.

Cost With Reservation	\$50.00
Cost if Admitted 5 years or less	\$45.00
Cost at Door	\$55.00

Dinner Meeting Reservation September 14, 1995

Marilyn Matthes Brogan, Esq.
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New York, NY 10036
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(212) 764-5574

A check for \$ _____ payable to the "NEW YORK INTELLECTUAL PROPERTY LAW ASSOCIATION, INC." is enclosed for _____ reservation(s) for the September 14, 1995 dinner meeting. The name(s) of those attending is (are) listed below.

Name(s) _____ Firm _____

COMPARISON OF NYIPLA DISABILITY INSURANCE PLAN

As reported in the last issue of the *Bulletin*, the NYIPLA Board of Directors has permitted Randy Rasmussen of Rand Insurance to make available to all Association members a high quality, personal disability income insurance program. Since publishing information about the plan, a number of questions have arisen as to how the NYIPLA plan compares to the plan offered by the New York State Bar Association. The following is a comparison between the two disability plans.

	NYSBA	NYIPLA
1. Definition of Disability	Contains the "own occupation" definition, but severely limits this by stating "provided he or she is not engaged in any occupation for pay or profit."	Requires <i>only</i> that the insured be unable to perform his or her "own occupation."
2. Partial Disability	Must be preceded by a period in which the insured has received payment for a covered total disability.	No provision for partial to be preceded by total disability.
3. Residual Disability	Must be preceded with at least 30 days of covered total disability.	No provision for total disability to precede residual.
4. Successive Disabilities	If successive benefits are due to same accident or illness and are separated by less than 90 days of continuous full-time work, no new waiting period is necessary.	If successive benefits are due to same accident or illness and are separated by less than 12 months of continuous full-time work, no new waiting period is necessary.
5. Premiums	Increase on a step rate with age — can be raised at any time by the carrier.	Remain the same throughout the life of the contract.
6. Cancellation	Coverage can be canceled at any time by the insurer.	As long as the insured pays the premium on a timely basis, the contract <i>cannot be canceled</i> .
7. Non-Disabling Injury Provision	None	This provision pays the first dollar on all medical costs, to one-half your monthly benefit to a \$3,000 maximum, per injury. It applies to injuries that do not result in a disability claim, and pays in addition to your medical coverage.
8. Loss of Use Provision	Loss of use of two limbs, eyesight or hearing must be deemed to be total and permanent to collect benefits from day one.	Loss of use need not be permanent. Temporary loss of use of two limbs, eyesight, or hearing <i>will pay</i> benefits from day one.
9. Benefit Offsets	Benefits will be offset by any other income, including Social Security.	Benefits have no offsets. The benefit specified in the contract is the benefit that will be paid regardless of any other income, including Social Security.
10. Waiver of Premium	After 6 months of total disability only.	After 90 days of total or partial disability.
11. Coverage Terminates	At age 70.	At age 75.

RECENT DECISIONS OF INTEREST

by *Thomas A. O'Rourke*

PATENTS

Best Mode Violations

In *Glaxo Inc. v. Novopharm Ltd.*, 34 USPQ2d 1565 (Fed. Cir. 1995), the Court of Appeals for the Federal Circuit held that an employer's knowledge of the best mode of practicing an invention should not be imputed to the employee-inventor. Thus, the patent-in-suit was not invalid for a best mode violation when the employer had knowledge, which was unknown to the employee-inventor, of a process to facilitate the use of the claimed composition.

In 1978, the plaintiffs Glaxo Inc. and Glaxo Group Ltd. ("Glaxo") obtained patent number 4,128,658 ('658) for a number of chemical compounds, including ranitidine and its hydrochloride salt, which had potential use as an antiulcer medication.

In 1980, Crookes, an employee of Glaxo, developed hydrochloride in a crystalline or polymorph form. Although this form had characteristics that made it better for commercial applications, it was difficult to measure and dispense. Accordingly, scientists at Glaxo developed a novel process to granulate this new form.

Glaxo filed a patent application on the new form of ranitidine hydrochloride developed by Crookes. Glaxo chose to keep the novel granulation process secret. Although Glaxo and its patent officer knew of the process, it was not disclosed in the application. The Patent Office issued patent number 4,521,431 ('431) to Glaxo for the crystalline ranitidine hydrochloric compound. After the '431 patent issued, Glaxo

sued Novopharm for patent infringement. Novopharm admitted infringements, but raised defenses of anticipation, inequitable conduct and best mode violations.

Novopharm argued that the '431 patent was anticipated by Glaxo's original '658 patent because the '658 patent disclosed a practice which yielded the same form of ranitidine hydrochloride as the '431 patent. The Federal Circuit held that the district court's findings that the original '658 patent yielded crystals of either form were not clearly erroneous. In addition, the Federal Circuit did not overturn the district court's inequitable conduct ruling. Although certain declarations by Glaxo were misleading and material, Novopharm failed to prove intent to deceive.

Novopharm also contended that the district court erred in refusing to impute to the inventor Glaxo's knowledge that the granulation process was the best mode to practice the invention. The Federal Circuit agreed with the district court that the best

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For more information, contact Gregory J. Battersby,

NYIPLA Publications

Committee Chair

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mode requirement had not been violated. The best mode inquiry focuses on the inventor's state of mind at the time the application was filed. Although others at Glaxo knew of the granulation process, there was no evidence that Crookes knew of it when he filed his application.

Novopharm contended that Glaxo purposefully prevented Crookes from gaining knowledge of the most advantageous application of the invention in order to maintain it as a trade secret. The Federal Circuit stated that:

In this case, Crookes was unconcerned with the commercialization of the claimed compound. It is undisputed that Crookes invented a compound and was not involved in whatever processes were to be used to commercially produce it. Therefore, whether Glaxo deliberately walled off the inventor is irrelevant to the issue of failure of his application to disclose the best mode known to him. *Id.* at 1570.

Judge Mayer dissented to the opinion and stated that:

With this case, the court blesses corporate shell games resulting from organizational gerrymandering and willful ignorance by which one can secure the monopoly of a patent while hiding the best mode of practicing the invention the law expects to be made public in return for its protection." *Id.* at 1571.

The majority rejected the dissent's agency argument. According to the majority:

An agency relationship may exist during prosecution before the PTO where the patent attorney is acting on the inventor's behalf. An agency relationship does not exist, however, with respect to what an inventor must disclose in order to obtain a patent on his invention, which includes, of course, any best mode under §112. Therefore, in addition to being inconsistent with §112, as explained above, because an agency relationship does not exist for purposes of what is disclosed in a patent application, it would be improper to impute a patent attorney's knowledge of a best mode to the inventor for purposes of finding a best mode violation." (citation omitted). *Id.*

Usefulness and Utility Standards

In *In re Brana*, 34 USPQ2d 1436 (Fed. Cir. 1995), the Court of Appeals for the Federal Circuit overturned a USPTO Board of Patent Appeals and Interference affir-

mation of the examiner's final rejection. The Court stressed the importance with regard to pharmaceutical inventions of using a standard of practical utility or usefulness based in patent law and not Food and Drug Administration standards. The Court held that the Brana invention and application had sufficiently demonstrated usefulness and utility required by 35 U.S.C. § 112.

The patent application filed June 30, 1988 (Serial No. 213,690) is directed to 5-nitrobenzo[de]isoquinoline-1,3-dione compounds, for use as antitumor substances. The specification states that the substance was a significant advance over the prior art compounds by mixing substitution on the isoquinoline ring. The compound was claimed to have unexpectedly better antitumor properties than the compounds in the prior art. The inventors supported their assertions with affidavits and results of *in vitro* tests against two specific types of human tumor cells. The examiner issued a final rejection of the application. In his answer to the applicants' appeal brief, the examiner stated that the final rejection was based on 35 U.S.C. § 112 ¶1. The examiner concluded that there was a lack of showing of practical utility in the prior art tests, i.e., the tests were incapable of establishing a reasonable exception of antitumor activity in humans. The Board upheld the finding by the examiner that the tests offered by the applicants to prove utility were inadequate to convince one of ordinary skill in the art that the claimed compounds are useful as antitumor agents.

The Court found that a specification disclosure which contains a teaching of the manner of making the invention in terms which correspond in scope to those used in describing the subject matter sought to be patented *must* be taken to comply with the first paragraph of §112 *unless* there is reason to doubt the objective truth of the statements contained therein. The PTO has the initial burden of challenging a presumptively correct assertion of utility in the disclosure. The Court held that the PTO did not meet this burden. According to the Court, the references cited by the Board did not question the usefulness of any compound as an antitumor agent, but merely discussed the therapeutic predictive value of *in vivo* urine tests. Such references are relevant only if applicants must prove the ultimate value in humans of their asserted utility.

The Commissioner also asserted that the tests in animals cited in the application were merely preclinical tests used to determine if the drug will be tested at the next stage and are therefore not reasonably predictive of the success of the claimed compounds for treating cancer in humans. The Court strongly dismissed this argument as confusing the requirements for obtaining governmental approval to market a particular drug for human consumption with the requirements for establishing utility for an invention. The Court cited prior decisions of the CCPA condemning such confusion as imposing much too high a burden on the pharmaceutical invention.

With regard to such inventions, the Court reiterated that proof of an alleged pharmaceutical property for a compound by statically significant tests with standard experimental animals is sufficient to establish utility.

TRADEMARKS

First Sale Rule

In *Sebastian International, Inc. v. Longs Drug Stores Corp.*, 53 F.3d 1073 (9th Cir. 1995), the Court stated that the "first sale" rule cannot be circumvented in an attempt to control the distribution network for a trademarked product. The "first sale" doctrine limits the ability of the owner of a trademark to control the distribution of its trademarked product beyond the first sale. The resale by the first purchaser of the original article under the producer's trademark results in neither trademark infringement nor unfair competition. The Court held that the mistaken belief by consumers of affiliation between the seller and manufacturer does not render the "first sale" rule inapplicable.

The plaintiff, Sebastian, manufactures and markets hair care products. The products are directed for distribution to consumers through a chain of professional salons. Sebastian requires one to be a member of the "Sebastian Collective Membership Program" in order to resell the products to customers. An agreement is signed by members to resell the products only to other members or to salon customers. A collective membership mark has been registered by Sebastian for these purposes.

The defendant, Longs, purchases and

resells the same Sebastian hair care products without participating in Sebastian's collective membership. Longs presumably purchases the products from one of the members of the collective who is violating its agreement with Sebastian. There was no evidence that Long did anything more than stock and resell genuine Sebastian products lawfully acquired on the open market.

According to the Court:

The "first sale" rule provides a sensible and stable accommodation between strong and potentially conflicting forces. By guaranteeing that a product will be identified with its producer, it serves the legitimate purposes of trademark law — the producer gains the good will associated with the quality of its product, and the consumer gets exactly what the consumer bargains for, the genuine product of the particular producer. On the other hand, the "first sale" rule preserves an area for competition by limiting the producer's power to control the resale of its product. The "first sale" doctrine has proven to be a reliable and useful guide in an area in which a high volume of business-driven litigation must be expected. *Id.* at 1075.

Sebastian attempted to argue that the "first sale" rule did not apply to articles sold under a collective mark. The Court of Appeals did not agree. The decision stated that nothing in the language or legislative history of the Lanham Act indicates that this exception to the "first sale" rule should exist. In fact, the Lanham Act provides that a collective mark has the same effect, and is entitled to the same protection, as a trademark. This statement implies that the "first sale" rule would also apply to collective marks.

Sebastian also attempted to argue that the consumer confusion that Longs was affiliated with Sebastian should preclude the application of the "first sale" rule. Once again the Court disagreed. If a purchaser does no more than stock, display and resell a producer's product under the producer's trademark, then no action can follow on infringement or unfair competition charges. If, however, the purchaser does act in such a manner as to create confusion as to its affiliation with the producer, then an action may follow depending upon the circumstances of the situation. The actions must go beyond the mere resale of the trademarked product. Because the containers which were sold carried a logo and a statement of affiliation placed thereon by the

producer, the producer actually created the confusion and not the innocent retailer.

The Court held that the "first sale" doctrine shielded Longs from liability for the mere resale of Sebastian products, and it was erroneous to grant Sebastian's motion to preliminary injunction.

COPYRIGHT

Computer Software Rentals

In *Central Point Software, Inc. v. Global Software & Accessories, Inc.*, 34 USPQ 2d 1627 (E.D.N.Y. 1995), the Court held that any practice which in substance is rental of computer software violates the Computer Software Rental Amendments Act, 17 U.S.C. §109(b)(1)(A). Accordingly, in a bench trial, the Court found the defendant guilty of copyright infringement.

Plaintiffs develop and market personal computer software on computer disks for the use of businesses and individuals. They own several copyrights in computer software applications. Defendant operates a business of renting computer software to its clientele. Plaintiffs claim that the nature of defendant's business results in infringement of plaintiffs' copyrights.

Some of the copies of the programs which defendant rented were acquired following the December 1, 1990 passing of the Rental Amendments Act. The Act was passed because Congress considered the illegal copying of software to be a compelling threat to the software industry due to the ease of making the illegal copies of software. The Court reiterated that:

[t]he purpose of the rental ban, as reflected in the Senate Report on companion legislation passed in the Senate in May 1990 "was to protect the investment of software publishers in their copyrighted computer programs by preventing the rental, lending, leasing, or similar disposal of copyrighted software for direct or indirect commercial gain without the copyright holder's permission." S. Rep. No. 265, 101st Cong., 2d Sess. 2,7 (1990) (emphasis added). *Id.* at 1632.

Defendant maintained that he was not guilty of infringement and should have been allowed to continue renting the software for two reasons. First, he cited a pamphlet published by the Software Publishers Association ("SPA") which stated that an upgrade was an improvement to the

original software and not a new copy. He argued that this meant that the software was still the same basic software which was purchased before the deadline but only updated since the deadline. This argument failed on the evidence which indicated that defendant was renting both the updated version and the original software. In addition, the pamphlet only discussed the sale of old copies of software and not the rental of software. The Court found that the rental of the updates violated the Rental Amendment.

Second, defendant attempted to circumvent the law by establishing a "Deferred Billing Plan" ("DBP") which allowed a customer to pay a small fee upfront, supposedly a restocking fee, and return the software within five days if not completely satisfied. If the software was not returned on time, then the full price was charged to the customer for the purchase, and the registration card was provided to the customer at the time. Defendant claimed that its DBP was a legitimate sales plan. Again, the Court did not agree with the defendant. The Court pointed to the nearly 100 percent return rate and other evidence which indicated, or should have indicated to the defendant, that the plan was nothing more than an elaborate system of maintaining a rental business. The Court stated that the language of the Rental Amendment must be construed in light of the mischief to be corrected and the end to be attained. As mentioned earlier, the legislative history the Court referred to indicated that Congress was intending to address the threat that computer software rentals pose to the computer software industry. This indicates that any program which would have the effect of rental, whether a rental by name or not, was a violation of the Rental Amendments Act.

The Court held that the activities of the defendant constituted a rental of protected software in violation of the Rental Amendments Act. Accordingly, the Court granted a permanent injunction due to the threat of continuing violations. In addition, the Court granted the plaintiffs a date for hearing to determine the statutory damages and attorney's fees and costs. Statutory damages were awarded due to the finding of willful infringement by the defendant.

PEPE & HAZARD

A BUSINESS LAW FIRM

A dynamic Connecticut business law firm with established intellectual property practice seeks two experienced attorneys. One attorney should be a litigation attorney with a minimum of ten years of relevant legal experience, private firm practice experience, and patent bar membership. The other attorney should be a business attorney with a minimum of ten years active patent prosecution, private firm practice experience, experience in strategic business counselling, and substantial experience in licensing and other commercial exploitation of intellectual property.

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