



THE NEW YORK INTELLECTUAL PROPERTY LAW ASSOCIATION

BULLETIN

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PRESIDENT'S CORNER

When I started on the "ladder" as the Second Vice President of this Association in 1993, I was totally unaware that I would be the President leading the Association into its Diamond Jubilee year and its Diamond Jubilee Dinner in honor of the Federal Judiciary. But, obviously, that is what has happened, and so I am honored not only to be President of the Association, but at a particularly auspicious time.

Our Association is unique; that is not a jingoistic statement. Alone among regional Intellectual Property Law Associations, we are asked to participate and to have, at least, observer status in WIPO Conferences. We participate in a variety of other associations and groups, by invitation, when other regional intellectual property law associations are not invited.

This status is a tribute to our membership and to our past leadership. Only because of the substantive efforts of these dedicated lawyers have we been able to achieve this status, and it is our obligation to maintain that status.

When our Association is mentioned by other lawyers, particularly those outside of this area and frequently active in their regional associations and in the national associations, of course, the reference is often to our "Judge's Dinner." There is no question that that is our "jewel in the crown." However, it is not, and must not, be our only activity.

To name only a few more specific examples, our Publications Committee now publishes a very erudite "Intellectual Property Law Annual." Our CLE Committee has been very active in taking a leading role in the joint CLE program of the New Jersey, Connecticut and Philadelphia Intellectual Property Law Associations; in participat-

ing with Fordham Law School in programs and in running and developing programs of its own. Our Committee on Meetings and Forums sponsors a monthly luncheon at which speakers from a variety of disciplines offer substantive information and advice.

Periodically, the question is raised as to what the other committees do. I must admit that, at times, I have raised the same question. However, particularly after attending our Annual Meeting in May, I have concluded that "the trouble, dear Brutus, lies in ourselves." We just don't publicize what we do, and in many cases don't even communicate it to our members.

A significant number of well-thought out, substantive reports were delivered at that Annual Meeting. This column is not the place to single out the ones of particular interest. Those reports, however, could not

have been written only for the meeting; a substantial amount of work by a number of people had to have been done in order to generate the information which was found in those reports. We must find a way to communicate this work at least to our members.

In short, while our Association can and should continue to focus on events such as the Dinner in honor of the Federal Judiciary, we must also continue all of the substantive work which has truly gained us the national, and indeed international, reputation which we have, and we must find a way to communicate it. Your suggestions on how to disseminate this information would be most appreciated.

— Martin E. Goldstein

CALENDAR OF EVENTS

September 20-21, 1996

Franklin Pierce Law Center International Intellectual Property Practice Series: Protecting and Industrial Property in Mexico and Central America. Franklin Pierce Law Center, Concord, New Hampshire.

September 29 - October 2, 1996

Licensing Executive Society (LES) (USA and Canada) Annual Meeting. El Conquistador Bajada, Puerto Rico.

October 23, 1996

American Intellectual Property Law Association National Conference on Industrial Design Protection. J.W. Marriott Hotel, Washington, DC.

October 24-26, 1996

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

NEWS FROM THE BOARD OF DIRECTORS

by John F. Sweeney

The Board of Directors met at The Yale Club on Thursday, May 23, 1996. Gregory Battersby presented the Treasurer's Report. He commented that the Association's balance is greater than last year. Upon motion by Howard Barnaby, the Treasurer's Report was approved.

Martin Goldstein led a discussion on possible speakers for the 1997 Judges' Dinner. Included in the possibilities discussed were Supreme Court Justices, Circuit Court Judges and public figures. There was also a short discussion on who might be chosen to sing the "Star Spangled Banner." It was reported that a Judge Gawthorp of the District Court of Pennsylvania is a trained operatic tenor and may be considered.

Pending applications for new members were considered. Upon motion by Alfred Haffner, Jr., the pending applications for membership were approved.

Alice Brennan suggested that the Board consider accepting voluntary financial contributions. Mr. Goldstein indicated that a resolution along these lines could be entertained.

Mr. Goldstein commented that a simplified membership application procedure, in accordance with the resolution passed at the Annual meeting, will be published in the *Bulletin*.

PENDING LEGISLATION

by Edward P. Kelly

NEW PROTECTION FOR DATABASES

A company which makes a substantial

financial investment in creating an electronic database has an economic interest in preventing competitors from merely copying a substantial part of the factual database. However, finding a form of intellectual property which can prevent a competitor from extracting the factual information contained in the database for its own commercial use has proven problematic. Copyright protection might be asserted at least with respect to the selection, coordination or arrangement of the facts, although not to the facts themselves. The facts are generally deemed available to all and therefore not original works under the copyright statute. The Supreme Court has held that merely because the creator of the database used his "sweat of the brow" to compile the facts does not mean that the facts cannot be copied. See *Feist Publications v. Rural Telephone Service, Co., Inc.*, 494 U.S. 340 (1991).

Representative Carlos Moorehead (R-Cal.) recently introduced a bill (HR 3531) that would prevent competitors from extracting facts from a database. The bill is entitled "The Database Investment and Intellectual Property Anti-Piracy Act of 1996." The bill would add amendments to Title 15 of the U.S. Code. Section 4 of the Act makes it a violation for a person "to extract, use or reuse all or a substantial part, qualitatively or quantitatively, of the contents of a database in a manner that conflicts cumulatively with the database owners' normal exploitation of the database or adversely affects the actual or potential market for the database." "Database" is defined broadly to mean any collection or compilation in any form or medium now or later known or developed.

In introducing the bill, Rep. Moorehead noted that there is currently a European Union Directive On Legal Protection of Databases which is set to go in effect by 1998. The EU directive creates a new non-copyright form of protection for databases to supplement copyright protection. United States companies would not be able to take advantage of the EU directive unless the U.S. offered comparable protection to European databases. Therefore, according to Rep. Moorehead, there would be an enormous competitive disadvantage to U.S. companies throughout the entire European market.

Under Rep. Moorehead's proposed

law, the database would be subject to protection for 25 years. The bill also provides for civil remedies like injunctions and monetary relief, including defendants' profit and any damage sustained by plaintiff and costs.

H.R. 3531 has been referred to the House Judiciary Committee.

TRADEMARK COUNTERFEITING

The President recently signed into law a bill (S.1136) intended to prevent counterfeiting of trademark and copyrighted goods. The major provisions of the bill (which add to previous counterfeiting bills) are as follows.

1. Counterfeiting would become a violation of The Racketeer Influence and Corrupt Organizations Act (RICO).
2. The bill would provide up to \$1,000,000 in damages for willful violations and provide for statutory damages from \$500 to \$100,000 per counterfeit trademark for each type of good. These statutory damages are in addition to actual damages that would be recoverable under the Lanham Act.
3. The Customs Service would be required to destroy counterfeit merchandise rather than return the merchandise to the owner who attempted to import the counterfeit goods.

OMNIBUS PATENT BILL

The House Judiciary Committee recently approved an Omnibus patent bill (HR-3460) which contains several independently introduced pieces of legislation regarding patent issues. The following issues are now addressed in the Omnibus bill.

Invention Marketing Industry

Bills have previously been introduced in the House (HR-241) and Senate (S.909) which deal with the issue of control over companies who promise to bring the inventions of small inventors to market. Previously introduced bills would have required the invention marketing firms to enroll an-

nually with the PTO and would have given the PTO the authority to suspend a firm for misconduct and monitor complaints. The Omnibus bill eliminates the enrollment requirement but makes false and misleading statements made by a company in connection with the marketing of an invention a misdemeanor and provides for fines up to \$10,000 for each offense.

Reexamination Proceedings

The patent statute currently provides that a third party may request reexamination of a patent. However, the third party's participation does not go beyond the initial request for reexamination and a reply to the patent owner's statement in response to the request for reexamination. For instance, amendments made to the claims during reexamination may not be addressed by the third party which requested examination.

Representative Carlos Moorehead (R-Calif.) previously introduced a bill (H.R. 1732) that would make certain amendments to the reexamination provisions of the patent statute so that third parties requesting examination would have a greater role in influencing the outcome of the reexamination. For instance, the bill would allow the third-party requester to not only comment on the patent owner's response to reexamination, but also to address the issues raised in the Patent Office during the reexamination procedure. The basis for reexamination would also be expanded to include compliance with Section 112 of the patent statute. A third-party requester would also be able to file an appeal of the examiner's final decision with the Board of Patent Appeals and Interferences. The House Judiciary Committee essentially adopted H.R. 1732 but also added a requirement that the real party in interest reveal its identity in the request for reexamination.

Prior Use Defense

As a general rule, a company that protects its technology by keeping it a trade secret does so at its peril because it could be liable for patent infringement if someone obtains a patent on that technology. A bill previously introduced by Rep. Moorehead (H.R. 2235 and now incorporated into the Omnibus bill) would change that result by amending the patent statute to provide for a

limited defense to patent infringement where the alleged infringer made prior use of the patented invention.

The bill would amend § 273 of the patent statute to assert a defense to patent infringement if the person had, acting in good faith, commercially used the subject matter in the U.S. before the effective filing date of the patent. "Commercially used" means use in the U.S. in commerce whether or not the subject matter at issue is accessible to or otherwise known to the public. "Use in commerce" means any actual sale or commercial transfer. There is also a special exception for subject matter that cannot be commercialized without significant investment of time and money. In that case, a person shall be deemed to have commercially used the subject matter if:

(A) before the effective filing date of the patent, the person reduced the subject matter to practice in the U.S., completed a significant portion of the total investment necessary to commercially use the subject matter and made a commercial transaction in the United States in connection with the preparation to use the subject matter and (B) after the effective filing date of the patent, diligently completed the remainder of the activities and investments necessary to commercially use the subject matter and promptly began commercial use of the subject matter.

While a literal reading of the bill indicates that the use or reduction to practice must occur before the effective filing date, the bill is not that broad. A later section of the bill entitled "one year limitation" provides that the defense provided by the bill is only available if the use or reduction to practice occurred more than one year prior to the effective filing date of the patent.

The bill would specifically add a section stating that the defense does not constitute a general license but only applies to subject matter claimed in the patent that the person asserting the defense had commercially used before the effective filing date.

Publication of U.S. Patent Applications

The United States converted to a patent term which expires 20 years from the filing

date as part of its accession to the GATT treaty. Many of the countries that are signatories to the GATT treaty publish patent applications 18 months after they are filed. The U.S., however, currently does not publish patent applications prior to issue of the patent. A bill (H.R. 1733) previously introduced by Rep. Carlos Moorehead (and now incorporated into the Omnibus bill) would bring the U.S. into conformity with those countries that do provide for publication 18 months after filing. The published application would be considered prior art under § 102(e) of the patent statute.

The bill also contains a provision that would allow the patent holder to obtain provisional rights to obtain a reasonable royalty from infringers who infringe during the time between the publication and the time the patent issues. The bill had been pending last year and was not favorably received. New provisions that were added this year include a provision that an independent inventor's application would not be published until three months after the first office action. The application would not be published even if more than 18 months have passed from the filing date. If enacted, the bill would take effect on January 1, 1996.

TRADE SECRET THEFT

Two bills are pending in the House (3723) and Senate (1525) which would address the issue of economic espionage or theft of trade secrets. The most recent bill introduced by Rep. Bill McCollum (R-Fla.) would make theft of trade secrets a criminal offense under Title 18 of the U.S. Code. The bill protects all types of proprietary economic information including financial, business, scientific, technical and engineering information from theft. Previous measures protecting theft of trade secrets had been only civil violations. The bill would apply to thefts intended to benefit foreign governments or individuals. The bill generally applies to espionage occurring in the United States. However, the bill also would apply to conduct occurring outside the United States if the offender is a United States person or an act in furtherance of the offense was committed in the United States.

RECENT DECISIONS OF INTEREST

by Thomas A. O'Rourke

PATENTS

Claim Interpretation

In *Ultradent Products Inc. v. Life-Like Cosmetics, Inc.*, 1996 U.S. Dist. LEXIS 6571 (D. Utah May 10, 1996), the court held that a patent claim for a dental bleaching method that covered a specified range of an ingredient was literally infringed only if the ingredient was contained in the specified range in the end product.

The plaintiff Ultradent sued the defendants, collectively referred to as Life-Like, for infringement of U.S. Patent Nos. 5,098,303 and 5,234,342, which cover methods for bleaching teeth, and U.S. Patent No. 5,376,006, which covers methods and compositions for dental bleaching.

The court considered each of the patents separately. The asserted claims of the '003 patent covered a method for bleaching a patient's teeth, comprising, in pertinent part, at paragraph (b), "a matrix material into which the dental bleaching agent is dispersed, *said matrix material including carboxypolymethylene in the range from about 3.5% to about 12% by weight of the dental bleaching composition*" (Emphasis added). See *id.* at * 16.

Relying on the Federal Circuit decision in *Exxon Chem. Patents, Inc. v. Lubrizol Corp.*, 64 F.3d 1553 (Fed. Cir. 1995), the court interpreted the claim as follows:

Claim 1 is not a process claim drawn to a specific method of manufacture of a bleaching composition; it is not a recipe of ingredients which when mixed together will yield a desired result. Instead, *the language of paragraph (b) sets forth attributes of a chemical comparison to be used in practicing the patented method of bleaching teeth.* (Emphasis added). 1995 U.S. Dist. LEXIS at * 16.

The court added that there can be no

literal infringement by showing that about 3.5% to 12% carboxypolymethylene by weight was an *initial* ingredient in the formula used to produce the composition. The court reasoned that "[i]f, during the manufacturing process, chemical reactions yield a composition including less than about 3.5% or more than about 12% carboxypolymethylene by weight, the resultant composition cannot be found to literally infringe claim 1."

The '342 patent, like the '302 patent, also claimed a method for bleaching teeth requiring "a matrix material into which the sustained release dental bleaching agent is dispersed, said matrix material including carboxypolymethylene in the range from about 3.5% to about 12% by weight of the dental bleaching composition." The court interpreted claims of the '342 patent identically to the claims of the '302 patent.

Doctrine of Equivalents

In *Maxwell v. J. Bakar, Inc.*, 39 USPQ2d 1001 (Fed. Cir. June 11, 1996), the U.S. Court of Appeals for the Federal Circuit held that embodiments of an invention disclosed in the specification but not claimed are dedicated to the public. Infringement under the doctrine of equivalents does not exist if the putative infringer utilizes an embodiment of the invention as disclosed in the specification and that embodiment was not covered by the claims. As a matter of law, J. Bakar, Inc. could not infringe Maxwell's patent by using any embodiment of the invention dedicated to the public.

The patent-in-suit, U.S. Patent Number 4,624,060 to Maxwell, claimed a system for connecting two shoes so as to keep them organized in a retail context. The system involved securing tabs inside each shoe through which a filament could be threaded which connected the shoes. The claims of the '060 patent described the tab as being fastened to the shoe between the inner and outer soles. The District Court interpreted this language as requiring the tab to be a separate piece from any other shoe part which extended from between the inner and outer shoe soles.

Two designs sold by J. Bakar, accused of infringement, had the securing tabs attached to seams on the interior walls of the shoes. The jury found that these designs

infringed the '060 patent. J. Bakar made a motion for JMOL, maintaining that language in the specification, i.e. "[a]lternatively, the tabs may be stitched into a lining seam of the shoes at the sides or back of the shoes," dedicated the embodiments it was using to the public, making it clear that the tabs could not now be reclaimed by the patentee under the doctrine of equivalents. Maxwell countered that inclusion of the alternative description in the specification actually supported a finding of equivalents.

The CAFC agreed with J. Bakar's interpretation. The Court held that matter disclosed but not claimed is dedicated to the public and a finding of literal infringement is prohibited. The Court expanded the rule saying:

[t]his rule, however, applies equally to prevent a finding of infringement under the doctrine of equivalents. A patentee may not narrowly claim his invention and then, in the course of an infringement suit, argue that the doctrine of equivalents should permit a finding of infringement because the specification discloses the equivalents. Such a result would merely encourage a patent applicant to present a broad disclosure in the specification of the application and file narrow claims, avoiding examination of broader claims that the application could have filed consistent with the specification. See *Genentech, Inc. v. Wellcome Found., Ltd.*, 29 F.3d 1555, 1564, 31 USPQ2d 1161, 1167 (Fed. Cir. 1994).

Maxwell limited her claims to tabs attached between the inner and outer soles. By failing to claim other embodiments contained in the specification, she led others skilled in the art to believe these embodiments were dedicated to the public. They may not now be reclaimed under the doctrine of equivalents.

Prior Art

In *In re Recreative Technologies Corp.*, No. 95-1337 (CAFC May 13, 1996), the Court of Appeals for the Federal Circuit reversed a decision of the Board of Patent

Appeals and Interferences that invalidated patent claims in a reexamination proceeding. The Board found the patent claims invalid based on a prior art reference that was considered in the original examination of the patent.

Recreative Technologies Corp. held U.S. Patent No. 4,918,800 (the '800 patent), directed to a cleaning device for use by golfers. On reexamination, the examiner rejected certain claims of the '800 patent as unpatentable on the ground of obviousness in view of a reference to Ota. The Ota reference had been cited in the original examination on the same ground, obviousness, and the claims were held patentable over Ota. The Board of Patent Appeals and Interferences reversed the examiner's rejection, holding that the claims were not obvious in view of Ota. However, the Board *sua sponte* rejected claims 1, 2 and 4 based on the same Ota reference, but now for a lack of novelty.

The Court of Appeals for the Federal Circuit stated that 35 U.S.C. §303 authorized reexamination only when there is a substantial new question of patentability. According to the Court, a second examination on the identical ground that had been previously raised and overcome is barred. In order to address the Commissioner's argument that a different interpretation should prevail, and that the PTO has the authority to reach a different result on reexamination on the identical ground, the Court reviewed the considerations that underlay the reexamination statute at the time of enactment.

According to the Court, the proponents of reexamination anticipated three principal benefits:

First, reexamination based on references that were not previously included in the patentability examination could resolve validity disputes more quickly and less expensively than litigation. Second, courts would benefit from the expertise of the PTO for prior art that was not previously of record. Third, reexamination would strengthen confidence in patents whose validity was clouded because pertinent prior art had not previously been considered by the PTO.

Thus, the Court concluded that reexamination is barred for questions of patentability that were decided in the original examination. The Court held that the question of patentability in view of the Ota reference was decided in the original examination, and thus it could not be a substantial new question. The Board's decision was reversed and remanded since the reexamination should have been terminated when no other ground of rejection was raised.

TRADEMARKS

In *Starter Corp. v. Converse, Inc.*, 84 F.3d 592 (2d Cir. May 23, 1996), the U.S. Court of Appeals for the Second Circuit reversed and remanded a District Court judgment of dismissal of the plaintiff's declaratory judgment action on the defendant's motion to dismiss. The Court held that an actual case or controversy exists, sufficient to bring a declaratory judgment action, where a party has engaged in a course of conduct evidencing a "definite intent and apparent ability to commence use" of the marks on the product.

Both the plaintiff and defendant owned trademark registrations of five-pointed stars in connection with athletic wear. The plaintiff had taken substantial steps in bringing a line of sneakers bearing the five-pointed star logo to market, up to one of the final steps of choosing a manufacturing partner. Converse had opposed several of Starter's trademark applications and threatened to sue Starter for infringement of its marks if Starter used a five-pointed star on its footwear. Starter, in response, brought this action for declaratory judgment on May 19, 1995. The District Court dismissed the complaint six months later for lack of subject matter jurisdiction. The Second Circuit reviewed the District Court's factual findings for clear error and legal conclusions *de novo*.

Converse contended that because Starter had not yet used the mark "in commerce" as required by the Lanham Act, no statutory basis for federal question jurisdiction exists. The Second Circuit held that Starter's prior use of other embodiments of its marks places the marks sufficiently "in commerce" to sustain jurisdiction under the Lanham Act.

The Court then turned to the question

of whether an actual case or controversy existed at the time the suit was filed. This involved the two prong test of *Windsurfing Intern. Inc. v. AMF Inc.*, 828 F.2d 755 (Fed. Cir. 1987):

(1) has the defendant's conduct created a real and reasonable apprehension of liability on the part of the plaintiff, and (2) has the plaintiff engaged in a course of conduct which has brought it into adversarial conflict with the defendant. *Id.* at 757-58 (applying Second Circuit Law).

The parties agreed that the first prong of this test was satisfied by Converse's threats. Converse, however, contended that Starter's course of conduct up until this point had not been sufficient to bring the parties into adversarial conflict, i.e., the relationship between the parties cannot be said to be an actual case of controversy.

The District Court saw Starter as pleading "no more than a desire and intention to use its trademark on athletic footwear at a future time." *Starter* p. 595. Starter maintained that actual use of the mark was not the appropriate test here. The Second Circuit agreed, applying the test from *Wembley, Inc. v. Superba Cravats, Inc.*, 315 F.2d 87, 89-90 (2d Cir. 1963). Applying that test, an actual case or controversy exists where the plaintiff has engaged in a course of conduct evidencing a definite intent and apparent ability to commence use of the marks in commerce. The Court remarked that further proof of the appropriateness of this test was the similarity of trademark and patent declaratory judgment actions. Courts deciding patent declaratory judgment cases often use the immediate intention and ability test.

Using this test and the basic premise of declaratory judgment actions, i.e., substantial expense incurred by parties should be avoided if possible, the Second Circuit held that Starter had demonstrated an actual intent and ability to imminently engage in the allegedly infringing conduct. This "meaningful preparation" on the part of Starter had raised an actual case or controversy under the declaratory judgment statute and the District Court was required to entertain the case. ■

COURSEBOOKS AVAILABLE FROM THE 1995 — 1996 JOINT PATENT SEMINAR PROGRAMS

A limited number of coursebooks from the annual joint seminars on patent practice sponsored by the Connecticut, New Jersey, New York and Pennsylvania intellectual property law associations are available for both the 1995 and 1996 programs. The cost for the coursebooks are as follows:

1996:	\$20
1995	\$10
Both:	\$25

Those interested in obtaining copies should send a check for the appropriate amount, made payable to the Connecticut Patent Law Association, to:

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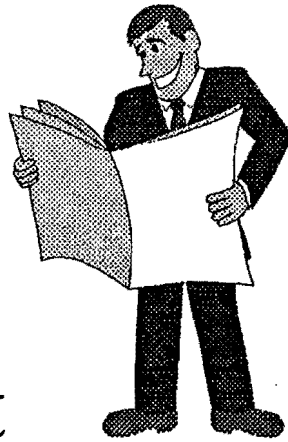
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Great News

NYIPLA Disability Insurance Is Improved!

Coming in October 1996, we are pleased to announce a new and improved price structure on our individual disability insurance plan. The program has been specifically designed for members of the New York Intellectual Property Law Association at rates not available to the general public. The key features are:

- The policy cannot be cancelled, modified or reduced by the insurance company.
- Premiums are significantly discounted and guaranteed not to increase.
- State of the art contract. "Own occupation" and residual (partial) benefits included.
- Benefits can be tailor made to correspond to each person's individual needs.

Please be on the lookout for an update in October. If you have any questions before then please call Randy Rasmussen at 203 637-1006.

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