



THE NEW YORK INTELLECTUAL PROPERTY LAW ASSOCIATION

BULLETIN

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PRESIDENT'S CORNER

This column is being written just after the Annual Judges Dinner; our Association's 74th and the penultimate 75th anniversary celebration. We again set a record as the largest event ever at the Waldorf. We had over 2700 members and guests attending and honored over 100 judges who were in attendance. We additionally had as honored guests a large number of court executives and clerks, officials of the Patent and Trademark Office and many, many bar association presidents from around the country. Mayor Giuliani gave a wonderful speech. My congratulations to each of you who participated in our wonderful annual festivities; who gathered to honor the judges and who make the Judges Dinner festivities in New York a memorable experience every year.

Several judges have thanked me personally for our hospitality and the amount of effort we expend every year in honoring them. The following is representative of many of the letters I received from the judges attending:

"The New York Intellectual Property Law Association presented its 74th Annual Dinner with its usual competence and style.

I am enriched indeed by the hospitality, fellowship and professional insight of our host, the other guests and the rousing remarks of Mayor Giuliani.

Thanks to the Association for the generous hospitality.

I am grateful for all of the courtesies extended."

Our board of directors, together with our committee of past presidents, is now considering the appropriateness of all of our activities and the general direction of

the Association as we approach our 75th anniversary. Since the beginning, our organization has been both a substantive and a social organization, all the while operating through volunteers with no paid staff and a very low dues structure.

Our discussions have and will address whether what we currently do should continue to be our mandate. There's no doubt that we excel at some things: the judges dinner, our luncheon series, the Annual, which in one book provides an overview of the entire year's activities in intellectual property, and our one-day CLE seminar providing an overview of the yearly developments. We also have historically had many substantive committees addressing patents, trademarks, copyrights, antitrust and trade secrets. Should we continue with this Committee structure? Many of these committees overlap with those of the American Bar Association, the American Intellectual Property Law Association and the Association of the Bar of the City of New York. My own anecdotal view is that our substantive committees are not as active over the last few years as they have been in the past. Perhaps this is because there is now a large overlap between the work in



these areas done by the national organizations and ours. The national committees seem to cover all of the areas we cover ourselves. On the other hand, our members would seem to be able to have more input on the smaller committees here than they would on the national committees. Is there a need for a regional or New York input to our substantive laws in addition to that by the national organizations? Should we reorganize some of our committees along other lines to more appropriately meet our members' wishes and desires? Why have our substantive committee efforts seemingly fallen off?

CALENDAR OF EVENTS

April 17, 1996

The Twelfth Annual Joint Seminar Program: Patent Practice Update. Sponsored by the CPLA, NJIPLA, NYIPLA and PIPA, Grand Hyatt Hotel, New York City

May 13-14, 1996

Law Journal Seminars-Press "Computer Law-Internet and Other Complex Technologies," The Plaza Hotel, New York City

May 23, 1996

The NYIPLA Annual Dinner, Yale Club, New York City

July 22-26, 1996

The Fifth Annual Advanced Licensing Institute, Franklin Pierce Law Center, Concord, NH

On a different topic, should we attempt to increase our membership? Our board of directors and officers now spend a substantial amount of time each week on Association business. If we increase our membership, can or should they continue to do that? Would we need an executive director or need to retain one of the several bureaus who provide executive director services for small associations? All of this would likely entail some raising of the dues. How would that affect our Association? What services should we provide that we are not doing now?

Our officers, directors and past presidents will be considering these matters in the weeks and months ahead. If you have any ideas on any of these matters or would like to provide any input, please contact me or any of our Board members.

— Thomas L. Creel

REPORT ON THE U.S. BAR/EPO LIAISON COUNCIL MEETING

by Samson Helfgott

On Monday, October 30, 1995, the U.S. Bar/EPO Liaison Council held its 11th annual meeting with officials of the EPO in Arlington, Virginia. Attending the meeting on behalf of the European Patent Office was President Paul Braendli and Vice President Renata Remandas. Other officials of the EPO were also present. On behalf of the Council, the New York Intellectual Property Law Association was represented, as were the national and other major regional bar associations.

The EPO reported that year-to-date they received 57,000 new applications. Approximately 50% were PCT filings. Currently, this represents a 7% increase versus year-to-date 1994. Despite the increase, they are trying to continue reducing the backlogs. Their goal is that 90% of all

applications will be published with search reports. A first official action should issue between 5 and 7 months and examination should be completed within 20 months. Their goal for oppositions is completion within 27 months; appeals should be completed within 12 months and interparty appeals within 16 months.

A major topic of discussion was the high cost of filing within Europe. A presentation was made by the Council regarding comparison of costs for filing in Europe and elsewhere in the world. The results of various studies clearly show that the costs for covering the European Market is substantially more than the cost for equivalent market size elsewhere in the world.

The EPO officials indicated their sensitivity to the cost situation, but indicated limited ability to address the situation under the present administrative arrangement for governing the EPO. The EPO is governed by the Administrative Council consisting of representatives of each of the national member states of the EPO. In many cases, the representatives are national Patent Office officials. As a result, the national Patent Offices are reluctant to give the EPO a larger share of the maintenance fees collected on EPC granted patents, but would rather keep the bulk of the maintenance fees for national use. While generally a Patent Office can reduce its filing and prosecution fees compensating for such low costs through the maintenance fees, the EPO does not have such capability. Thus, their filing and searching fees remain high.

Nevertheless, the EPO has pointed to the fact that they have not increased their fees for the last three years and have no plans for increases for the next year. The EPO has furthermore put together a number of proposals which they plan to submit to the Administrative Council, including trying to get a larger share of the maintenance fees, reducing filing fees and designation fees and proposals to eliminate the need for national translations. The EPO has proposed that only claims be translated into the individual national languages and the full specification only be required for translation prior to any enforcement. However, the EPO is not too optimistic about getting the Administrative Council to pass such proposals.

The EPO continues to extend its coverage over the rest of Europe. Through the

Extension System, Slovenia, Lithuanian and Latvia have begun accepting EPC granted patents, and it is anticipated the Albania will likewise make use of this system beginning in 1996. As full members, it is hoped that Finland will join in 1996. Cyprus and Turkey are considering membership. Hungary, Poland and Czechoslovakia may also be applying for participation in EPC.

Other subjects discussed included various rule changes implemented during the last year relating to introduction of evidence during oppositions, and delays prior to grant. Statistics with respect to opposition and appeals were also discussed. Noteworthy was the fact that the opposition rate appears to be going down. From an initial 11% opposition rate, the opposition rate is now between 6 and 7%.

Mr. Braendli will be leaving the position of President of the European Patent Office at the end of the year. The new President will be Ingo Kober.

The NYIPLA representatives to the U.S. Bar/EPO Liaison Council are Samson Helfgott and Richard Mayer.

UPDATE ON THE NYIPLA DISABILITY INSURANCE PROGRAM

The response to the individual disability insurance program being offered to the NYIPLA membership has been greater than anticipated. Many members are taking this opportunity to update their coverages. This is crucial as there continue to be changes, with more likely, in the non-cancelable, guaranteed renewable disability insurance marketplace. Recently, Chubb Life announced that it will no longer be offering the non-cancelable disability product.

We are very fortunate that The Union Central Life Insurance Company of Cin-

cinnati, Ohio continues to offer this high quality coverage to the NYIPLA at a considerable discount. Every effort is being made to keep this program in place; however, it is not certain that we will have this offer indefinitely. A key point to remember is that once you have the NYIPLA disability plan in place, it remains effective for as long as you continue to pay the premium regardless of what happens to the Association's offering in the future.

If you have not reviewed your disability coverage recently, it is very likely you need more protection. Now is a good time to review your coverage. The plan administrator, Randy Rasmussen of Rand Insurance, will provide you with a summary of your current coverages and determine whether you qualify for additional disability protection and the cost of that coverage. Simply complete the enclosed questionnaire and return it to Randy at P.O. Box 443, Riverside CT 06878 or fax it to his attention at (203) 637-9671. ■

that the discount for recent graduates be eliminated and that consideration be given to raising prices and/or selecting a less expensive location. Ms. Brogan agreed to report back to the Board about alternative locations.

There was also discussion of the reasons that the monthly luncheons tend to be more successful than the CLE programs. The consensus was that the luncheons are more successful because of the location and the fact that less time is involved. Also, it was mentioned that CLE programs require more extensive promotion, which has not always been done. Upon motion, the Treasurer's Report was accepted.

Mr. Filardi reported, and led discussion, concerning the Judges Dinner. There was extensive discussion of a proposed budget and pricing for the 1996 Judges Dinner, including review of information concerning recent dinners. The discussion included review of reimbursement of honored guests and the accommodations assigned.

There was discussion concerning the recent Fordham CLE Program. Ms. Brogan commented that it was a good program with at least 70 attendees. She thought that the inclement weather and the potential train strike had diminished attendance.

The Craco Report, a report of a two-year study of attorney-client relationships that had been requested by Justice Kaye, was discussed. Mr. Creel commented that the report contains several recommendations, including a recommendation of engagement letters for matters in excess of \$1000. There were also comments concerning mandatory CLE.

Mr. Creel suggested that the Board should have an ad hoc committee to interface with the State Bar Association and/or Justice Kaye with regard to CLE, to make sure that the unique requirements of IP practice are considered. Mr. Filardi, Ms. Brogan and Mr. Dippert volunteered to work with Mr. Creel on this committee. ■

NEWS FROM THE BOARD OF DIRECTORS

by William H. Dippert

The Board of Directors met on December 12, 1995. Thomas Creel presided. Gregory Battersby provided the Treasurer's Report. He commented that the Association's bank balance is down about \$18,000 compared to last year's bank balance at this time, the difference being primarily due to problems with group dues billing of firms. He commented that the remainder of the difference was due to increased expenses during the past year, such as subsidization of luncheon meetings.

There was discussion regarding the prices of luncheon meetings, including the discount given to recent graduates, as well as the costs involved. It was recommended

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RECENT DECISIONS OF INTEREST

by Thomas A. O'Rourke

SUPREME COURT UPDATE

This term the Supreme Court will review the recent doctrine of equivalents case, *Warner-Jenkinson Co. v. Hilton Davis Chemical Co.*, 35 USPQ2d 1641 (CAFC 1995). The question to be reviewed by the Court is:

Does patent infringement exist whenever an accused product or process is "equivalent" to the invention claimed in the patent, in that the differences are not "substantial" as determined by a jury, even though the accused product or process is outside the literal scope of the patent claim?

This is the third patent case the Supreme Court has agreed to hear this term. The Supreme Court has also granted certiorari in *Markman v. Westview Instruments* and *In re Lockwood*. Overall, this has been the most patent dominated Supreme Court docket in recent memory, and is sure to have quite an effect on the field when all of the decisions are rendered.

PATENTS

In *Modine Manufacturing v. United States International Trade Commission*, No. 93-1513, 1996 U.S. App. LEXIS 1690 (CAFC February 5, 1996), the Court of Appeals for the Federal Circuit reversed a decision of the International Trade Commission that the claim language "relatively small hydraulic diameter" is limited to the range of "about 0.15 to 0.40" inches as recited in the specification.

Modine Manufacturing Co. sought to exclude the importation of air conditioner condensers by a company named Showa, alleging that the condensers infringed U.S. Patent No. 4,998,580 (the '580 Patent). The '580 patent claimed an air conditioner condenser having a flow path with a "relatively small hydraulic diameter." The '580 specification describes the diameter of "about 0.015-0.40 inch" as the "preferred embodiment." However, this was the only embodi-

ment in the patent since the broader range of "0.015-0.070" inch was removed from the specification.

The '580 patent evolved from two continuation-in-part applications which had a diameter with an upper limit of "about 0.070" inch. During the prosecution of the parent application, a prior art condenser was cited having a diameter about 0.0496 inch. According to the Court, "the replacement of 0.070 with 0.040 in the text requires the conclusion that the applicant limited the invention described in the reflected applications to hydraulic diameters of up to about 0.40 inch." *Id.* at *15.

The CAFC held that the Commission incorrectly limited the hydraulic diameter to precisely 0.40 inch and did not give consideration to the scope of "about" in the claim. Furthermore, the CAFC held that the Commission incorrectly held that the doctrine of equivalents did not apply because Showa did not "unscrupulously" copy the Modine Condenser.

According to the Court,

Thus we conclude that the available range of equivalency is limited, by estoppel, to the hydraulic diameter of the [prior art] condenser. Within the boundary, however, the prosecution history and the prior art do not eliminate equivalents if substantial identity is shown. The controlling criterion, as reaffirmed in Hilton Davis, 62 F.3d at 1518, 33 USPQ2d (BNA) at 1645, is whether the accused device is substantially the same as the claimed invention.

Thus, the CAFC overturned the International Trade Commission ruling that Modine was estopped to assert equivalency against any condenser with a hydraulic diameter larger than exactly 0.40 inch.

COPYRIGHT

In *Princeton University Press, Inc. v. Michigan Document Services, Inc.*, 1996 U.S. App. LEXIS 1919 (6th Cir. 1996), defendant Michigan Document Services, Inc. (MDS) was appealing a grant of summary judgment for Princeton University Press, Inc. (PUP). PUP claimed that MDS infringed copyrights held by PUP when MDS made multiple copies of excerpts from various materials provided by University of Michigan professors, compiled these copies into "coursepacks," and sold the coursepacks to students for a profit.

MDS defended on the grounds that the "coursepacks" were a "fair use" of the copyrighted works and therefore not an infringement.

University of Michigan professors often utilized MDS and their "coursepack" service to offer students a convenient method of copying all of the excerpted materials for their classes. Whenever an excerpt was substantial enough to warrant purchasing the entire book, the faculty member would have the students purchase the book instead of attempting to place it in the "coursepack." The students were free to purchase either the "coursepack" or to copy the materials themselves at the library for a greater cost or to purchase each of the books which contained the excerpted portions used in class at an even greater cost. The professors received no commission or other return for using the "coursepack" service. In addition, the "coursepacks" were priced on a per-page basis, regardless of the contents of the page; that is, the fee for a page reproducing copyrighted materials was the same as the fee for a blank page or a page of uncopyrighted materials. The books were sold by MDS at the same profit rate as any other copy job. While PUP often granted permission to use materials, MDS never obtained, nor sought to obtain, permission to use the copyrighted portions reproduced in the "coursepacks."

PUP relied on the part of the legislative history of the Copyright Act which concerned Classroom Guidelines. The court dismissed this usage of the legislative history stating that where the statute is unambiguous, the language of the statute passed by both Houses of Congress should be neither expanded nor contracted by the statements of the individual legislators or committees during the course of the enactment process. Thus, during their analysis of fair use, the court utilized the four factors listed in 17 U.S.C. §107:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The first factor was broken into two

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segments. First, the court analyzed "the degree to which the challenged use has transformed the original." *Id.* at 16. Here the court determined that, in dictum, the Supreme Court has noted that "the obvious statutory exception to this focus on transformative uses is the straight reproduction of multiple copies for classroom distribution." *Id.* at 17. They thus found the fair use defense preserved through the multiple copies for classroom use exception. The court next analyzed the purpose of the use and whether it was "commercial or nonprofit and educational." *Id.* at 18. Here the court was concerned with whether the user stood to profit from the exploitation of the copyrighted material without paying the customary price. Although the MDS did make a profit on the sales, the court found the mechanical production of the copies and the classroom use of the excerpts to be inextricably intertwined in an overall result of noncommercial and educational use. The court held that the Copyright Act does not prohibit professors and students who may make copies themselves from using the photo reproduction services of a third party in order to obtain those same copies at less cost. The first factor favored a finding of fair use.

The second fair use factor is "the nature of the copyrighted work." *Id.* at 22. Here, the court determined that the materials were closer to the core of work protected by copyright than compilation of data such as in phone books. The court stated that this second factor does little more than confirm that the works at issue should be protected by the Copyright Act and may be used fairly.

The third factor considers "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." *Id.* at 23. Here the court looked to see if the new work reproduced the original to such an extent as to supersede it. The court found no evidence that the six excerpts in the "coursepacks" were complete enough to supersede the original. The court considered the portions excerpted to be particularly pertinent to the professor's limited classroom purposes. Hence, the court found that the copyrighted works at issue were not excerpted so substantially as to be superseded by the new creation. The court determined that the third factor favored fair use.

The fourth factor in fair use is "the

effect of the use upon the potential market for or value of the copyrighted act." *Id.* at 25. The record here could not support market harm; PUP attempted to use lost permission fees on the materials to show market damage, but the court considered that to be insufficient evidence. Since, without the photocopying, the professors would not be using the materials, the court was reluctant to find market damage. In addition, the court pointed to the limited use as being good advertising for the copyrighted publications. The court found that there was no evidence of market effect and that the fourth, and most important factor, weighed decisively in favor of "fair use."

Finally, the court considered a fifth factor. The court looked to the author motivation in this case. The court stated that the "fact that incentives for producing higher education materials may not revolve around monetary compensation" was highly relevant. *Id.* at 31. MDS's use of the copyrighted works appears to provide the authors with incentive to create new works, thereby advancing the progress of science and the arts, rather than discourage them from doing so. Thus, the court found that the additional factor, incentives to create in this specialized field, weighed in favor of a finding of fair use.

Since balancing the factors dictated a finding of fair use, the court concluded that MDS did not infringe PUP's copyrights. The court reversed the district court and granted summary judgments to MDS.

The dissent in part by David A. Nelson argued that the use was commercial and that MDS should have the burden of showing no market damage. In addition, the dissent argued that showing that the challenged use would adversely affect the potential market should be enough to negate fair use. Also, he pointed out that one of the potential uses of the copyright works at issue was the selling of licenses to copy portions of the works for coursepacks. The dissent considered the four factors and determined that the court should at least allow a full trial if it could not find for the plaintiff.

TRADEMARKS

In *Kareem Abdul-Jabbar v. General Motors Corporation*, 1996 U.S. App. LEXIS 1778 (9th Cir. 1996), the Court of

Appeals for the Ninth Circuit overturned the district court's summary judgment in favor of General Motors Corporation ("GMC"). The Ninth Circuit held that a proper name could not be deemed abandoned throughout its possessor's life, despite a failure to use it.

This dispute arose from a commercial aired approximately six times in March 1993, during the NCAA men's basketball tournament. The commercial compared Lew Alcindor's record-setting feat of being voted the tournament's most outstanding player three years in a row ('67, '68, '69) to the Oldsmobile Eighty-Eight's similar record regarding "Consumer Digest's Best Buy" list. Kareem Abdul-Jabbar played basketball under the name Lew Alcindor throughout his college and early NBA years. After his conversion to Islam, during college, he was known among friends as "Kareem Abdul-Jabbar" and in 1971 he recorded that name under an Illinois name recordation statute. He thereafter played basketball and endorsed products under that name and has not used the name "Lew Alcindor" for commercial purposes in over ten years. GMC did not obtain Mr. Abdul-Jabbar's consent for the use of the name Lew Alcindor. When Mr. Abdul-Jabbar complained to GMC about the commercial it was promptly withdrawn.

The district court, for the most part, based its summary judgment in favor of GMC on its finding that the plaintiff had abandoned the name Lew Alcindor and had abandoned the right to protect that name.

The unauthorized use of a celebrity's identity for endorsement purposes, which is likely to confuse consumers as to the plaintiff's sponsorship or approval of the product, is an actionable claim under Section 43(a) of the Lanham Act. Mr. Abdul-Jabbar contended that GMC's unauthorized use of his birth name was likely to confuse consumers as to his endorsement of the Olds 88, thus violating the Lanham Act.

GMC offered two defenses in response to this claim: 1) Mr. Abdul-Jabbar "abandoned" rights to the name Lew Alcindor; and 2) GMC's use was a nominative fair use not subject to the protection of the Lanham Act.

Abandonment of a trademark under the Lanham Act occurs when use has been discontinued with intent not to resume use. Nonuse for two consecutive years shall be

prima facie evidence of abandonment. A prima facie showing of abandonment may be rebutted by showing valid reasons for non-use or lack of intent to abandon the mark.

The Ninth Circuit acknowledged that the Lanham Act had been applied to cases alleging appropriation of a celebrity's identity. They refused, however, to expand the law even further to allow a defense such as

abandonment. The Court concluded that one's birth name is an integral part of one's identity and is not bestowed for commercial purposes or "kept alive" by commercial usage. Also, a birth name cannot be deemed "abandoned" while its possessor is still alive. Whether or not the name is used commercially does not matter. No intent to set aside a birth name may be inferred from a decision not to use the name, whether for

religious, marital or other personal considerations.

The Court also found that there were relevant questions of fact as to the Lanham Act claims of Mr. Abdul-Jabbar as well as to the defenses raised by GMC which precluded any summary judgment. The case was reversed and remanded. ■

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