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Go Med. Indus. Pty, LTD. v. Inmed Corp.

U.S. Court of Appeals for the Federal Circuit, Oct. 27, 2006

Summary by Brent Berning

Absent sufficient notice, the Lear doctrine cannot be applied to release a licensee from its contractual obligation to pay royalties, if a patent's validity is on appeal. Additionally, district courts have broad latitude to adjust jury awards for trademark infringement under 15 U.S.C. § 1117.

In 1987, patentee was issued a patent for a urinary catheter that minimized the risk of bladder infection. In 1988, appellants, patentee and a manufacturer entered into a long-term licensing agreement with respondents. Respondents were medical distributors that sold the patented catheters in the United States. In 1997, respondents urged appellants to sue a third-party distributor of similar catheters for trademark infringement.

Litigation raised questions of the patent's validity, and a district court found the patent invalid. With the decision in appeal, respondents sent appellants a letter stating their decision to place licensing royalties in escrow until the patent's validity was determined. Appellants terminated their agreement, then filed suit against respondents, alleging patent and trademark infringement, and a variety of contract claims.

The Federal District Court in Northern Georgia granted summary judgment in favor of appellants for patent infringement, but found that claims from the patent were invalid as anticipated. The court thereby precluded royalties from the date the patent was ruled invalid. Appellants appealed this judgment, as well as a summary judgment in favor of respondents denying a prejudgment motion for liquidated damages, and judgment as a matter of law, in favor of

respondents, reducing trademark infringement and contract damages. Respondents appealed the court's grant of permanent injunction against them from using appellant's trademark.

The United States Court of Appeals for the Federal Circuit upheld summary judgment in favor of respondents, agreeing with the district court that appellant's claims were anticipated. Appellant was not entitled to an earlier priority date, because appellant did not disclose the invention in a manner that satisfied the best mode requirement. The court agreed with the lower court that appellant possessed a best mode, but that there was insufficient disclosure to sustain validity. The court also found no abuse of

the district court's denial of prejudgment interest, since the liquidation of contract damages were pending until the return of a jury verdict. Likewise, there was no abuse of discretion in denying a prejudgment motion under the Lanham Act.

Next, the court reviewed de novo the district court's adjustment of damages for breach of contract and trademark infringement. The court found that the district court erred in applying the Lear doctrine to preclude appellants from receiving royalties because the patent's validity was on appeal. The Lear doctrine allows licensees to cease payments for a license on the grounds of an invalid patent, but it only applies when (1) a licensee ceases payment of royalties, and (2)

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a licensee provides notice and reason (patent deemed invalid) to the licensor for ceasing payment. The appellant's license should not have been terminated because the patent's validity was on appeal. Respondent's letter to appellants implicitly acknowledged this fact: respondents stated they would place royalties in escrow until the appeal was decided. Furthermore, the court doubted the respondent's letter gave adequate notice. Regardless, the preclusion of royalties from the initial judgment of invalidity to the time of respondent's letter was a misapplication of the Lear doctrine. The court vacated the judgment and remanded for recalculation of contract damages.

Moving on, the court affirmed the district court's broad latitude to adjust trademark infringement rewards under 15 U.S.C. § 1117, because the awards in this case were based on actual damages as opposed to profits. The court agreed with the lower court that there was no agreement for a royalty rate in the appellant's trademark and that appellant's award for royalty fees and profits was "arbitrarily pulled out of the air." The court was persuaded that success of patented sales more likely resulted from respondent's marketing and advertising, than the patentee's name. Finally, the court found substantial evidence to sustain a permanent injunction.

Accordingly, the court affirmed summary judgment in favor of respondents for patent imaging systems. This case involves two predecessor patents to the '602 reissue patent at issue, which were assigned to Medrad. The first and original patent was U.S. Patent No. 5,494,036 ('036 patent), which was issued on February 27, 1996. Medrad then filed an application for reissue of the '036 patent on February 23, 1998, which declared an "underclaiming" error on the part of the inventors. Medrad proceeded to correct an "over claiming" error and inventorship, in addition to correcting the underclaiming error during the prosecution of the reissue patent, which subsequently issued as U.S. Reissue Patent No. 36,648 ('648 reissue patent). However, during this reissue application process, Medrad failed to submit supplemental reissue declarations regarding

the over claiming or inventorship errors as required by 37 C.F.R. § 1.175.

Alleging illegal importation of devices that infringed the '648 reissue patent, Medrad filed a complaint with the U.S. International Trade Commission on April 25, 2000. In this proceeding, the International Trade Commission found the '648 reissue patent to be invalid on a motion for summary judgment, because Medrad failed to file supplemental reissue declarations regarding the over claiming and inventorship errors that were subsequently corrected during an additional patent reissue prosecution. However, during the ITC proceeding, Medrad filed a reissue application (which became the '602 reissue patent) for the '648 reissue patent in an effort to correct its failure to submit the supplemental declarations during the prosecution of the '648 reissue patent. Therefore, the only difference between the '648 reissue patent and the '602 reissue patent is that Medrad filed supplemental declarations during prosecution of the '602 reissue patent that corrected the failure to do this during the prosecution of the '648 reissue patent.

On a cross motion for summary judgment regarding the validity of the '602 reissue patent from Medrad's complaint in the district court against Tyco alleging infringement of the '602 reissue patent, Tyco argued that this reissue patent was defective under 35 U.S.C. § 251. Ultimately, the district court granted Tyco's motion for summary judgment because it determined that Medrad had corrected a "procedural" error and not an error in the specification, drawings, or claims of the '648 reissue patent.

In its case before the Federal Circuit, Medrad argued that 35 U.S.C. § 251 encompasses any inadvertent error that results in underclaiming or overclaiming, not only errors in the specification, drawings, or claims of the patent. Conversely, Tyco argued that even if a party had a right to correct a failure to submit supplemental declarations under 35 U.S.C. § 251, the district court's ruling should still be affirmed because the supplemental declarations submitted in the '602 reissue patent do not comply with 37 C.F.R. § 1.175. However, since the district

court expressly declined to consider the issue regarding 37 C.F.R. § 1.175, the Federal Circuit remanded the issue back to the district court for consideration. Consequently, the issue on appeal was whether the 35 U.S.C. § 251 requires that the error occur in the actual language of a patent's claims – as Tyco argues – or refers broadly to errors that result in patent rights with more or less scope than would have been provided but for the error – as Medrad argues.

In interpreting 35 U.S.C. § 251, the Federal Circuit reasoned that although such an error may result from the language used in a claim, the express terms of the statute do not refer only to errors in the claim language itself, as Tyco argues. Rather, the court stated, section 251 can be read to encompass any error that causes a patentee to claim more or less than he had a right to claim.

Since the Federal Circuit decided that a defect of a patent owner failing to submit supplemental reissue declarations regarding over claiming or inventorship errors, as required by 37 C.F.R. § 1.175, but then correcting the failure to file these supplemental declarations during the prosecution of a subsequent reissue patent is the type of defect that can be corrected under 35 U.S.C. § 251, the Federal Circuit reversed the district court's summary judgment that the '602 reissue patent was invalid and remanded the case for further proceedings. Therefore, Medrad prevailed in the case because its '602 reissue patent was not held to be invalid.

Figueroa v. United States

U.S. Court of Appeals for the Federal Circuit, Oct. 11, 2006
Summary by Dirk Vanover

Congress is not limited by the Patent Clause to collecting fees on patents solely for the operation of the Patent and Trademark Office ("PTO"), and legislation requiring patent fees higher than necessary to fund the operations of the PTO is rationally related to legitimate congressional objectives. Patent fees are not a direct tax on intellectual property, and, if they were to be considered

a tax, they would be an excise tax.

Plaintiff filed a patent application on February 27, 2001, and paid the application fees required by statute. On August 7, 2001, plaintiff filed a complaint in the Court of Federal Claims seeking to recover the paid fees and also seeking declaratory and injunctive relief barring future allegedly illegal exactions of patent fees. In the complaint, plaintiff alleged that the fees imposed by the patent fee statute exceeded Congress's power under the Patent Clause, constituted an unapportioned direct tax on intellectual property in contravention of the Direct Tax Clauses, and constituted a taking under the Fifth Amendment. Plaintiff also alleged that because of Congress's allegedly unlawful diversions and rescissions of patent surcharge and patent fee revenue, the PTO is underfunded and cannot keep up with the volume of patent applications. Plaintiff later paid the patent issuance fee and was issued a patent on November 26, 2002.

The Court of Federal Claims held that plaintiff had standing to bring the suit, and it dismissed plaintiff's direct tax and takings claims. The court did not dismiss plaintiff's Patent Clause claim, and upon motion for summary judgment from both parties, the court held that plaintiff failed to show that there was no rational relation between Congress's use of the fee revenue and the promotion of the useful arts.

On appeal by the Plaintiff, the Federal Circuit reviewed the Court of Federal Claims' dismissal and summary judgment.

The Federal Circuit held that the Patent Clause's preambular language limits congressional authority to actions necessary and proper to "promot[ing] the progress of science and the useful arts," and that the limitation is judicially enforceable. However, the court also ruled that Congress is not limited under the Patent Clause to enacting legislation to fund the PTO.

The court also concluded that there was a rational relationship between the present level of patent fees and Congress's legitimate objectives under the Patent Clause. The court said that Congress' actual reason—to generate additional revenue to fund non-PTO programs—does not render

the legislation invalid if "Congress *could* conclude that the level of fees served legitimate congressional objectives." (emphasis in original) The court ruled that there were three reasons that would satisfy a rational relationship: first, that it was rational for Congress to impose fees to fund the overall patent system, not just the PTO; second, that even if the fees collected exceeded the secondary costs of operating the patent system within any given year, Congress could have rationally decided that increased fees were necessary to keep pace with likely increasing costs of maintaining the PTO and patent system; and third, even if the fees exceeded the current and predicted costs necessary to operate the PTO and patent system, "Congress could also rationally decide to set fees above what is needed to meet the funding needs of the PTO in order to deter the filing and prosecution of certain types of patent applications."

In response to plaintiff's complaint that the patent fees constituted a Direct Tax, the court held that patent fees should not be viewed as taxes, but as payments for a privilege—the privilege of securing a patent grant. The court also ruled that even if patent fees were a tax on patent rights, the fees would be an excise tax and not a direct tax. The court said a tax on patents is "like other taxes on specific categories of personal property that the Supreme Court has sustained against direct tax challenges."

The Federal Circuit affirmed the lower court's findings and dismissed the case in favor of the defendant.

1Mage Software, Inc. v. Reynolds & Reynolds Co.

U.S. Court of Appeals for the Tenth Circuit,
Aug. 23, 2006
Summary by Maria Matsoukas

A district court has authority to compel arbitration when a licensing agreement between two parties contains an arbitration clause, the dispute arises from or is related to the licensing agreement, and the court has

subject matter jurisdiction.

Plaintiff, a company that creates computer imaging software used by the automotive industry entered into a Software Licensing Agreement granting Defendant a perpetual license to use, market, and distribute its software and in which both parties agreed to arbitrate any disputes under the agreement in Ohio. Two years later, the parties entered a "Maintenance Agreement" (through which Defendant obtained a license for an upgraded version of the software) containing a merger clause, which provided that the new agreement superseded all prior agreements between the parties, except for the previously mentioned Software Licensing Agreement. Several years later, Defendant notified Plaintiff that it decided to terminate the Maintenance Agreement and Plaintiff responded that Defendant no longer had any license to its upgraded software. Defendant continued using the software and Plaintiff sued Defendant, along with nineteen car dealers who had obtained Plaintiff's software from Defendant.

Defendant then filed a motion to stay the federal litigation and to compel arbitration of the claims pursuant to the Federal Arbitration Act. The district court granted the motion, the arbitrator awarded Defendant almost \$400,000 in damages, and the district court confirmed the award. Plaintiff appealed the district court's jurisdiction and order compelling arbitration.

First, as to the issue of proper subject matter jurisdiction, the court concluded that jurisdiction is appropriate over actions arising under federal laws including the Copyright Act. To determine whether this claim arose under the Copyright Act, the court adopted the Second Circuit's approach that an alleged claim arises under the Copyright Act, and thus a district court has subject matter jurisdiction over it, if: "(1) The complaint is for a remedy expressly granted by the Act" or, "(2) The complaint asserts a claim requiring construction of the Act." In applying this test, court held that jurisdiction was appropriate because Plaintiffs alleged a claim under the Copyright Act for copyright infringement and sought damages provided for under the Act.

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Second, in response to another issue of jurisdiction, the court held that the Colorado district court could grant Defendant's motion to compel arbitration in Ohio because the controlling rule from *Ansari* is one of venue. Issues of venue are waived if not brought up before the district court. Because, in this case, the parties did not raise this issue, they effectively waived it.

Third, the court held that the district court did not err in granting Defendant's motion to compel arbitration. According to the court, absent ambiguity in the arbitration agreement the party's intentions control. While the more recent agreement did not include an arbitration clause, it did include a merger clause maintaining all provisions of the original agreement. The district court held, and the appellate court agreed, that this dispute arose under the original agreement and was therefore subject to the arbitration clause.

The appellate court affirmed the district court's confirmation of the arbitrator's award for the Defendant.

Fuji Kogyo Co., Ltd v. Pacific Bay International, Inc., et al.

U.S. Court of Appeals for the Sixth Circuit,
Aug. 23, 2006
Summary by Natalie Sturicz

When a company seeks trademark protection for designs that were previously protected in utility and design patents, the court must determine whether the functionality of the designs precludes their protection under the Lanham Act. In order to determine whether the designs are functional, the court should use the *Morton-Norwich* factors test, which places a large emphasis on prior patent protection, and the doctrine of equivalents. The result of such analysis is that designs previously protected by an expired patent, as well as designs that would have been protected under that patent according to the doctrine of equivalents, will likely be found functional and not protectable under

trademark law.

Fuji Kogyo Co., Ltd manufactures fishing tackle, including several varieties of fishing line guides. During the 1970s, Fuji acquired several design and utility patents to protect its various designs for fishing line guides. When those patents began to expire in the 1990s, Fuji registered several of its fishing line guide designs as trademarks in order to extend its exclusive ability to use those designs. Due to the time and expense involved in seeking trademark protection, Fuji sought to enforce some of its designs as unregistered marks as well. In general, Fuji's trademark claims included only parts of the designs protected in the original patents, but the claims were very similar to the patented designs. On these facts, the court ruled on the following issues: whether a design previously protected by utility patent must be considered functional and unprotectable as a trademark; whether a design previously protected by design patent should be considered functional and unprotectable as a trademark; and whether similar designs to those previously protected by patent should be protected as trademarks.

The court first addressed the designs previously protected by utility patents. In order to obtain a utility patent, the party seeking protection must demonstrate the utility of its design. This amounts to proof and admission of functionality, which is incompatible with trademark protection. Additionally, protection by utility patent carries with it the understanding that the protected work will pass into the public domain upon expiration of the patent. It would contradict patent policy to allow Fuji's designs previously protected by utility patent to receive subsequent protection under trademark law. The court cancelled the trademark registration for those designs.

Next, the court addressed the designs previously protected by design patents. While a utility patent requires a showing of utility/functionality in order to issue, a design patent requires the opposite—a showing that the feature to be protected is not essential to the function of the product. However, the court could not use this presumption of nonfunctionality to determine whether the

line guides protected by Fuji's design patents were functional because several of those designs were also protected by utility patent. This dual protection resulted in conflicting presumptions regarding the functionality of the designs, and the court resolved the conflict by using the *Morton-Norwich* factors test to determine functionality. These factors include: (1) the existence of a utility patent; (2) advertisements in which the manufacturer emphasizes the design's utility; (3) availability of functionally equivalent designs for use by the manufacturer's competition; and (4) information indicating that the designs are more economically efficient than competing designs in the market. There was information in this case supporting functionality based on all four of the factors listed. By offering information to satisfy the *Morton-Norwich* test, a defendant may overcome the presumption of functionality accompanying prior patent protection. The court also cancelled the trademark registration for the designs previously protected by design patent.

Finally, the court addressed the issue of whether Fuji could seek trademark protection for designs very similar, but not identical, to those protected in their patents. The court determined that if a design would have been protected under their patents viz. the doctrine of equivalents, then that design falls within the scope of the patent for purposes of functionality analysis in trademark protection. Under this analysis, the court also cancelled trademark registration for the designs that were very similar to Fuji's previously patented designs.

Ross, Brovins & Oemhke, P.C. v. Lexis Nexis Group

U.S. Court of Appeals for the Sixth Circuit,
Sept. 15, 2006
Summary by Henry L. Welch

A collection of public domain legal forms can be sufficiently creative to qualify for copyright protection as a compilation. However, the placement and appearance of

dialog boxes in the presentation of the legal forms using the default settings for the template authoring tool and the interrelation of variables between templates are not entitled to copyright protection.

In 1997, plaintiff entered into a contract with defendant to provide the defendant with a set of templated electronic legal forms for the state of Michigan. Plaintiff assembled a series of 576 legal forms using many standard forms approved by the Michigan State Court Administration Office (SCAO) as well as some custom-created forms. Both the public domain and custom forms were integrated into a single package using a proprietary software package for authoring templates so that entries filled out on one form would be automatically reproduced, as necessary, on the other forms.

Following a successful five-year relationship, defendant terminated its agreement with plaintiff under the terms of their agreement. Defendant then assembled its own set of 406 forms based upon the public domain SCAO forms. Defendant's compilation included 350 of the forms that appeared in plaintiff's compilation, but did not include any of plaintiff's custom forms. Defendant used the same template authoring software and included the same general field duplication feature. Plaintiff filed suit against defendant alleging, among other claims, copyright infringement.

Plaintiff's collection of forms was found to be sufficiently creative to warrant copyright protection. Plaintiff's selection of 576 forms from among the over 700 SCAO forms and use of some custom table of contents headings showed sufficient creativity to warrant thin copyright protection as a compilation. Likewise the defendant also showed sufficient creativity in creating its own compilation to qualify for its own copyright. Despite the duplication of 350 of the same forms and use of many of the same table of contents terms in its compilation, defendant's compilation was not infringing because there were sufficient differences between the two compilations and all of the duplicated elements were due to the include of the public domain SCAO forms.

Plaintiff's automation of the forms as

electronic templates was not sufficiently creative to qualify for copyright protection. The selection and placement of input fields on the various forms was driven almost entirely by the functional needs and the arrangement of the public domain SCAO forms and is not sufficiently creative to qualify for copyright protection. Further, plaintiff's use of the default dialog settings in the template authoring software represented a programming choice that was too trivial to qualify for copyright protection. Additionally the interrelation of variables between the various forms was also insufficiently creative for copyright protection because it was driven by the instructions for filling out the forms rather than some creative or original choices of plaintiff.

The District Court's grant of summary judgment for the defendant was upheld with regard to all of the copyright claims. However, the case was remanded for further proceedings under a contract theory. On all the copyright issues the ruling on appeal favored the defendant, Lexis Nexis Group, over the plaintiff, Ross, Brovins & Oemhke,

P.C.Ormco Corp. v. Align Tech., Inc.

U.S. Court of Appeals for the Federal Circuit, Aug. 30, 2006
Summary by Tim Johnson

Ormco appeals from a district court summary judgment that held, in part, claims 1-3 and 7 of Align's '611 patent and claims 10 and 17 of Align's '548 patent were not invalid and were infringed by Ormco's RW&B orthodontic product.

Align is the holder of two patents – the '611 and '548 patents – that disclose a series of orthodontic retainers which are used for adjusting teeth from an initial to a final configuration. Four claims of the '611 patent are at issue on this appeal. Claim 1 describes a series of retainers and instructions for their use. Claim 2 describes the shape and adjustment of the retainers. Claim 3 specifies the adjustment magnitude of the retainers, and claim 7 describes the different identifying marks on each retainer.

Claim 10 of the '548 patent is an apparatus claim that depends from independent claim 1, which describes a series of retainers and identifying marks. Claim 10 requires instructions for the retainers' uses to be included in the package. Claim 17 is a method claim that depends on claim 11, which includes the same basic elements of claim 1. Claim 17 adds an intervals limitation to claim 11, specifying the replacement time for a retainer to be 2-20 days.

Two instances of prior art were important in this analysis. First, Dr. Truax, an orthodontist, took a patient's mold and structured the mold into a series of retainers of increasing thickness. Thicker molds exerted more pressure on a patient's teeth. Truax's patients were given one mold at a time. The second instance of prior art involved Dr. Rains. He also used a series of retainers, though he made succeeding mold in the series at subsequent checkups.

Section 103(a) states that an item cannot be patented if it is obvious. The circuit court held here that Truax's practice and instruction sheet qualified as prior art. The circuit court here stated that Dr. Truax's devices satisfied the dictionary definition of geometry in claim 1. Also, nothing in claim 1's language requires the retainers to be substitutable only by the patient. Providing the retainers to the patient in one package is a well-known practice of packaging items in the most efficient manner. The court further stated that adding the instructions limitation did not render claim 1 non-obvious because the FDA generally required instructions to be provided with medical devices to consumers.

Claim 2 of the '611 patent, which was dependent on claim 1, was also found to be invalid. The instructions in Truax's retainers made clear that his appliances were also polymeric shells with cavities that corresponded to the patient's teeth, and that these cavities were made to be reconfigured between successive arrangements. Also, Truax's devices also were characterized by cavities that did not change. Thus, the claim 3 requirements were met by Truax. Finally, the court found Truax's retainers to meet claim 7 requirements because the

thicknesses of Truax's retainers indicated the order in which they were to be used. Accordingly, Ormco made a prima facie case that claims 1-3 and 7 of the '611 patent would have been obvious.

Similar to its analysis of claims 1 and 7 of the '611 patent above, the court found that Ormco established obviousness with respect to this combination of elements under claim 10 of the '548 patent. The court found that claim 17 of this patent requires that devices actually be replaced within 2-20 day intervals. Where a claimed range overlaps with a range disclosed in a prior art, there is a rebuttable presumption of obviousness. The presumption is rebuttable by showing that the prior art teaches away from the claimed range, or the claimed range produces new or unexpected results. (citations omitted). Based upon Truax's practice and instruction sheet, the court found that Align failed to rebut the presumption of obviousness where the claim 17 range overlapped with Truax's stated range.

Lastly, the court discussed that secondary considerations include novelty shown through the claimed subject matter's commercial success, long felt but unsolved needs, and failure of others. There must be a nexus between the secondary consideration and the claimed invention. If the commercial success is due to an unclaimed feature of the invention, then such success is irrelevant. Align's own witnesses testified that the commercial success of the patented inventions were due in large part to unclaimed or non-novel features – e.g. aesthetic appeal and improved comfort of the retainers. Also, Truax had already accomplished the improved efficiency and appeal of such devices. Thus, Align did not provide adequate evidence that its inventions produced warranted secondary considerations of non-obviousness.

In sum, the court held that claims 1-3, and 7 of the '611 patent and claims 10 and 17 of the '548 patent are invalid as obvious under § 103(a). The district court's grant of summary judgment is reversed.

Syngenta Seeds, Inc. v. Delta Cotton Co- operative, Inc.

U.S. Court of Appeals for the Federal
Circuit, July 28, 2006
Summary by Julie Piper

Following an April 28, 2005 jury verdict in favor of Syngenta Seeds, Inc. and Syngenta Participations AG ("Syngenta"), Delta Cotton Co-operative, Inc. ("Delta") filed motions for judgment notwithstanding the verdict, a new trial, and remittitur. However, the District Court denied these motions and granted Syngenta's motions for permanent injunction and costs. Delta then filed this appeal. On appeal, the United States Court of Appeals reversed the district court's judgment for damages and injunctive relief against Delta. The court held that Syngenta did not present enough evidence of infringement under the Plant Variety Protection Act and the Lanham Act and that the district court did not properly construe section 2567 of the Plant Variety Protection Act.

Syngenta is an international agribusiness that produced a commercial crop seed variety called "Coker 9663" ("Coker"). The Plant Variety Protection Act (PVPA) protects certain seeds such as the Coker variety. The PVPA offers patent protection for a period of twenty years to those who breed certain plant varieties. The PVPA also provides a cause of action for the infringement of the patent protection. The PVPA requires that those seeds protected by the PVPA be packaged in materials indicating that the unauthorized propagation of the seed variety is prohibited. In addition to having protection under the PVPA, Syngenta holds a trademark to the name "Coker."

Through the course of Delta's businesses, it sells bags of stored wheat called "feed wheat." This wheat contains seed meant to be fed to farm animals rather than to be used as planted crops.

This case initially arose when Delta sold three 60-pound bags labeled "feed wheat" that actually contained Syngenta's Coker protected seed. The three bags were labeled

with Delta's name and the phrase "Feed Wheat." Thus, Syngenta filed suit for and won damages for infringement of the PVPA, infringement of the Lanham Act, injunctive relief, treble damages, disgorgement of profits, and costs.

In this appeal, Delta asserts five challenges to the district court's denial of its post-trial motions. Delta first says that Syngenta failed to present any evidence of infringement under both the PVPA and Lanham Act. Secondly, because the element of knowledge is required in order to prove PVPA infringement, Delta argued that, because it only sold the seed as feed wheat and not for propagation, Syngenta could not have established that Delta knew that it was bagging and selling as feed wheat Syngenta's protected variety.

Third, Delta argued that the district court was erroneous in preventing Delta from presenting evidence regarding its lack of knowledge of the source of the wheat. Because it could not present evidence indicating that it was unaware that the bagged seed was Coker seed, Delta could not properly use one of the defenses allowed under section 2567 of the PVPA. Section 2567 of the PVPA states that an owner of a protected variety of seeds cannot recover damages for infringement if the seeds are legally distributed and are obtained by the alleged infringer without a label stating that the unauthorized propagation of the seeds is prohibited, unless the alleged infringer has "actual notice or knowledge that propagation is prohibited or that the variety is a protected variety." Fourth, Delta also alleges that Syngenta failed to present enough evidence for the court to find in their favor on the Lanham Act claim. Lastly, Delta argues that the damages awarded to Syngenta by the district court were excessive under the PVPA and the Lanham Act.

On the issue of the PVPA infringement claim, the court of appeals determined that the district court improperly interpreted a portion of the PVPA. More specifically, the court of appeals opined that the lower court improperly ignored section title 7 section 2541(a)(6) of the United States Code that requires the alleged infringer to have actual knowledge that the seed in question

is a protected variety and that the alleged infringer have failed to provide notice to the recipient of the seed that the seed was a protected variety. Thus, because the district court did not require Syngenta to provide that Delta (1) had notice and (2) did not provide this notice to the recipient of the seeds, the jury did not have enough evidence to make a finding of infringement.

As a result, Delta went on to argue that because it received the Coker seed without the knowledge that they were protected, it cannot be held liable for infringement. Syngenta countered by arguing that the court lacks jurisdiction over this issue because Delta did not raise this section 2567 argument until the post-verdict motion. However, the court found that, per section 2567, Syngenta, the patentee, had the burden of proving that Delta had actual or constructive notice that the seeds were patented. Thus, because Delta did not have the burden of proving whether it did or did not have notice, it preserved the section 2567 defense.

Further Delta argued that there was insufficient evidence to sustain a Lanham Act claim. Syngenta, however, alleged that Delta engaged in “reverse passing off” or claimed the Coker seed as its own. Though the bag labeled “Delta Co-op Feed” that Delta used to package the Coker seed was considered a false designation, the Court of Appeals held that there was not enough evidence to support the kind of reputational injury referred to by the district court. Syngenta never submitted any evidence indicating that it suffered actual financial harm. Further, because the seed was sold as feed seed, the seed is not likely going to be propagated. Therefore, the court questioned whether the Lanham Act even allows a claim when a re-branded product is used for a different purpose than, and thus does not compete with, the trademarked product.

In the end, the Court of Appeals reversed the denial of Delta’s motion for judgment as a matter of law on both the PVPA and Lanham Act claims.

Ebay Inc. v. MercExchange

U.S. Supreme Court, May 15, 2006
Summary by Mike Tuchalski

When permanent injunctive relief is sought in a patent infringement case, it is appropriate for courts to use the generally applicable four-factor test to determine if injunctive relief is appropriate, regardless of the patent holder’s willingness to license the patent or its lack of commercial activity in using the patent.

Petitioners, eBay and its wholly owned subsidiary Half.com, operate popular auction websites that offer a forum for private sellers to sell goods and services through an auction or at fixed price. Respondent, MercExchange, holds various patents, including a “business method patent for an electronic market designed to facilitate the sale of goods between private individuals by establishing a central authority to promote trust among participants.” MercExchange entered into negotiations with eBay and Half.com to license this patent, but were unsuccessful. Subsequently, they filed a patent infringement suit against eBay and Half.com in the United States Court for the Eastern District of Virginia.

A jury found that MercExchange’s patent was valid and that it had been infringed upon by eBay and Half.com. Upon receiving this jury verdict, MercExchange moved for permanent injunctive relief, which was denied by the district court. The appellate court reversed this ruling, holding that as a “general rule the courts will issue permanent injunctions against patent infringement absent exceptional circumstances.”

Well established principles of equity have created a four-factor test that must be satisfied by a plaintiff seeking permanent injunctive relief: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and the defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved

by a permanent injunction.

In the spirit and longstanding tradition of equity, the Supreme Court held that this four-part test is applicable in a patent infringement dispute with equal force. Stating that a change in the longstanding tradition of equity should not be taken lightly, the Court found that Congressional intent did not indicate such a departure with the Patent Act. Specifically, the Court quoted directly from the Act, stating that it provides for injunctions in accordance with the principles of equity. 35 U.S.C. § 283.

Further, the Court found the Act to give patents the same characteristics of personal property, including a “right to exclude other from making, using, offering for sale, or selling the invention.” However, this parallel with personal property is still subject to the provision of the Act that provides for injunctive relief in accordance with the well established principles of equity. Moreover, as copyrights possess these very same characteristics, the Court pointed to consistent commitment in declining to replace long standing principles of equity with an automatic rule that an injunction follow a copyright infringement ruling.

Accordingly, the Court vacated the court of appeals decision creating a categorical rule that automatically imposed a permanent injunction in light of patent infringement and remanded for further proceedings consistent with equitable principles of injunctive relief, namely, the generally applicable four-factor test.

Buying For The Home, LLC v. Humble Abode, LLC

U.S. District Court For The District of New Jersey, Oct. 19, 2006
Summary by Marc Morgan

Unfair competition claims can be brought under the Lanham Act, 15 U.S.C. § 1125(a), involving advertisements and links that appear on search engines.

Plaintiff sued defendants for violations of the Lanham Act, and New Jersey’s Fair

Trade Act, as well as under the common law for trademark infringement, unfair competition, defamation and trade disparagement. The defendants, in turn, made counter claims and third party claims.

The defendants' moved for summary judgment for all counts of the plaintiff's claims and for the defendants' store's claims of trademark infringement, unfair competition and false advertising. Also the plaintiffs requested that the court strike the defendant's request for attorney fees with respect to the Lanham Act claims.

The plaintiff alleged that the defendants' store misappropriated its mark by causing a sponsored ad to appear next to search results on Google when Internet surfers entered the term "total bedroom." Additionally, the plaintiff alleged that the defendants made false statements to parties that do business with the plaintiff.

While the defendants alleged that the plaintiff undertook aggressive attacks against the defendant store through various furniture related websites, and improperly used the store's mark "Humble Abode," as well as, its unique product names.

The court denied the defendants' motion for summary judgment on the plaintiff's unfair competition and infringement claims because: (1) they failed to meet their burden of showing an absence of a valid and legally protectable mark; (2) there is sufficient evidence for the jury to find the plaintiff to be owner of the mark; (3) the plaintiff has satisfied the "use" requirement of the Lanham Act; and (4) the defendants did not challenge the "likelihood of confusion" claim made the plaintiff.

The court granted the defendants' motion for summary judgment on the plaintiff's defamation and trade disparagement claims. Defamatory statements had only been attributed to one of the defendants and so the claims were automatically dismissed against the other defendants. The court also dismissed the defamatory claim against the remaining defendant because the plaintiff

failed to make a sufficient showing that (1) the defendant made a defamatory statement of fact; (2) concerning the plaintiff; (3) which was false; (4) which was communicated to persons other than the plaintiff; and (5) fault. After dismissing the defamation claims, the District Court dismissed the disparagement claim against the defendants' because the plaintiff did not provide any evidence of malice, falsity or damages.

The court denied the defendant store's motion for summary judgment on its infringement and unfair competition claims. The defendant did not provide evidence of how its product names are protectable marks. However, the defendant's "Humble Abode" is a registered service mark entitled to a presumption of validity, but the plaintiff raised a fair use defense. The court accepted the plaintiff's argument that it used the competitor's trademark for purposes of comparative advertising in the absence of evidence from the defendant that there was a likelihood of consumer confusion.

The court denied the defendant store's motion for summary judgment on its false advertising claim because the defendant did not get specific as to what statements were false and misleading or why. The court denied the defendant store's motion for summary judgment on its unfair competition by filing law suit claim because there was no showing that the claim is a viable theory under New Jersey law and, because, the defendant's claim fails under the Lanham Act. Further, the plaintiff's defense of reliance on counsel raised an issue of fact that precluded summary judgment. Finally, the court granted the plaintiff's motion to strike the defendant store's demand for attorney fees because even if the defendant ultimately prevails, none of the facts presented to the court would warrant a finding that the plaintiff's conduct involved bad faith, fraud, malice, knowing infringement or the like.

The court, after examining the above stated issues, granted the defendants' motion for summary judgment in part and denied the motion in part. Additionally, the court granted the plaintiff's motion to strike the defendant store's request for attorney's fees.

Novotny v. Chapman

U.S. District Court for the Western District of North Carolina, Aug. 9, 2006
Summary by Aaron Glass

In order for a Plaintiff to receive a preliminary injunction barring a Defendant from filing complaints under section 512(f) of the Digital Millennium Copyright Act (DMCA), Plaintiff must show the possibility of actual and imminent irreparable harm if the injunction is denied.

Plaintiffs had entered into an agreement with Defendant whereby Defendant would produce and transfer to Plaintiffs original instructional videos, which demonstrated a particular method of cutting women's hair. Plaintiffs would transfer the original videos into digital format, publish, and sell them on their website as downloadable streaming media clips. Defendant did not have a federally registered copyright on the videos. Approximately two years after the original agreement, as sales of the videos began to wane, Defendant requested that Plaintiffs remove his videos from their website. Defendant claimed that Plaintiffs were "pirating" and "stealing" his videos and likened them to "thieves." Plaintiffs refused, explaining that: "(1) they had made significant expenditures to reformat the videos from their original form into digital format, (2) Defendant's demand to terminate their agreement without reasonable notice was unacceptable, and (3) the Plaintiffs were within their rights to leave the videos on their website since the videos, as edited and reformatted, were now Plaintiffs' intellectual property."

Defendant subsequently filed complaints of copyright infringement against Hurricane Internet Services and Interland, Inc., Plaintiffs' third party internet providers, and Paypal, Plaintiffs' third party online payment processor. Under the DMCA, a copyright owner "who in good faith believes that a website may be infringing on his copyrighted material may file a complaint with the alleged infringer's internet service provider." 17 U.S.C. § 512(c)(3). Once a service provider is made aware of such complaints it becomes responsible to re-

move all allegedly infringing material or it may be held responsible for infringement. Hurricane Internet Services, Interland, Inc. and Paypal all suspended their services to Plaintiffs following Defendant's complaints. In response to the suspension of their internet services, Plaintiffs removed Defendants videos from their website.

Plaintiffs moved to have Defendant enjoined from bringing additional claims against them under the DMCA. The court stated that injunctive relief "is considered an extraordinary remedy which is to be applied 'only in limited circumstances.'" The court would only consider the Plaintiffs' argument, that their success on the merits is likely, if they could first show the likelihood of actual and imminent irreparable harm. Plaintiffs argued that they would suffer irreparable damage to their reputation and business interests if further complaints were filed against them.

The District Court found that Plaintiffs' removal of Defendant's videos from their website precluded the Defendant from causing the very injury Plaintiffs sought to have the court prevent. Therefore, due to Plaintiffs' failure to show the possibility of actual and imminent irreparable harm, the court denied the preliminary injunction to bar Defendant from bringing further claims against Plaintiffs under section 512(f) of the Digital Millennium Copyright Act.

C.B.C. Distribution and Marketing v. Major League Baseball Advanced Media

U.S. District Court for the Eastern District of Missouri, August 8, 2006
Summary by Matthew J. Faust

The right of publicity cannot be claimed by a professional athlete in an attempt to prevent unauthorized use of the athlete's playing records by a provider of fantasy sports games. Additionally, even if the right of publicity could be claimed, the First Amendment prevents its application.

Plaintiff is an online provider of fan-

tasy sports games. Fantasy sports is a multimillion dollar industry in which a participant ("owner") "drafts" athletes from various professional sports teams. In a given period of time (usually one week), the owners "compete" against other owners by comparing the statistics of their drafted athletes against those of the other owners. Defendant is a bargaining representative for professional athletes that licenses usage of the players' names and statistics to various fantasy sports providers. After rejecting a licensing agreement with defendant, plaintiff brought a declaratory action seeking injunctive relief barring defendant's interference with plaintiff's fantasy sports business.

A public personality must show that the "[alleged violator] commercially exploited the personality's identity . . . to obtain a commercial advantage" to successfully claim a violation of the personality's right of publicity. A "commercial advantage" is defined by the alleged violator's intent to use the personality's identity in a manner suggesting that the personality is somehow associated with the alleged violator. Furthermore, the alleged violator must use more than the plaintiff's name alone, i.e. the plaintiff's *persona* as a figure of celebrity.

The court determined that the plaintiff's use of player names and playing records was akin to that of a box score in a newspaper. This use did not rely on the players' identities to sell its product, instead reporting the statistics of the players' performances. In addition, the plaintiff's use was not intended to create a commercial advantage over other fantasy sports providers at the expense of the players because the plaintiff did not create the illusion that it was associated with the players in any way.

Even if the defendant's could claim the right of publicity, however, the First Amendment prevents its application. First, the court determined that the plaintiff's website merited First Amendment protection. This analysis required the court to establish that even though the plaintiff's website was a not a "traditional medium of expression," it is still worthy of receiving First Amendment protection. Furthermore, the court again analogized the plaintiff's website to a

newspaper and determined that, even though the website dynamically displayed facts in an entertaining manner, it should not be denied protection. Finally, the court determined that the website was not commercial speech, despite the profit that it generated for the plaintiff.

The court balanced the public's interest in unrestricted expression against defendant's claimed right of publicity. This balancing test distinguished between plaintiff's use of factual information and other cases focusing on the exploitation of the public personality's identity. Factual use of a player's records will merit protection, whereas economic exploitation of identity will not.

The district court granted summary judgment in favor of the plaintiff and ordered the defendant to refrain from interfering with plaintiff's fantasy sports business.

800-JR Cigar, Inc. v. GoTo.com, Inc.

U.S. District Court for the District of New Jersey, July 13, 2006
Summary by Julia V. Dovi

To grant a motion for summary judgment, courts have to find that there is no genuine issue of material facts for trial. In this case, the cigar retailer, JR Cigars, moved for summary judgment on its claims against an internet search engine alleging, *inter alia*, trademark infringement, unfair competition, and dilution. To determine if there are any genuine issues of fact of the search engine's liability for trademark infringement, the court assessed whether the search engine's trademark use (1) was commercial, and (2) created a likelihood of confusion. The court found that the use was commercial but that there were disputed material facts on the issue of whether a likelihood of confusion was created.

The internet search engine GoTo.com, Inc. ("GoTo") accepted bids by advertisers for key words or phrases used as search terms. The higher the advertiser's bid, the higher up on GoTo's list of search results the advertiser was placed. The advertisers

were charged only when a user selected their listings. GoTo sold the rights to “JR Cigar” and variations thereof (“JR marks”) to different advertisers. 800-JR Cigar, Inc. (“JR”) claimed that this unauthorized use of its marks by GoTo constituted trademark infringement. Specifically, JR claims that GoTo gained profits from this unauthorized use, attracted users to GoTo.com, and diverted potential JR customers to direct competitors of JR. In addition, JR claimed that GoTo’s conduct constituted unfair competition and dilution. Both parties moved for summary judgment.

First, the court turned to the question of whether GoTo’s use of the trademark constitutes commercial use. A trademark use has to be commercial in nature to satisfy the elements of trademark infringement cause of action under the Lanham Act. In this case, GoTo’s use of the JR marks was commercial. GoTo was neither a distributor nor a direct competitor of JR. However, GoTo solicited and accepted bids from JR competitors for usage of the JR marks. This offer and sale of JR marks is a communication to the public, which is to be distinguished from pop-up advertising generated by random computer coding that does not constitute trademark use.

Second, the court turned to the question of whether the plaintiff’s motion of summary judgment should be granted as to a likelihood of confusion created by GoTo’s use of JR’s trademark. To determine if a likelihood of confusion exists, this court applied the *Lapp* factors analysis. All ten factors are neither necessary nor sufficient to establish the existence of a likelihood of confusion, but are helpful guidelines. The ten factors assess: (1) how similar the marks were; (2) how strong the plaintiff’s mark was; (3) indicators of consumer attention when purchasing the product; (4) how long the defendant used the mark in the absence of confusion; (5) what the defendant intended when using the mark; (6) possible evidence of actual confusion; (7) if the same advertisement means were used to market the product; (8) did the potential customer pools overlap; (9) whether consumers are likely to deem the products as to origin from the same

source; and (10) any additional evidence to consumers suggesting identity of source.

The court found that three of the ten factors weighed in favor of JR. The third, fourth, and sixth *Lapp* factor involved disputed material issues of fact. Specifically, it was unclear whether a temporary diversion from JR’s website was sufficient to establish initial interest confusion. Initial interest confusion can arise when a defendant diverts a plaintiff’s customers to its website by use of the plaintiff’s mark. The confusion may be temporary and no actual sale has to occur. To establish initial interest confusion, courts look at similarity of products, carefulness of purchasing decision, consumer sophistication, and the defendant’s intent. In this case, there was insufficient evidence to assess customer sophistication as well as GoTo’s intent when using the JR marks. Because of these disputed facts, the court denied JR’s motion for summary judgment on the issue of GoTo’s trademark infringement.

The court granted GoTo’s motion for summary judgment with regard to allegations under the New Jersey Consumer Fraud Act and the Telemarketing and Consumer Fraud and Abuse Prevention Act. Even though, the court found that JR’s mark was famous, there were disputed facts on the existence of a likelihood of confusion. Thus, the court denied GoTo’s cross-motion for summary judgment on the dilution claim.

SMG Group, Inc. v. 417 Lafayette Restaurant LLC

U.S. District Court for the Southern District of New York, July 6, 2006
Summary by Stephanie Mueller

While the actions of non-profit businesses are not outside the Lanham Act’s protections for claims of trademark infringement, the requirement of “commercial use in commerce” in a trademark dilution claim may exempt non-profit businesses from liability.

Plaintiff owns two restaurants in New York City: Trattoria Dell’Arte and Brooklyn

Diner USA. Defendants, a non-profit organization seeking to improve New York City restaurant working conditions, distributed leaflets outside plaintiffs’ restaurants. The leaflets contained plaintiffs’ restaurant logo on the front and text describing the alleged poor working conditions on the inside. The inside text contains the phrase “DO YOU REALLY WANT TO EAT HERE?” Defendants’ name and status as a non-profit organization is written on the back of the leaflet.

Plaintiff brought an action against defendant for trademark infringement in violation of the Lanham Act, 15 U.S.C. §§ 1114, 1125, and trademark dilution in violation of the Lanham Act, 15 U.S.C. § 1125 and N.Y. Gen. Bus. Law § 360-1. To obtain a preliminary injunction, plaintiffs must show (1) a likelihood of irreparable harm and (2) a likelihood of success on the merits (or serious questions regarding the merits and a showing of hardships that favors the injunction). The court analyzed the likelihood of success on the merits and a likelihood of irreparable harm. The plaintiffs must demonstrate four elements to succeed on a claim for likelihood of success on the merits: (1) plaintiffs possess the trademark at issue, (2) defendants used the mark in commerce, (3) defendants used the mark in connection with goods or services, and (4) defendants used the mark in a manner likely to cause confusion.

The court found that all four elements for success on the merits were satisfied. First, defendants conceded that plaintiffs were the trademark holders of the logos used in the leaflets. Second, the court read Congress’s use of the phrase “in commerce” in the Lanham act broadly, stating that, because plaintiffs’ businesses engage in interstate commerce, defendants’ use of the mark was likely to adversely affect commerce. Third, the court found defendants use of the mark to be in connection with services because defendant provided a public service by educating the public on restaurant working conditions. The court stressed that a lack of profit does not place an action outside the scope of the Lanham Act’s definition of “services.”

In analyzing the fourth element for success on the merits, the court examined the doctrine of initial interest confusion. Initial interest confusion occurs when a junior user's mark is so similar to the senior user's mark to attract potential consumers, even though those consumers are not confused by the mark at the time of purchase. Previous cases applying initial interest confusion involved one party using another's mark for financial gain. The court declined to limit the doctrine to only situations of financial gain, stating that the Lanham Act prohibits the use of anything likely to cause confusion to the public at large, regardless of profit.

Because the court found that all four elements for success on the merits were satisfied, the plaintiffs were entitled to a preliminary injunction if they were able to show a likelihood of irreparable harm. The plaintiffs argued that the likelihood of confusion resulting from defendants' use of their mark established irreparable harm. The court disagreed.

While other Courts of Appeals have found that confusion may ordinarily establish a likelihood of irreparable harm, the court stated that confusion does not make a finding of irreparable harm automatic. Because the actual harm that resulted from the defendants' use was a result of the substantive message of the leaflet and not the use of plaintiffs' mark, the court declined to find irreparable harm. Therefore, the court denied plaintiffs' motion for a preliminary injunction based on their infringement claim.

With respect to the plaintiffs' dilution claims, the court found that the claims were unlikely to succeed. Under 15 U.S.C. § 1125(c), the plaintiffs must show that (1) their marks are famous, (2) defendants' use of the mark is "commercial use in commerce," (3) plaintiffs' marks were famous before defendant began using them, and (4) defendants' use of marks "dilutes the quality" of the marks. The New York law is broader than the Lanham Act and requires the plaintiffs show that (1) they possess distinctive trademarks and (2) defendants' use of the trademarks resulted in a likelihood of dilution.

The court stated that the plaintiffs had not brought enough evidence to show that their mark was famous. Furthermore, the court found that the defendants' use of the mark was not "commercial use in commerce" because the nature of the use was not for profit. Finally, the plaintiff had not made the clear showing of actual dilution necessary to sustain a claim for dilution.

Finding that the plaintiff had not shown irreparable harm or actual dilution, the court denied the plaintiff's motion for a preliminary injunction.

Newborn v. Yahoo! Inc.

U.S. District Court for the District of Columbia, May 23, 2006
Summary by Jason Ko

In awarding attorney's fees, expenses, and costs resulting from litigation regarding the Copyright Act, the Lanham Act, and 28 U.S.C. § 1927, courts will evaluate each basis for awards individually and may choose to award the prevailing party.

The plaintiff, Terry Newborn, brought an action against defendants, Yahoo! Inc. and Google Inc., for copyright and trademark infringement. The U.S. District Court for the District of Columbia granted the defendants' motion to dismiss plaintiff's complaint for failure to state a claim and dismissed the case with prejudice. Defendant's additionally motioned for attorney's fees, expenses, and costs pursuant to the Copyright Act, the Lanham Act, and 28 U.S.C. § 1927.

Plaintiff initially filed a complaint in the summer of 2004, and the defendants moved to dismiss the complaint because plaintiff had alleged violations of the Digital Millennium Copyright Act (DMCA) without clarifying which provisions were violated. Plaintiff then responded to the motions and filed an amended complaint, which asserted all of the claims in the original complaint and additional claims pursuant to the Lanham Act.

The court granted the defendants' motion to dismiss the amended complaint because it could not determine which statute provision had been infringed from the complaint,

which was full of vague and contradictory statements.

Under the Copyright Act, a court may award a reasonable attorney's fee to the prevailing party as part of the costs. The court awarded reasonable attorney's fees and costs to defendants under 17 U.S.C. § 505 because plaintiff's Copyright Act claim was frivolous and objectively unreasonable.

The defendants also argued their entitlement to attorney's fees according to the Lanham Act, 15 U.S.C. § 1117(a), which provides that a court may award reasonable attorney fees in "exceptional" cases. The court concluded that the case was not exceptional under the statute and chose not to award attorney's fees under the Lanham Act, because it found no evidence that the complaints were "designed to harass" the defendants, nor did plaintiff act "wilfully or in bad faith."

The defendants also argued that the court should order plaintiff's counsel to provide the attorney's fees and costs incurred regarding the motion to dismiss the amended complaint under 28 U.S.C. § 1927. The statute provides any counsel who "unreasonably and vexatiously" multiplies court proceeds may be required to pay the costs incurred as a result. Looking to prior court decisions and comparing this case's circumstances to previous cases' extreme circumstances, the court found that "it is clear that the defendants' Section 1927 request should be denied."

Therefore, the court awarded the defendants reasonable attorneys fees and costs pursuant to the Copyright Act, while it awarded nothing under the Lanham Act or 28 U.S.C. § 1927. The defendants were allowed to provide an accounting denoting hours and costs incurred in litigating the Copyright Act claim for the second motion to dismiss.



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