

LAIPLA BULLETIN

Los Angeles Intellectual Property Law Association

December 2011
Issue 80
www.laipla.net

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President's Message

by Brian G. Arnold

Greetings and Happy Holidays to all LAIPLA Members! I encourage everyone to attend our final event of the calendar year 2011 – a joint program with the Los Angeles County Bar Association regarding the Central District's new Patent Pilot Program. Event details are below. The distinguished panel, moderated by Roderick Dorman of McKool Smith Hennigan, will feature Honorable Judges Audrey B. Collins, Andrew J. Guilford, Samuel James Otero, Otis D. Wright II, and George H. Wu. The panel will discuss what the new Patent Pilot program means for litigators, and how the judges will handle patent cases under the program. A reception with the Federal Judiciary follows the panel. As yet another benefit to your LAIPLA membership, all LAIPLA members can attend for a reduced rate. I look forward to seeing you on December 6th!

Your LAIPLA Board continues to plan events for the remainder of the 2011-12 fiscal year, including our monthly meetings, Washington in the West, Judges' Night, and Spring Seminar. Mark your calendars for June 8-10, 2012 for the Spring Seminar at the beautiful Lodge at Torrey Pines. We have already secured a number of outstanding committee volunteers and speakers, but there is still time – if you are interested in speaking at the Spring Seminar and/or joining our committee, please contact me at barnold@loeb.com or 310-282-2160.

Event Notice: December 6, 2011 Joint Event with LACBA

**Patent Pilot Program
December 6, 2011
Ronald F. Deaton Civic Auditorium
Los Angeles Police Administration Building
100 West First Street, Los Angeles
(Corner of First and Main)**

LAIPLA is pleased to announce a joint meeting with the Los Angeles County Bar Association on December 6, 2011 at the Ronald F. Deaton Civic Auditorium in Los Angeles. We will learn about the new Patent Litigation Pilot Program in the Central District of California. Don't miss out on this important information every patent litigator needs to know. For more information, please visit www.tinyurl.com/PatentPilotProgram. Register today and join LAIPLA & LACBA for this great event. We look forward to seeing you on the 6th.

Article: There's No Place Like Court: Film Character Copyrights

The view and opinions expressed in this article are those solely of the author(s) and are not of the Los Angeles Intellectual Property Law Association or its members.

By: Anthony V. Lupo, Sarah L. Bruno,
Eva J. Pulliam, & Anthony D. Peluso
Arent Fox LLP

Law360, New York (November 17, 2011, 12:53 PM ET) — The U.S. Court of Appeals for the Eighth Circuit recently ruled in favor of Warner Bros. Entertainment Inc. in its copyright infringement suit against several movie image licensors that had been selling altered public domain images of famous characters from “The Wizard of Oz,” “Gone with the Wind” and a number of “Tom and Jerry” short films. In affirming the district court’s grant of a permanent injunction, the appellate court found that copyright law prohibits the defendants from extracting images from publicity materials for the classic films and licensing alterations for use on consumer items like T-shirts, playing cards and figurines. The court’s ruling that filmmakers are entitled to copyright protection of their characters — even after the characters images entered the public domain — is a major victory for studios that have carefully balanced the preservation of rights in their characters with the promotion of the films themselves.

Before the plaintiff’s films were completed and copyrighted, producers circulated publicity materials to garner attention for the films. In doing so, however, they failed to include the required copyright notice, which ultimately led the Eighth Circuit to conclude that the publicity materials had fallen into the public domain, preventing the plaintiff from restricting their use. The court nevertheless explained that the defendants’ freedom to make derivative works — that is, expressive creations that incorporate major, copyright-protectable elements of an original work — based on the public domain materials was limited to the extent that the derivatives conflicted with the studios’ valid copyrights in the films. In other words, copyright liability could still arise where some aspect of the defendants’ derivative work overlapped with the copyright-protected material.

The Eighth Circuit analyzed the scope of the studios’ copyrights in the classic films, the scope of the material dedicated to the public domain, and whether the defendants’ derivative uses of the public domain images exceeded the latter, thus giving rise to infringement liability. First, the court concluded that Warner Bros. was entitled to copyright protection over the films’ characters, reasoning that if material related to a certain character lies in the public domain, a party can nevertheless obtain rights in that character to the extent that a later copyrighted work makes the character sufficiently distinctive. Next, the court found that the public domain materials only covered each character’s purely visual characteristics, revealing nothing about their signature traits or mannerisms as depicted in the films. Finally, it analyzed the defendants’ liability as to three distinct categories of products: (1) those that reproduce a single two-dimensional image from a single public domain item, (2) those that create a new composite work by juxtaposing an extracted public domain image with another extracted image from the materials or a printed phrase from the book underlying the film and (3) those that extend an extracted image into three dimensions. It ruled that the first category led to no infringement because the mere reproduction of an image onto another medium fails to add even an increment of expression to a film character, but that the second and third categories constitute new increments of expression that evoke the film characters in a way the isolated public domain images could not. The Eighth Circuit, therefore, largely affirmed the district court’s grant of the permanent injunction, reversing and vacating only as it related to the first category of the defendants’ products.

A pair of analogous cases arose in California, where a federal district court held that film studios were entitled to copyright protection over their distinctive characters. In the first case, *Siegel v. Warner Bros. Entertainment Inc.*, the US District Court for the Central District of California ruled that the plaintiffs, the wife and daughter of “Superman” creator Jerome Siegel, possessed rights in an advertisement’s fairly limited pictorial illustration of the iconic comic book hero — that is, a black-and-white image of a person with extraordinary strength wearing a leotard and cape and holding a car over his head — but that the image was readily distinguishable from the defendants’ copyright in the comic book and film series, which encompassed well-known, distinctive elements such as Superman’s name, alter ego, origins, famous “S” crest, and distinctive blue leotard, red cape and boots.

Similarly, in *Metro-Goldwyn-Mayer Inc. v. American Honda Motor Co.*, the same court held that MGM Studios’ copyrights in the James Bond film series established a copyright in the “James Bond” character, allowing the studio to enjoin Honda Motor Co. from airing an advertisement that featured a male protagonist who possessed James Bond’s unique character traits as developed in the films, namely, “his cold-bloodedness; his overt sexuality; his love of martinis ‘shaken, not stirred’; his marksmanship; his ‘license to kill.’” These cases illustrate a trend of courts strengthening filmmakers’ rights in copyrightable character elements while limiting the reach of the public domain.

Article: Extending ITC's Reach to Trade Secrets Theft Abroad By: Andrew R. Kopsidas

The view and opinions expressed in this article are those solely of the author(s) and are not of the Los Angeles Intellectual Property Law Association or its members.

Law360, New York (November 17, 2011, 12:47 PM ET) — On Oct. 11, 2011, a divided panel of the Court of Appeals for the Federal Circuit interpreted Section 337, the U.S. International Trade Commission's governing statute, as giving the ITC authority to investigate and grant relief against products that are manufactured abroad using misappropriated trade secrets. What makes the case, *TianRui Group Co. v. International Trade Commission*, unique and one of first impression is that, while it has long been accepted that the ITC's authority to investigate "[u]nfair methods of competition and unfair acts" includes trade secret misappropriation, all of the acts relating to misappropriation in this case occurred outside the United States. The ITC is authorized to exclude articles from entry into the United States when it finds the articles were produced through "unfair methods of competition" or "unfair acts." The majority of Section 337 cases involve allegations of patent infringement, but the ITC has interpreted Section 337 to apply to cases involving trade secret misappropriation as well.

The complainant, Amsted Industries Inc., a domestic manufacturer of cast steel railway wheels, owned a trade secret process for manufacturing such wheels known as the "ABC process." Amsted had ceased using the ABC process in favor of a different one and chose to license the ABC process to a number of licensees.

The respondents, Chinese companies TianRui Group Co. Ltd. and TianRui Group Foundry Co. Ltd. (collectively, "TianRui"), attempted to license the ABC process from Amsted in 2005, but the parties could not reach an agreement. After the failed negotiations, TianRui hired nine employees away from one of Amsted's Chinese licensees, Datong ABC Castings Co. Ltd., and began producing wheels using the ABC process.

Amsted initiated an ITC investigation, accusing TianRui of misappropriating the ABC process. The administrative law judge found "overwhelming direct and circumstantial evidence that TianRui obtained its manufacturing process for cast steel railway wheel[s] through the misappropriation of [Amsted's] ABC Trade Secrets." TianRui argued that all of the conduct alleged to have constituted trade secret misappropriation — namely, that TianRui hired Datong employees knowledgeable about the ABC process and who were under duties of confidentiality, and that those employees relayed their knowledge about the ABC process and documents describing the process to TianRui — occurred in China. Thus, according to TianRui, Section 337 could not apply where all of the conduct occurred outside the United States.

What Trade Secret Law Applies?

Because trade secrets are typically governed by state law, the Federal Circuit first analyzed what law should be applied in the context of a Section 337 investigation. The court rejected Amsted's argument that Illinois trade secret law governed, holding instead that "a single federal standard" should determine what constitutes trade secret misappropriation under Section 337. The court suggested that the Uniform Trade Secrets Act (UTSA) would be most appropriate, even while finding little variation in trade secret law between the states and widely recognized authorities such as the Restatement of Unfair Competition and the UTSA.

Trade secret owners should note that, although the UTSA has been adopted by most states, some have adopted it in modified form. Moreover, Massachusetts, New Jersey, New York and Texas have not adopted the UTSA. Thus, it is at least theoretically possible that a company could find trade secret protection via the ITC even where the company's state law does not provide the same.

Capturing Unfair Acts Abroad

The court then turned to the main issue of "whether section 337 applies to imported goods produced through the exploitation of trade secrets in which the act of misappropriation occurs abroad." The court began by noting the "longstanding principle of American law" that statutes should be construed as applying only within the territorial jurisdiction of the United States absent a clear congressional indication to the contrary, but then held that the presumption against extraterritoriality does not apply here for several reasons.

First, the court concluded that Section 337, by its nature, is not limited to domestic activities. It is a trade statute, the focus of which — the regulation of imports — is "inherently international."

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Next, the court noted that the ITC's exclusion order affects foreign conduct only to the extent it results in the importation of goods into the United States causing domestic injury. For example, the ITC could not hinder TianRui from selling its wheels in China or any other country, regardless of the misappropriation. As such, the ITC was not attempting to regulate purely foreign conduct; rather, it was setting "conditions under which products may be imported into the United States."

In dissent, Judge Kimberly A. Moore argued that the panel's interpretation of Section 337 would improperly give the ITC authority "to police Chinese business practices" — a holding that could implicate practices well beyond trade secret misappropriation. However, the panel responded by noting that, under Judge Moore's construction of Section 337, the ITC would be essentially powerless as long as the misappropriating party was savvy enough to commit its acts outside of the United States.

Finally, the court reviewed the legislative history of Section 337 and found that it supports interpreting the statute to cover overseas conduct. In particular, the court concluded that, in enacting Section 337, "Congress contemplated that, in exercising its new authority over unfair competition, the Commission would consider conduct abroad in determining whether imports that were the products of, or otherwise related to, that conduct were unfairly competing in the domestic market." Thus, the panel concluded that the ITC "has authority to investigate and grant relief based in part on extraterritorial conduct insofar as it is necessary to protect domestic industries from injury arising out of unfair competition in the domestic marketplace."

A Different Domestic Industry Standard

The court also decided an ancillary issue that further aids companies looking to enforce trade secret rights via the ITC. Amsted did not even practice its ABC process. Those familiar with ITC practice will recall that in typical cases, such as those involving patent infringement, the complainant must show the existence of a domestic industry relating to the articles protected by the patent concerned. TianRui argued that there could be no Section 337 violation because Amsted did not practice the ABC process domestically.

The Federal Circuit held that, because trade secret misappropriation falls under the general "unfair acts" heading of Section 337(a)(1)(A), as opposed to Section 337(a)(1)(B), which protects statutory intellectual property, there is no need to show a nexus between the domestic industry and the specific trade secrets at issue. Instead, it was sufficient for Amsted to show the existence of a domestic industry for the products generally, and that TianRui's unfair practices threatened to "destroy or substantially injure" that industry.

Conclusion

The Federal Circuit has now clarified that the application of Section 337 is not based on where the misappropriation occurs, but rather on the nexus between the imported articles and the unfair methods of competition. In other words, a company cannot hide its misappropriation from the ITC as long as it is selling related products in the United States.

Moreover, a company that petitions the ITC need not even show that it is using the process that is the subject of the misappropriated trade secret. This decision has wide-ranging application for any company that believes its trade secrets have been misappropriated — anywhere in the world — by companies offering competing products for sale in the United States.

Article: Is Inequitable Conduct Still A Viable Defense?

The view and opinions expressed in this article are those solely of the author(s) and are not of the Los Angeles Intellectual Property Law Association or its members. By: Angie M. Hankins & Iuliana Tanase
Stroock & Stroock & Lavan LLP and
Reiko Manabe, Fujifilm Corp.

Law360, New York (November 22, 2011, 12:33 PM ET) — In 2011, the standard and procedures for disclosing prior art to the U.S. Patent and Trademark Office underwent a major transformation due to changes in both legal precedent and legislation. First, on May 25, 2011, the Court of Appeals for the Federal Circuit revised the standard for inequitable conduct in its en banc decision *Therasense, Inc. v. Becton, Dickinson and Co.*[1] Then, on Sept. 16, 2011, President Barack Obama signed the Leahy-Smith America Invents Act ("AIA"), including a "supplemental examination" provision that allows disclosure of material to the United States Patent and Trademark Office after a patent issues — potentially curing conduct that may previously have been inequitable conduct. As a result, it is more difficult to invalidate a patent for inequitable conduct, while patentees have an additional opportunity to cure defects in their disclosure to the PTO.

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The doctrine of inequitable conduct “evolved from a trio of [U.S.] Supreme Court cases that applied the doctrine of unclean hands to dismiss patent cases involving egregious misconduct.”[2] These cases involved the common thread of manufacture and suppression of evidence.

“Each individual associated with the filing and prosecution of a patent application has a duty of candor and good faith in dealing with the [PTO], which includes a duty to disclose to the [PTO] all information known to that individual to be material to patentability.”[3] Inequitable conduct occurs when an applicant or their attorneys breach these duties by failing to provide the PTO material information relevant to the prosecution of a patent with intent to deceive the PTO.[4] A finding of inequitable conduct renders the entire patent unenforceable, even if the conduct is only related to a portion of the invention or the claims.[5]

The standard for inequitable conduct is high, requiring proof by clear and convincing evidence.[6] However, the evidentiary requirements for the intent and materiality elements had become diluted over time. The Federal Circuit explained that “as the inequitable conduct doctrine evolved from these unclean hands cases, it came to embrace a broader scope of misconduct, including not only egregious affirmative acts of misconduct intended to deceive ... but also the mere nondisclosure of information to the PTO.[7] For example, the Federal Circuit conflated the materiality and intent elements by placing them on a “sliding scale,” such that a higher finding of materiality allowed for a lower level of intent, and vice versa.[8] The Federal Circuit had found inequitable conduct using low standards for intent, e.g., gross negligence,[9] and for materiality, e.g., substantial likelihood that an examiner would consider the reference important.[10]

In *Therasense*, the Federal Circuit recognized that inequitable conduct is a powerful and negative doctrine: powerful because it can render an entire patent unenforceable, even if the inequitable conduct only relates to one of many claims, and cannot be cured by reissue; and negative because a charge of inequitable conduct can result in many adverse consequences for both the patentee and the prosecuting attorney.[11] A finding of inequitable conduct also can have long-reaching consequences, such as rendering unenforceable other patents in the family and spawning antitrust and unfair competition claims.[12] As a result, “Applicants disclose too much prior art for the PTO to meaningfully consider, and do not explain its significance, all out of fear that to do otherwise risks a claim of inequitable conduct. This tidal wave of disclosure makes identifying the most relevant prior art more difficult.”[13]

Inequitable conduct is asserted as a defense so often that it has become an “absolute plague” on the courts.[14] “Because allegations of inequitable conduct are routinely brought on the slenderest of grounds, patent prosecutors constantly confront the specter of inequitable conduct charges.”[15]

The New Standard

In *Therasense*, the district court found inequitable conduct because the patentee had not disclosed statements made during the prosecution of a related European patent application.[16] The district court found these statements were relevant because they related to a portion of the European patent applications corresponding to the specification language relied on to overcome a prior art rejection in the U.S. application.[17] “Recognizing the problems created by the expansion and overuse of the inequitable conduct doctrine,” the Federal Circuit granted en banc review and reversed, remanding to the district court to reconsider in view of the new inequitable conduct standard.[18]

The Federal Circuit revised the standard for both the deceptive intent and the materiality of information elements of inequitable conduct. With regard to deceptive intent, the Federal Circuit reversed its prior precedent and held that a “misrepresentation or omission amount[ing] to gross negligence or negligence under a ‘should have known’ standard does not satisfy this intent requirement.”[19] Rather, a finding of intent to deceive requires a showing that the applicant “made a deliberate decision to withhold a known material reference.”[20] Furthermore, the Federal Circuit held that “[i]ntent and materiality are separate requirements” and that a “court may not infer intent solely from materiality.”[21] While intent may still be proved by circumstantial evidence, “the specific intent to deceive must be the single most reasonable inference able to be drawn from the evidence.”[22] The evidence must be sufficient to require a finding of intent, and intent should not be found when there are multiple reasonable inferences. Finally, the Federal Circuit held that “[t]he absence of a good faith explanation for withholding a material reference does not, by itself, prove intent to deceive.”[23]

With regard to materiality, the Federal Circuit reversed its prior precedent that inequitable conduct may be found on intent alone and also held that “the materiality required to establish inequitable conduct is but-for materiality.”[24] In other words, information is “but-for material” if the PTO would not have allowed the claim if it had been aware of the information.[25] In determining whether information is material, the preponderance of the evidence standard is applied and claims are given their “broadest reasonable construction.”[26]

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The Federal Circuit carved out an exception to the but-for standard, allowing an inference of materiality when there is "affirmative egregious misconduct." [27] For example, egregious conduct such as the intentional filing of a false affidavit would support a finding of materiality, even if the patent would have issued over the reference. "After all, a patentee is unlikely to go to great lengths to deceive the PTO with a falsehood unless it believes that the falsehood will affect issuance of the patent." [28] These changes to both the materiality and intent standards will likely make it harder for courts to find inequitable conduct, thus enabling applicants to be more discerning when disclosing prior art to the PTO.

The Supplemental Examination Provision in the AIA

Since the Federal Circuit's decision in *Therasense*, further changes to the disclosure requirements have come via the AIA's supplemental examination provision, effective Sept. 16, 2012. [29] This provision allows a patent owner to disclose prior art to the PTO even after the patent issues. A patent owner may request supplemental examination to "consider, reconsider, or correct information believed to be relevant to the patent, in accordance with such requirements as the Director may establish." [30] The PTO then conducts a supplemental examination and issues a certificate indicating whether the information presented in the request raises a substantial new question of patentability. If the PTO finds a substantial new question is present, it orders a reexamination of the patent based on the submitted information. This procedure allows a patentee to disclose prior art that an applicant may have been aware of, but omitted, during prosecution. Moreover, with limited exceptions, such as fraud, [31] the patent cannot be held unenforceable in litigation based on the subsequently disclosed prior art. Thus, after Sept. 12, 2012, a patent owner may, post-issuance, cure potential inequitable conduct resulting from the failure to disclose information. The "information" that forms the basis of the request for supplemental examination is not limited to patents and printed publications, and may include other issues, e.g., issues under 35 U.S.C. § 112.

Although this provision appears to permit a patent owner to disclose information indefinitely via supplemental examination, there are limitations. First, supplemental examination of the patent must be requested before an accused infringer asserts inequitable conduct based on the information a patentee seeks to disclose during the supplemental examination — once inequitable conduct has been alleged in a patent litigation, the patent holder cannot invoke the protections offered by the supplemental examination provision for the references and information that form the basis of the inequitable conduct allegation.

Second, the supplemental examination will not protect a patent holder from fraud, and the PTO director will be able to continue to investigate issues of possible misconduct and impose sanctions, as well as refer the matter to the attorney general. Thus, supplemental examination appears to be directed toward close calls or error, rather than permitting the curing of intentional and egregious misconduct before the PTO.

Additionally, the invocation of supplemental examination risks the possible revocation of an otherwise granted patent. If the PTO finds a substantial new question of patentability is present, reexamination will be ordered. During this reexamination, the patent holder would face the potential requirement of narrowing their claims and/or having their patent invalidated. Thus, while supplemental examination offers a potential cure, it also has potential disadvantages.

Conclusion — Practical Tips for Companies

Although inequitable conduct remains a viable defense, after *Therasense* it will likely be more difficult to win on inequitable conduct. Accordingly, the number of challenges seeking to invalidate patents based on inequitable conduct will likely decrease. Moreover, the amount of prior art that must be disclosed to the PTO will likely decrease. But, *Therasense* does not change the amount of prior art that practitioners will need to evaluate to determine which, if any, prior art to disclose to the PTO.

Once patent applicants or their attorneys are aware of a reference, they will need to evaluate the reference under the new standard to determine whether it should be disclosed. Furthermore, under the supplemental examination provision, which appears to be a means for curing inequitable conduct, the patentee has the option of disclosing prior art after a patent issues. However, practitioners should be wary of over reliance on supplemental examination because such examination could risk invalidation of a patent or may not be available if the prior art is asserted in a litigation of the patent as a basis for unenforceability. Thus, supplemental examination should only be used as a safety net.

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Department

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Bulletin published by the
Los Angeles Intellectual
Property Law Association

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