IP Issues Impacting Business Transactions

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Jason Kipnis, Partner, WilmerHale
Ashwin Gokhale, Partner, WilmerHale

Attorney Advertising

Speakers

Jason Kipnis
Partner

Ashwin Gokhale
Partner

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PATENT

Developments in 2017

- *Helsinn Healthcare v. Teva Pharmaceuticals* (on-sale bar)
- *Impression Products v. Lexmark* (exhaustion)
- *Life Technologies v. Promega* (exports)
- *Intellectual Ventures v. Motorola Mobility* (indirect infringement)
- *TC Heartland v. Kraft Foods* (venue)
- *Raytheon v. Cray* (venue)

Helsinn Healthcare v. Teva Pharmaceuticals

Factual Background

- Helsinn owned four patents directed to formulations containing 0.25 mg of the drug palonosetron. All four patents had a critical date of January 30, 2002. One was subject to AIA (the others predated).
- On April 6, 2001, Helsinn entered into a license and supply agreement with a third party to supply palonosetron. The agreement was public.
- Helsinn subsequently sued Teva for infringement of its patents.
- Teva argued that the patents were invalid under the 102(b) on-sale bar.

Helsinn Healthcare v. Teva Pharmaceuticals

Legal Background

- Under pre-AIA law, sales by patentee could trigger the on-sale bar, even if details of invention not public.
- The AIA added language barring patents for inventions that were on sale "or otherwise available to the public" before the effective filing date.
- The question raised by Teva was whether the on-sale bar under the AIA was triggered by sales in which certain details of the transaction, as well as the patented invention itself, were confidential.
  - In other words, did the new language change the rule that the on-sale bar was triggered by sales where details of invention were not public.

Helsinn Healthcare v. Teva Pharmaceuticals

Federal Circuit Holding

- The AIA did not change the statutory meaning of “on sale.”
- Under the AIA, “if the existence of the sale is public, the details of the invention need not be publicly disclosed in the term of sale” for the on-sale bar to be triggered.
- Essentially – no change with respect to an on-sale bar arising from the public sale of a product secretly embodying a patented invention.

Helsinn Healthcare v. Teva Pharmaceuticals

Federal Circuit Holding – Order on Petition for *En Banc* Hearing

- Denied petition for rehearing.
- Explained that Helsinn did not hold that all public sales will trigger on-sale bar, nor that all secret sales never will trigger on-sale bar.
- Secrecy of the sale is one factor to be considered. Other factors include:
  - whether the agreement itself was made public;
  - passage of title; and
  - whether the invention was marketed before the critical date.

Helsinn Healthcare v. Teva Pharmaceuticals

Business Pointers

- All but a few details of the transaction in Helsinn were disclosed in the 8-K. Unclear whether outcome would have been the same if the sale had been confidential. To increase likelihood of protection: (i) ensure all pre-filing sales are confidential; (ii) avoid marketing before critical date; and (iii) avoid passage of title.
- To preserve ability to obtain US patent protection, ensure that a US patent application is filed within one year after either the first public disclosure, or any sale.
  - For foreign protection, file a patent application before the public disclosure or sale – no one-year safe harbor.
- This decision has no impact on *Medicines Company v. Hospira* (2016), which found no on-sale bar where a supply agreement was structured as a service agreement.

Impression Products v. Lexmark

Factual Background

- Lexmark manufactures and sells toner cartridges for its printers, both domestically and abroad.
- Some of the cartridges are sold at a discount, under an express single-use/no-resale contract restriction.
- Third parties acquire the cartridges (both the foreign and single-use domestic) and refurbish them to circumvent single-use technology.
- Impression purchased the refurbished cartridges, imported them, and sold them in the United States.

Impression Products v. Lexmark

Case Overview

- Lexmark sued Impression for infringement of Lexmark patents, alleging:
  1. Infringement by the sale of refurbished single-use cartridges first sold in the United States
  2. Infringement by the importation and sale of any cartridges first sold outside the United States
- Impression agreed that Lexmark patents were valid and enforceable and covered the cartridges.
- Impression contested liability based only on alleged exhaustion of the patents.
  - Impression did not raise an implied license defense.

Impression Products v. Lexmark

Procedural History

- The district court granted Impression's motion to dismiss infringement claims involving single-use cartridges first sold in the United States, and held that exhaustion did not apply to any cartridges first sold outside the United States.
- The Federal Circuit found no exhaustion arose from either the domestic single-use sales or the foreign sales.
- Supreme Court granted *certiorari*, and issued its opinion on May 30, 2017.

Impression Products v. Lexmark

Supreme Court Decision

- **Question 1:** Exhaustion from a conditional sale?
- **Held:** Reversed the Federal Circuit
- A patentee's decision to sell a product exhausts all of its patent rights in that item, regardless of any restrictions the patentee purports to impose.
  - A patentee may be able to enforce a restriction on post-sale activity via contract law, but may not do so through a patent infringement lawsuit.
  - Federal Circuit erred by assuming that a sale "presumptively grants[s] authority" for the purchase to use and resell it. In fact, exhaustion is a limit on the scope of the patentee's rights, not a presumptive grant of rights to the purchaser.

Impression Products v. Lexmark

Supreme Court Decision

- **Question 2:** Exhaustion from a foreign sale?
- **Held:** Reversed the Federal Circuit
- An authorized sale outside the United States, just as one in the United States, exhausts all rights under the Patent Act.
- Foreign sales exhaust patent rights for the same reasons they exhaust copyright rights.

Impression Products v. Lexmark

Drafting Pointers

- Assume any sale of a product will trigger patent exhaustion, and price the product accordingly.
- Contract remedies for non-authorized activity are still available, but may not be practical.
- Unclear whether a license, as opposed to a sale, will trigger exhaustion.
- A carefully drafted field of use restriction may avoid exhaustion, but may not be available in all situations.
- Also need to be careful to avoid antitrust issues, when drafting post-sale restrictions outside the scope of the patent.

Life Technologies v. Promega

Factual Background

- Promega and Life Technologies Corp. sell kits for identifying genetic markers in DNA.
- Promega accused LT of shipping Taq polymerase to LT's plant in London, combining it with at least four other components, and then marketing the finished kits worldwide.
- Promega won $52M at trial, based on LT's global sales.
- Trial judge set verdict aside.
- Federal Circuit restored award.
- Supreme Court reversed the Federal Circuit.

Life Technologies v. Promega

35 USC § 271(f)

- At issue was the interpretation of 35 USC 271(f)

(1) Whoever without authority supplies or causes to be supplied in or from the United States all or a substantial portion of the components of a patented invention, where such components are uncombined in whole or in part, in such manner as to actively induce the combination of such components outside of the United States in a manner that would infringe the patent if such combination occurred within the United States, shall be liable as an infringer.

(2) Whoever without authority supplies or causes to be supplied in or from the United States any component of a patented invention that is especially made or especially adapted for use in the invention and not a staple article or commodity of commerce suitable for substantial noninfringing use, where such component is uncombined in whole or in part, knowing that such component is so made or adapted and intending that such component will be combined outside of the United States in a manner that would infringe the patent if such combination occurred within the United States, shall be liable as an infringer.

Life Technologies v. Promega

Supreme Court Decision

Held:

- The phrase “substantial portion” refers either to qualitative importance or quantitatively large size. Statutory context points to a quantitative meaning.
- Under a quantitative approach, a single component cannot constitute a “substantial portion.”
- Reading 271(f)(1)’s reference to “substantial portion” to cover a single component would undermine the language in 271(f)(2) that refers to a single component “especially made or especially adapted for use in the invention.”

Life Technologies v. Promega

Business Pointers

- Can avoid infringement by exporting from the US just a single component of a claimed invention, as long as that component is not “especially made or especially adapted” for use in the invention.
- If you must supply more than one component, try to source all but one of the components from locations outside the US.
- Obtain a range of patent claims. Some should recite many small components, and others should include few large components.
    - Large components are more likely to be “especially adapted” to the invention.
    - Small components are more likely to be staples, but if a patent claim includes many of them, it is more difficult for a supplier to only supply one.

Intellectual Ventures v. Motorola Mobility

Factual Background

- IV sued Motorola for infringement of two patents.
- The ‘144 patent relates to a file transfer system between computer devices.
- A jury found the ‘144 patent valid and infringed.
  - Direct infringement by customers
  - Indirect infringement by Motorola, which is predicated upon a finding of direct infringement by the customers
- Motorola moved for judgment as a matter of law and the district court denied.
- Motorola appealed to the Federal Circuit.

Intellectual Ventures v. Motorola Mobility

Claim 41

- At issue was infringement of last element of claim 41.

41. A communications device, comprising:
a processor; and
a memory that stores at least one program usable to control the communications device, wherein the communications device is configured to:

- display a collection of file identifiers, wherein each file identifier represents a selectable file;
- receive a user selection of at least one file identifier representing a file selected to be transferred to a second device;
- display a collection of destinations identifiers, wherein each destination identifier represents a remote device having a numbered destination address on a circuit switched or packet switched network;
- receive a user selection of at least one destination identifier as selection of the second device;
- display a data entry field in which a text message can be entered; receiving the text message; encapsulate the text message with the selected file into a single combined file;
- generate a unique transaction identifier that identifies a transfer of the single combined file; and
- send the single combined file to the second device at its numbered destination address,

the second device being configured to:

- receive the single combined file irrespective of user action at the second device;
- generate a delivery confirmation message confirming reception of the single combined file;
- transmit to an authenticating device of the communications network, the delivery confirmation message;
- provide an alert indicating reception of the single combined file;
- display an identification of the communications device in relation to at least one of the selected file or the associated text file, wherein the identification includes at least one of a communications address of the communications device, a name of the communications device, or a username associated with the communications device; and
- display at least a portion of content of the selected file or the text message,

wherein the authenticating device is configured to:

- **generate a delivery report that indicates a delivery event and a time of the delivery event**.

Intellectual Ventures v. Motorola Mobility

Legal Background

- The parties agreed that claim 41 was a system claim.
- Under the test set forth in *Centillion Data Systems, LLC v. Qwest Communications International, Inc.*, 631 F.3d 1279 (Fed. Cir. 2011), to "use" a system for purposes of infringement, "a party must put the invention into service, i.e., control the system as a whole and obtain benefit from it."
- Motorola argued that its customers did not receive a benefit from the claimed delivery reports, and therefore were not direct infringers.
- Intellectual Ventures argued that the customers received a benefit from the system as a whole.

Intellectual Ventures v. Motorola Mobility

Federal Circuit Opinion

- **Legal question raised:** Does the *Centillion* test require that the infringer obtain a direct benefit from the entire system as a whole, or from each separate claimed component?
- **Held:** Centillion requires that a direct infringer must obtain benefit from each separately claimed component.
- Recent case, *Grecia v. McDonalds Corporation* (Fed. Cir., March 6, 2018) followed the holding in *IV v. Motorola*, upholding the dismissal of a complaint because plaintiff could not establish that McDonalds obtained a benefit from every element of the claimed system.

Intellectual Ventures v. Motorola Mobility

Business Pointers

- If concerned about infringement of a third party patent claim to an entire system, structure the business relationship to ensure that no single entity obtains a benefit from each of the components of the claim.
- <u>Purchasers of Services</u>: In a service transaction that may create liability under a system claim, review the indemnity clause in the service provider contract to understand whether the service provider would be obligated to indemnify for infringement by systems in which it does not control all components.
- <u>Providers of Services</u>: If potential for liability based on provision of services, consider seeking indemnification from customers or, alternatively, factoring the risk of infringement into the pricing.

TC Heartland v. Kraft Foods

Background

- The patent venue statute, 28 USC § 1400(b), provides that "[a]ny civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business."
- Section 1391 now provides that, "[e]xcept as otherwise provided by law" and "[f]or all venue purposes," a corporation "shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question."
- Historically, the Federal Circuit had interpreted 28 USC § 1400(b) as modified by section 1391, and found patent venue in any venue in which a defendant was subject to personal jurisdiction.

TC Heartland v. Kraft Foods

Background

- Kraft Foods filed a patent infringement suit in the Delaware against TC Heartland, a competitor that is organized under Indiana law and headquartered in Indiana but ships the allegedly infringing products into Delaware.
- TC Heartland moved to transfer venue to a District Court in Indiana, claiming that venue was improper in Delaware.
- The District Court rejected the transfer motion.
- The Federal Circuit denied a petition for a writ of mandamus, concluding that §1391(c) supplies the definition of "resides" in §1400(b).
- Supreme Court granted *certiorari*.

TC Heartland v. Kraft Foods

Supreme Court Opinion

- **Held:** “We conclude that the amendments to §1391 did not modify the meaning of §1400(b) as interpreted by *Fourco*. We therefore hold that a domestic corporation ‘resides’ only in its State of incorporation for purposes of the patent venue statute.”

- *But, the story does not end there . . . .*

In re Cray

Background

- The patent venue statute, 28 USC § 1400(b), provides that "[a]ny civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business."
- Few patent cases had interpreted the phrase "regular and established place of business," because it was so easy to establish venue under the "resides" prong of the patent venue statute.

In re Cray

Background

- Raytheon sued Cray for patent infringement in the Eastern District of Texas. Cray is a Washington corporation with its principal place of business in Washington.
- Cray did not rent or own any property in E.D. Texas.
- But, Cray did allow a sales executive to work remotely from his home in E.D. Texas.
- Cray moved to transfer the case from E.D. Texas to the State of Washington.
- The district court denied the motion, setting forth four factors for inquiries into what constitutes a “regular and established place of business” in “the modern era”: physical presence, defendant’s representations, benefits received, and targeted interactions.
- Cray appealed to the Federal Circuit.

In re Cray

Federal Circuit Opinion

- **Held:** The district court erred as a matter of law in holding that “a fixed physical location in the district is not a prerequisite to proper venue.”
- While the “place” need not be a fixed physical presence in the sense of a formal office or store, there must still be a physical, geographical location in the district from which the business of the defendant is carried out.
- The place of business must be “regular.” A business may be “regular” if it operates in a steady, uniform, orderly, and methodical manner.
- The regular and establish place of business must be the place of the defendant, not an employee.
  - Marketing and advertisements relevant only to the extent that they indicate that the defendant holds out a physical place for its business in the venue.

TC Heartland & In re Cray

Business Pointers

- To avoid establishing venue in a district, do not set up any physical place of business there. But, no bright line test.
  - What about leasing?
    - Probably no difference whether location is leased or owned.
  - What about remote workers?
    - *In re Cray* did not bless all remote workers. Courts will weigh whether employee is hired because of their location, or the employment is conditioned on residence at that location.
  - What about marketing and advertising?
    - Advertising is OK. But, courts will consider whether the location is marketed to the public as an office or location of the defendant.
- None of this applies to foreign entities

COPYRIGHT

Oracle America Inc. v. Google Inc.

- Google copied Java API headers for its Android OS to allow Java developers to easily generate Android applications.
- Oracle acquired rights in Java through the Sun acquisition, sued for copyright infringement.
- Initial ruling for Google finding that API code was not copyrightable was overturned by Federal Circuit.
- On remand, jury found for Google based on fair use.
- Jury verdict currently on appeal with Federal Circuit.

Oracle America Inc. v. Google Inc.

Business Pointers

- When licensing software, consider potential for undesirable "fair uses" by licensees.
- Consider whether to seek covenant not to engage in fair use – courts have held this is valid:
  - *Bowers v. Baystate Technologies, Inc*., (Fed. Cir. Jan. 29, 2003) (negotiated contract waived fair use reverse engineering)
  - *Davidson & Associates v. Jung*, 422 F.3d 630 (8th Cir. 2005) (clickwrap agreement prohibiting fair use reverse engineering upheld)

Artifex Software, Inc. v. Hancom, Inc.

- Artifex brought breach of contract and copyright infringement case against Hancom for using Ghostscript software in Hancom product without complying with GPL requirements.
    - Artifex also made Ghostscript available under a commercial license, which Hancom did not purchase.
- Court held that the GPL violation is a breach of contract, not just a copyright claim.
    - Previous cases dealt with GPL only as a license (i.e., a copyright issue).
- Court also held that damages claim could be based on payments which would have been made had Hancom entered into commercial license with Artifex.

Artifex Software, Inc. v. Hancom, Inc.

Business Pointers

- Case pushes the door further open to more litigation over breaches of open source licenses.
  - May be easier to go after worldwide conduct.
  - Additional basis for injunctive relief.
- Remains as important as ever to:
  - Implement and maintain an approval and tracking process for use of open source within organization.
  - Perform due diligence when acquiring software from others.
  - Negotiate appropriate reps and warranties for in-licensed software that will be used in your product.

TRADE SECRET

Molon Motor and Coil Corp. v. Nidec Motor Corp.

- Molon brought federal DTSA and Illinois state trade secret misappropriation claims against Nidec alleging that a departing Molon employee stole trade secret information and used it in new job for Nidec.
- Nidec filed motion to dismiss based on no specific allegations in complaint that Nidec received the information from the employee.
- Court denied motion on basis that the complaint did "trigger the circumstantial inference that the trade secrets inevitably would be disclosed."
  - "Inevitable Disclosure" doctrine

Molon Motor and Coil Corp. v. Nidec Motor Corp.

- First time that inevitable disclosure doctrine was found to apply to Defend Trade Secrets Act.
- Court in *Panera v. Nettles*, (E.D. Mo. Aug. 3, 2016) also referred to the doctrine in granting a TRO.
- California and some other states have traditionally rejected the doctrine under state trade secret laws.
- Widespread acceptance that doctrine exists under DTSA could lead to path to its revival in CA.

But…

Molon Motor and Coil Corp. v. Nidec Motor Corp.

- DTSA text at least suggests that inevitable disclosure doctrine is not part of DTSA, since injunctive relief is not available if it would “prevent a person from entering into an employment relationship, and that conditions placed on such employment shall be based on evidence of threatened misappropriation and not merely on the information the person knows.”
- Other courts have looked to the applicable state trade secret law in construing the DTSA rather than conducting a separate analysis:
  - *Kuryakyn Holdings, LLC v. Ciro, LLC* (W.D. Wisc. Mar. 15, 2017) (“courts may look to the state UTSA when interpreting the DTSA”)
  - *Panera v. Nettles* (“Although the Court's analysis has focused on Panera's Missouri trade secrets claim, an analysis under the Defend Trade Secrets Act would likely reach a similar conclusion”)

United States v. Liew

- Walter Liew and his company, USA Performance Technology, Inc. were convicted under the Economic Espionage Act for trade secret theft due to their hiring of employees from DuPont familiar with DuPont's chloride-route technology for producing titanium dioxide and then selling the know-how to a Chinese company.
- On appeal to the Ninth Circuit, Liew argued that DuPont did not use reasonable efforts to protect these trade secrets as it built a titanium dioxide plant for Sherwin-Williams in 1967 and required Sherwin-Williams to maintain confidentiality for only 15 years.

United States v. Liew

- As such, Liew argued that it was an error for jury not to be instructed that a disclosure to a single recipient not bound by NDA destroyed trade secret status.
- Court found that the jury instruction did not amount to “clear error” since it is not clear or obvious that that disclosure to a single competitor made information “generally known to” or “readily ascertainable” to “the public” as recited in the EEA given that Liew cited no authority for this proposition.

United States v. Liew

- EEA definition of trade secret has since been amended by DTSA to refer to information not known to or ascertainable by “another person who can obtain economic value from the disclosure or use of the information,” which is similar to UTSA language.
- Liew’s outcome may well have been different
  - *Silicon Image, Inc. v. Analogk Semiconductor, Inc.* (N.D. Cal Jan. 17, 2008) (denial of motion for preliminary injunction based in part on Silicon Image’s disclosure of information under NDAs that have expiration dates)
- Remains important to have perpetual confidentiality obligations for trade secrets disclosed under NDA.

TRADEMARK

Julie A. Moreno v. Pro Boxing Supplies

- PBS makes boxing equipment under the “Casanova” brand and had one registered mark and two applications on file with the PTO.
- Moreno held an exclusive trademark license for use of the Casanova name for boxing equipment from a Mexican company that had used the name for boxing equipment since 1972.
- Moreno filed for cancellation proceedings relying on her licensor’s use of the mark preceding her license agreement.

Julie A. Moreno v. Pro Boxing Supplies

- TTAB dismissed in favor of PBS on basis that Moreno, as an exclusive licensee, could not bring claims based on owner’s prior use of the mark.
- Illustrates importance of addressing enforcement/ standing issues upfront in license agreement
  - Need ability to add licensor as a plaintiff to the suit
  - Licensors often want to be able to decline to participate; consider what consequences should flow if licensor’s election not to join creates a business problem for licensee

Booking.com B.V. v. Matal

- Booking.com applied for federal trademark registration of "booking.com" word mark.
- PTO rejected the mark on grounds that it was generic or, alternatively, that it was descriptive.
- Booking.com appealed before TTAB, which affirmed PTO's rejections.
  - Consumers would understand "booking.com" to refer "to an online reservation services for travel, tours, and lodging" which would make the proposed mark generic for the services offered.
  - Proposed mark is also descriptive of services and Booking.com failed to show that it had acquired distinctiveness.

Booking.com B.V. v. Matal

- Booking.com appealed TTAB decision to federal court in E.D. Virginia.
- Court found that “booking” is indeed a generic term that is ineligible for trademark registration.
- However, court reversed TTAB in finding that “booking” combined with the “.com” TLD did result in a registrable mark because a TLD has source identifying significance and Booking.com presented new evidence of distinctiveness.
  - Surveys showed that public associated “booking.com” with the company rather than the products and services being offered.

Booking.com B.V. v. Matal

- Court decision is contrary to multiple Federal Circuit cases establishing bright-line rule that adding a TLD to a generic term does not result in registrable mark
- Consider reviewing your domain name portfolio for potential candidates for trademark registration

SAP UK Ltd. V. Diageo Great Britain Ltd.

- Diageo licensed from SAP both its SAP Business Suite software and its “PI” software for integration with Salesforce.com.
- Business Suite license requires fees based on the number of direct and indirect users; if customer uses the software in a way not specifically authorized in the agreement, additional fees are due based on SAP’s then-current price list.
- Diageo launched a CRM app for use by its salesforce and a product ordering app for its customers; both interfaced with Salesforce.com and, through the PI software layer, could read and edit data stored in SAP.

SAP UK Ltd. V. Diageo Great Britain Ltd.

- License agreement included a statement that no fees were due for data transfers between SAP software products; because of this and because Diageo had paid to use the PI software which specifically enabled this type of use, Diageo thought this use was authorized.
- SAP filed suit on the basis that each of the thousands of individual users of these two apps constituted an indirect user of SAP's software that had not been paid for, despite above facts and even though SAP's price sheets did include this user type.
  - Claimed damages: 54 million pounds sterling

SAP UK Ltd. V. Diageo Great Britain Ltd.

- Court finds in favor of SAP, but leaves amount of damages award for future determination.
- When licensing ERP/database software, critical to understand from business client all the ways that this software could be said to be "used."
- Ensure that license scope covers all use cases and costs are well-understood.
- If you are using SAP software, consider auditing your use now and getting ahead of a potential issue.

Questions?

Jason Kipnis, Partner
+1 650 600 5036
Jason.Kipnis@wilmerhale.com

Ashwin Gokhale, Partner
+1 650 858 6071
Ashwin.Gokhale@wilmerhale.com

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