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SPRING 2013 / VOL. 6, ISSUE 1

## THE UMBRELLA<sup>®</sup>. AN INTELLECTUAL PROPERTY LAW UPDATE.

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### Patent Filers: No More Swearing



Yon S. Sohn

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New Year's resolutions are made to be broken. But on March 16, the America Invents Act (AIA) will come to aid inventors and corporate R&D departments to keep their resolution to not swear anymore.

Of course, we are not talking about profanity but rather the practice known as "swearing behind" or antedating the date of invention when procuring a U.S. patent. But first, let us cover a little background before further discussing this no-more-swearing law.

The U.S. patent system has been a first-to-invent system that awards patents to those who invented first. Under this system, the USPTO presumes that the filing date of a patent application is the date of invention. So any patents or other publications that existed before the filing date would be considered prior art that can be cited against the would-be inventors to reject their patent application. The inventors could then file a declaration demonstrating that they invented before the date of the prior art being cited against them.

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## Use Unlicensed Music in Wedding Films at Your Peril



Vincent J. Allen

*Partner*

Quantum leaps have been made in both the quality and popularity of wedding films over the past 10 years. The advances are a result of technology improvements in post-production editing systems and the introduction of low profile cameras that rival the production quality of

movie sets. Most recently, the availability of relatively low cost DSLR cameras has added a cinematic element to event film productions that previously was not available.

Event filmmakers have begun creating works of art that capture the emotions of the wedding day. So it is no surprise that wedding films are often set to music selected to create the desired mood. Historically, event filmmakers have not given much thought to obtaining permission to use a popular song in a wedding film, and some have even operated under the erroneous belief that purchasing the song on a CD or iTunes will avoid a copyright violation.

One notable example is the film of Tony Romo's wedding that was streamed on the Internet by Austin event filmmaker Joe Simon in 2011. Although the film was only up for one day before it was taken down, that was long enough for a record label to notice that Simon had used a Coldplay song without a license. The record label sent Simon a cease and desist letter and demanded \$150,000 for the unlicensed use of the song in violation of copyright law. Simon ultimately settled the claim for an undisclosed five figure sum.

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## Trademark Basics: What's in a Name?



Mandy K. Jenkins

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Is the name of a new business or product really that important to its success? As Shakespeare would say, "that which we call a rose by any other name would smell as sweet." No offense to Shakespeare, but most people would agree that when starting

a new business or launching a new product, the name is very important. The name gives people a first impression and is associated with the product or business forever. So choosing the right name is paramount. When deciding upon the name for a new company or product, you want to select a name that can be protected as a trademark, ensure your chosen name will not infringe another's trademark, and take the proper steps to protect your trademark.

First, we need to cover a few basics of trademark law. A trademark is a word, phrase, or symbol that is used to identify and distinguish one's goods or services from another's. For a business or product name to be protectable as a trademark, it must be distinctive. A name that is descriptive of the business or product cannot receive trademark protection. There are three categories of distinctive marks: fanciful, arbitrary, and suggestive. A fanciful mark is an invented word like KODAK for cameras or XEROX for copiers. An arbitrary mark is a word that has an ordinary meaning but it is used for goods or services unrelated to the dictionary meaning of the word, such as APPLE for computers.

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Willfulness? Enhanced Damages? It's a Judge-ment Call



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Depending upon where you stand, on June 14, 2012, the Federal Circuit Court of Appeals either executed a “bloodless” coup d’état, or brought order to the issue of enhanced damages in patent cases. In *Bard Peripheral Vascular, Inc. et al. v. W. L. Gore and*

*Associates, Inc.*, the court ruled that the preliminary determination of “willfulness,” a *sine qua non* for enhancement of damages, is a matter of law for the court to determine, and subject to *de novo* review on appeal. This takes the issue out of the hands of the jury and places both the determination of willfulness as well as the enhancement of damages in the hands of the trial judge. Since judicial interpretation of statutes is retrospective, *Bard* applies to all ongoing litigation.

*Bard* completes the revision of the law on the willfulness standard that commenced five years ago in the landmark 2007 opinion, *In re Seagate*. *Seagate* reversed the long-standing rule of *Underwater Devices* that an accused infringer has an affirmative duty of care to take reasonable steps to avoid patent infringement. In its stead, *Seagate* substituted a requirement that the patentee provide “at least a showing of objective recklessness” on the part of the accused infringer. In addition, because the court expressly abandoned the affirmative duty of due care, it also emphasized that the accused infringer had no affirmative obligation to obtain an opinion of counsel.

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Rudy, Rudy, Rudy!: Reducing Patent Fees for the Little Guy



Bobby W. Braxton

Associate

It's easy to root for the little guy. Whether we are rooting for Rudy Rudettiger to take the field in *Rudy*, or for inventor Robert Kearns when he takes on Big Auto in the movie *Flash of Genius* (the *Rudy* equivalent for patent attorneys—we are

indeed a sad lot), we seek out success stories. A truly American success story is an invention that allows the smallest inventor to compete with the largest corporation. Unfortunately, while individual inventors dream about inventing the next big thing, the costs and fees involved in filing a patent application often make these dreams prohibitively expensive. According to the United States Patent and Trademark Office (“USPTO”), less than 20% of the patents granted in 2011 were awarded to so-called small entities, individuals or businesses with less than 500 employees. This means that greater than 80% of the patents granted were awarded to large businesses. How is the little guy supposed to compete? The USPTO and the American Invents Act (“AIA”) have offered a few avenues to make it a bit easier for Rudy to get into the game.

**Micro-Entity**

Beginning in March 2013, a new class of entities, micro-entities, will be entitled to a 75% reduction of certain fees. A micro-entity can now file a patent application for \$400 in filing fees compared to \$1,260 for a large entity.

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### Professional Profile



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Bobby W. Braxton focuses his practice on intellectual property law, including patent and trademark prosecution and litigation. Mr. Braxton has prosecuted and obtained patents for clients covering a variety of technologies including air conditioners, specialty pumps, extruders, medical devices, fertilizers, and food chemistry.

In addition to prosecuting patents, Mr. Braxton has experience in license agreements, right-to-use opinions, and invalidity opinions.

Mr. Braxton also has extensive experience in most aspects of patent and trademark litigation including drafting of pleadings, dispositive motions, Markman briefing and oral argument, written discovery, trial preparation, and settlement negotiations. Aside from traditional district court litigation,

Mr. Braxton also has experience litigating before the United States International Trade Commission.

Mr. Braxton graduated from Texas A&M University in 2004 with a bachelor of science degree in chemical engineering. He was involved in the co-operative program where he worked full time at a chemical plant and a research and development pilot plant for four total semesters, gaining experience as both a process engineer and a research engineer.

Mr. Braxton earned his law degree from Texas Tech University School of Law in 2007, where he graduated *summa cum laude*. While in law school, Mr. Braxton was an editor for the *Texas Tech Administrative Law Journal* and a member of the Order of the Coif.

Mr. Braxton is registered to practice before the United States Patent and Trademark Office, and the United States District Courts for the Northern and Eastern Districts of Texas. He is also a member of the American Bar Association, State Bar of Texas, Dallas Area Young Lawyers Association, Dallas Bar Association, and Texas Aggie Bar Association.