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THE UMBRELLA[®]. AN INTELLECTUAL PROPERTY LAW UPDATE.

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disputes and most other matters related to patents, with all appeals directed only to the U.S. Court of Appeals for the Federal Circuit, a trade secret in the United States is subject to 50 different state laws. A suit to enforce a trade secret may be brought in state court, and alternatively, possibly in federal court as well, if there are other bases for federal jurisdiction such as diversity of citizenship with respect to the parties, or the existence of pendant jurisdiction if claims pursuant to federal statutes such as those involving patents, trademarks or copyrights are also at issue.

To partially address potential inconsistent outcomes in trade secret cases between so many competing jurisdictions concerning what is now a national and international market for IP, most states have adopted.

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The Movement Towards a Federal Trade Secret Protection Law



Theodore G. Barood, Jr.

Partner

With the recent attention by the U.S. Congress and the U.S. Supreme Court to patent issues, the value of the IP protected as a trade secret may not be receiving the attention it deserves. Various studies have suggested that the value of IP protected as a "trade secret" (such as the recipe for Coke) greatly exceeds the value of IP protected by patents. Importantly, the protection afforded a trade secret lasts forever (or at least as long as the trade secret remains confidential); whereas the length of protection for a utility patent is generally 20 years from the earliest effective filing date for patent applications filed on or after June 8, 1995.

While patents are governed by a single federal statutory framework at 35 U.S.C. § 101, et seq., including exclusive jurisdiction in the federal district courts for infringement



Supreme Court Finds Coca-Cola's "Pomegranate-Blueberry Juice" is Deceptively Labeled



Shaukat A. Karjeker

Partner

The Supreme Court unanimously found that a Minute Maid juice product of The Coca-Cola Company, labeled in large type as "Pomegranate Blueberry," and depicting a pomegranate and blueberries prominently on the package, but containing only about 0.5% of these juices, is deceptively labeled. While that might appear to be a "common sense" judgment based on juice content, the Supreme Court's opinion reversed both

the trial court as well as the Ninth Circuit Court of Appeals. So, you might ask: "how did both of these courts get it so wrong and so contrary to common sense?"

Strangely enough, it was not as simple as it might seem to arrive at the "common sense" result. To get there, the Supreme Court had to carefully parse a federal regulatory scheme. The plaintiff (POM Wonderful) and the defendant (Coca-Cola) pitted two federal statutes against each other to support their respective positions in the lawsuit. The Court determined that the allegedly "conflicting statutes" are in fact complementary and the regulatory scheme was designed to meet Congressional intent to protect consumers from deceptive labeling, and to permit a competitor to file suit.

Briefly, POM Wonderful sells pomegranate juice, and juice mixtures that include pomegranate juice. Minute Maid (a Coca-Cola brand) entered the market and sold a juice in a package labeled "Pomegranate Blueberry" in all capital letters, on two separate lines. In smaller type below, was the phrase "flavored blend of 5 juices." And below that, in still smaller type, the words: "from concentrate with added ingredients." Following a line break, the final phrase was "and other natural flavors." The label also displayed a picture of "a vignette of blueberries, grapes and raspberries in front of a halved pomegranate and a halved apple." The contents included a juice blend of 99.4% apple and grape juices, 0.3% pomegranate juice, 0.2% blueberry juice and 0.1% raspberry juice.

As you might expect, there is a federal statute that prohibits deceptive and misleading advertising.

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IP Trends We'll Be Following in the Coming Year



Gregory W. Marcum

Of Counsel

As we transition in to a new year, we re-focus our efforts in certain trends in the area of intellectual property law. Four trends are briefly discussed below.

1. Data Privacy and Protection
2. Big Data Growth and Use
3. Post-Grant Patent Review via IPR
4. Patent Subject Matter Eligibility
Alice Corp. v. CLS Bank

Data Privacy and Protection

Recent thefts of celebrity images (including nude images) bring to the forefront of national attention the issue of data privacy and protection. Since many of the images appeared to have been taken using mobile devices and stored in cloud-based databases, the reliability of security in these environments has been brought into question. Other recent thefts have involved credit card data from major banks (Citibank, JP Morgan), major retailers (Target, Home Depot, Neiman Marcus), and credit card processors (Global Payments, Heartland Payment Systems). These data breaches involved millions of credit and debit card accounts. However, many smaller breaches have occurred which don't make headlines or go unreported.

Cloud data storage technology has grown exponentially in developed economies due to lower cost and increased convenience. Many government, business, professional, and individual users have migrated sensitive and confidential data to cloud data storage for these reasons. Even when reasonable security measures are employed the threat of a data breach cannot be completely negated due to the complexity of the system and vulnerabilities created by the human element, i.e. using "password" or "123456" as passwords. Another issue is the scope of vulnerability. The recent thefts involved photos, but could have just as easily included other data, information, or documents pertaining to boring business matters, commerce, or serious national security data. How long the data is vulnerable is also an issue.

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Tropic Ocean Airways: Don't Draft your Complaint on the Beach



Vincent J. Allen

Partner

When a lawsuit is filed, a plaintiff must provide the factual and legal basis for the claims to avoid the case being dismissed. How much detail must be provided was arguably changed significantly by a pair of U.S. Supreme Court decisions, *Twombly* and *Iqbal*, decided in 2007 and 2009, respectively. Before these two cases, the courts often repeated the rule that

“a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”

In *Twombly*, the Supreme Court retired this rule. The Court reiterated the requirement of Rule 8, which requires only a “short and plain statement of the claim showing the pleader is entitled to relief.” However, the Court went on to explain that while the complaint need not recite detailed factual allegations, the allegations provided by a plaintiff must be “more than labels and conclusions, and a formulaic recitation of the elements of a claim will not do.” Rather, the pleadings should provide enough facts to state a claim for relief that is plausible on its face.

In the context of intellectual property law claims, and particularly in patent cases, the *Twombly/Iqbal* decisions have not resulted in a significant change in the practice of pleading a case, at least not yet. For patent infringement claims, the Federal Rules provide a form the Federal Circuit has indicated is sufficient to state a claim for patent infringement. However, the Judicial Conference of the U.S., which suggests changes to the Federal Rules has unanimously approved the abolishment of the form complaints from the rules, including the patent infringement form complaint. Should the Supreme Court approve this change, then the Federal Circuit may very well re-evaluate its prior decisions regarding the adequacy of patent infringement complaints.

With respect to trademark claims, there have been several decisions in which the appellate courts have affirmed dismissals of trademarks claims because of a failure to state a claim that is “plausible.” In some of these cases,

the courts have looked into the facts alleged and made judgments about whether the claim is plausible. At first glance, this could be seen as an improper fact finding exercise and thus a failure of the court to follow the rule that the plaintiff’s allegations must be taken as true. But on closer review, it becomes apparent that the plaintiff is making conclusory statements regarding the validity of a trademark or the likelihood of confusion without alleging facts to back up the claims.

In a trademark-related case based on the Anticybersquatting Consumer Protection Act (ACPA), our firm was able to secure a dismissal of the complaint, which was recently affirmed by the Eleventh Circuit Court of Appeals. In *Tropic Ocean Airways, Inc. v. Key West Seaplane Service, Inc.*, the plaintiff failed to make sufficient allegations regarding its trademark rights in the TROPIC OCEAN AIRWAYS mark. The ACPA allows owners of certain marks to bring claims against those who register domain names that are identical or confusingly similar to the mark in question. However, one of the requirements of the ACPA is that the mark must have been distinctive at the time the defendant registered the domain name. Generally speaking, common law trademark rights in a mark arise upon use of the mark in connection with the goods or services unless the mark is merely descriptive of the goods or services provided. If the mark is merely descriptive, then rights do not arise until the mark has acquired distinctiveness, or in other words, the consuming public has come to associate the mark with a particular source of the good or services.

In the *Tropic Ocean Airways* case, the plaintiff alleged that it used the TROPIC OCEAN AIRWAYS mark “in connection with offering and provision of its commercial aviation services which transport passengers...”

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Firm Updates

- > Bill Imwalle was promoted to Partner this past January.
- > Austin Teng passed the Texas State Bar and is now a Patent Attorney.

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Professional Profile



Theodore G.
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Partner

Ted Barody's practice focuses on intellectual property disputes including patent litigation, trade secret litigation, trademark litigation and other Lanham Act claims, and copyright litigation. In addition to his law degree, which he received from Southern Methodist University Dedman School of Law (1989), Ted also holds a Bachelor of Science in Chemical Engineering from Rice University (1986).

Mr. Barody is licensed to practice before the United States Patent and Trademark Office, and is licensed to practice before the Federal Circuit. He is also licensed in the Northern, Southern, Eastern and Western Districts of Texas, as well as, the Texas Supreme Court.

He has been involved in the State Bar of Texas, the Dallas Bar Association, the American Intellectual Property Law Association, Texas Bar Foundation, the Dallas Federalist Society and the American Institute of Chemical Engineers. Mr. Barody authored two articles in *Law 360*: *Hyundai's Case for Coverage of a Patent Suit* (2010) and *Realtime, Expand Networks Settle Data Patent Suit* (2010). Ted also authored an article in *Lexology*: *Federal Circuit Hints at Future Limits on Patent Damages in i4i v. Microsoft Opinion* (2010).

He has worked with clients on a wide variety of cases involving allegations of patent infringement concerning software, web sites, home goods, and various other technologies. In addition, he has defended a major oil company concerning allegations of property damage from release of gasoline from underground storage tanks, as well as, appeared in an extended permit proceeding involving hazardous waste storage in a salt dome.

Mr. Barody has taken depositions which included numerous experts in the fields of semiconductor fabrication, web site architecture, WAN optimization software, build-to-order, process control, accounting, hazardous waste chemistry, environmental remediation, transportation, patent prosecution, and patent damages. The deponents have been located coast-to-coast in the United States, as well as in Canada and Taiwan.

Mr. Barody has significant jury trial experience in both the E.D. of Texas and the N.D. of Texas: he participated in a jury trial in the E.D. of Texas (Tyler Division) representing the defendant manufacturer of data compression software and hardware against allegations of infringing multiple patents (plaintiff dismissed case after jury selection); and a 3-week jury trial in the E.D. of Texas (Sherman Division) representing the plaintiff concerning alleged infringement of two patents related to web sites and build-to-order; and jury trial in the N.D. of Texas (Dallas Division) representing the defendant concerning alleged infringement of utility and design patents for floor lamps.