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INTELLECTUAL PROPERTY NEWS

February 2015

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US SUPREME COURT TAKES AWAY FREE PASS FOR PATENT CLAIM CONSTRUCTION

Previously, a district court would interpret the meaning of patent claims and then the parties would appeal to the Federal Circuit where a new look would be given to the claim interpretation. Therefore, parties believed they were getting a free pass or another chance at successfully arguing the construction of patent claims.

No more - says the US Supreme Court in *Tevos v. Sandos.*

There, the parties disagreed over the meaning of "molecular weight." The Supreme Court said that, on appellate review, the district court's interpretation or construction of patent claims should be reviewed for "clear error" - but only in the context of factual issues. No longer should the review be "de novo."

COMMENT:

Parties have previously assumed that if they lost on patent claim construction at the district court, they could get a new look at the Federal Circuit. And, some statistics have indicated about a 50% reversal rate by the Federal Circuit. At that rate, parties have thought that it makes financial sense to appeal.

This assumption may no longer hold true.

HAVE YOU BEEN "INDUCING" SOMEONE TO INFRINGE A PATENT?

One can directly or indirectly infringe a patent. Indirect infringement can occur by inducing infringement by another.

The US Supreme Court has found that it needed another patent case to decide, and this one involved the mental state required to induce another to infringe - *Commil v. Cisco.*

When this case was at the Federal Circuit, the appellate court referred to an earlier US Supreme Court - *Global-Tech.* The Federal Circuit said that under *Global-Tech* induced infringement "requires knowledge that the induced acts constitute patent infringement." In other words, the inducer must "have knowingly induced infringement, not merely knowingly induced the acts that constitute direct infringement."

The required knowledge under *Global-Tech* was either actual knowledge or willful blindness - both of which are different from recklessness and negligence.

Commil said that the inducer's "good-faith belief of invalidity may negate the requisite intent for induced infringement." This, according to the court, was consistent with the law that a good faith belief of non-infringement can preclude the requisite state of mind.

COMMENT:

What issues the Supreme Court will address is a mystery. Perhaps more guidance will be provided on when a good faith belief of invalidty and/or non-infringement "is" a defense, and not merely "may" be a defense.

TRUE OR FALSE - YOU CAN FREELY USE COPYRIGHTED MATERIAL FOR EDUCATIONAL PURPOSES?

Many believe that if copyrighted material is used for educational purposes, it is "fair use" and not copyright infringement.

The Copyright Act states that "the fair use of a copyrighted work . . . for purposes such as teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." However, the Act also states that factors are to be considered in determining whether there is fair use:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

In Cambridge University Press v. Patton (Eleventh Circuit), plaintiffs were book publishers who sued Georgia State University for allowing its professors to make digital excerpts of plaintiff books for students without payment to plaintiffs.

The court first pointed out that an item in the listed items of fair use in the Act is not a presumption of fair use. Next, the court said that each of the four factors are not necessarily of equal weight. Therefore, even if the use is for educational purposes and not for profit, the use is not necessarily fair. And even though defendant was a nonprofit university, it did not necessarily mean the use was not for profit.

In the end, the court determined that the university's use of the books did not generate significant revenue and was not a commercial use.

COMMENT:

Many users of copyrighted material try to find comfort in assuming that their use is a fair one and not an infringement because their use is not for profit or for educational purposes. While factors to consider, they do not provide automatic protection from claims of infringement.

ARE YOU CONFUSED BY "EAT MORE KALE" AND "EAT MOR CHIKIN"?

A Vermont artist started printing t-shirts and bumper stickers with "Eat More Kale" upon the request of a farmer friend.

Ten years later, the artist filed for a federal trademark registration. Apparently after the application filing, Chick-fil-A sent the Vermont artist a cease-and-desist letter based on confusion between "Eat More Kale" and "Eat Mor Chikin." Chick-fi-A told the artist that thirty others had ceased using the "Eat Mor" phrase.

The artist persisted, and Chick-fil-A did not oppose the artist's trademark application.

COMMENT:

The public reacted by calling Chick-fil-A a trademark bully. Is that accurate?