



Straight Talk: IP and Technology Developments

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Facebook Wars: In the Age of Social Media, a Trademark Registration Is More Important Than Ever

Michele Schwartz and Prisca LeCroy

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In the olden days (say, pre-1996), a Complexions Spa for Beauty and Wellness in New York and a Complexions Day Spa in California could peacefully coexist. After all, what savvy New Yorker would accidentally book her weekly manicure at a spa in “the O.C.” due to the confusingly similar names? However, with the recent popularization of social media, businesses are bumping into each other online in the realm of “friends,” “fans” and “tweets.” And so, it is more important than ever to take these basic steps to create and protect a unique business name, service mark and trademark.

- Choose a name or mark that no one else is using.
- Register your mark nationally.
- Recognize others’ preexisting common law rights (rights based on use only).

New Litigation Pits Common-Law Users against Federal Registrants

A case recently filed in the Northern District of New York raises just these issues. See *Complexions Inc. v. Complexions Day Spa and Wellness Center, Inc.*, 1:11-cv-00197-GLS-DHR (N.D.N.Y., complaint filed Feb. 18, 2011). The case involves a spa in New York which has been operating under the names “Complexions” and “Complexions Spa for Beauty and Wellness,” since 1987, but with no federally registered service mark. Enter “Complexions Day Spa” which began doing business in California in 2001 and applied to register several “Complexions”-based marks in 2007 with the U.S. Trademark Office. The New York Complexions did not seek federal registration until 2010.

Both spas have Facebook pages. Last January, Complexions Day Spa (CA) requested that Facebook take down the site for Complexions (NY). Facebook complied. Complexions (NY) responded by filing a suit for a declaratory judgment of its trademark rights and for an injunction requiring Facebook to restore the disputed page.

Protecting Your Rights in the Age of Social Media

In hindsight, this conflict (and the accompanying legal expense) could have been avoided. Complexions Day Spa (CA) could have chosen a unique name. As it turns out, dozens of spas use the term “Complexions” in their names. Having chosen a common name, the California spa now faces the prospect of challenging numerous senior users who may someday want to advertise with Facebook pages as well. A trademark attorney can help a new business owner determine not only whether another company has registered a similar name or mark but also whether other companies may have prior common law rights to a similar, but unregistered, name or mark.

Likewise, Complexions (NY) could have prevented this fight altogether by registering its trademark with the U.S. Trademark Office in 1987 when it opened its doors. Though a business’ common law rights are circumscribed to its geographical marketplace and natural area of expansion, a federal registration provides prospective rights throughout the U.S. Amid the expense and busyness of starting a new venture, it can be tempting to skip the step of registering your name as a trademark or service mark. After all, registration is not required for your business to begin operations. Yet, relying on common law trademark rights, which are restricted to a geographical area of use, is no longer feasible now that every local business can readily create a national and international presence through social media. (We will save international registrations for another article.)

For companies that have already secured national registration and want to limit the rights of common law senior users, the outcome of the Complexions case will be instructive. Getting a national registration does not deprive those who were using the mark before you of their right to keep doing so *in their current geographical marketplace and area of natural expansion*. Whether that area includes Facebook remains to be seen. Sending takedown notices to social media websites may prove a

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fruitless and even liability-inducing endeavor. (For instance, sending false takedown notices alleging copyright infringement has already been outlawed by statute.) Moreover, defending one's unique social media presence may turn out to be a necessary step in maintaining the validity of one's own trademark. Stay tuned.

For more information, please email IPandTech@andrewskurth.com.

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Hyatt v. Kappos: A New Standard for the Admissibility of Evidence in a Section 145 Action

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Abstract

When the Board of Patent Appeals & Interferences (the "Board") of the United States Patent and Trademark Office ("PTO") rejects a patent application, the applicant has two avenues available. He can appeal the decision to the United States Court of Appeals for the Federal Circuit. In that case, the record on appeal is the record from the PTO. New issues cannot be raised, and new evidence cannot be introduced. Alternatively, the applicant can file a civil action under Section 145 of the Patent Code in the U.S. District Court for the District of Columbia. As with an appeal, new issues cannot be raised. However, unlike an appeal, evidence not presented to the PTO can be introduced. In *Hyatt v. Kappos*, 625 F.3d 1320 (Fed. Cir. 2010), the *en banc* Federal Circuit recently held that there is no limitation in a Section 145 proceeding on the introduction of new evidence at the District Court level apart from limitations imposed by the Federal Rules of Evidence and the Federal Rules of Civil Procedure. Having twice had the time period extended, the PTO has until April 7, 2011, to seek *certiorari*.

Background

The Board confirmed the examiner's rejection of 79 of the 117 claims in Hyatt's patent application on the grounds that they failed to satisfy Section 112's written description requirement. In the District Court, the PTO moved for summary judgment upholding the Board's decision. In opposing the motion for summary judgment, Hyatt filed his declaration to provide additional support to refute the written description rejections. In granting the PTO's motion, the Court refused to admit the declaration, holding that Hyatt had been negligent in not providing it to the PTO. Without new evidence, the Court employed the deferential "substantial evidence" standard and upheld the Board's decision.

This decision was appealed to the Federal Circuit. On August 11, 2009, a divided panel issued its decision affirming the District Court's exclusion of the declaration and the grant of summary judgment. This opinion was subsequently vacated. The *en banc* Court reversed the District Court's decision. In the *en banc* decision, Judge Moore wrote the majority opinion, which was joined in by six other judges on the admissibility issue.

The *En Banc* Decision

After a lengthy review of the legislative history of the statute and prior statutes going back 200 years, the Court held that "35 U.S.C. § 145 imposes no limitation on applicant's right to introduce new evidence before the District Court, apart from the evidentiary limitations applicable to all civil actions contained in the Federal Rules of Evidence and Federal Rules of Civil Procedure." *Id.* at 1323.

The Court's extensive review of the legislative history led it to conclude that Congress intended Section 145 to be a new "civil action in which an applicant would be free to introduce new evidence." *Id.* at 1327. Having determined that Section 145 did not impose any limitation on the evidence that could be presented in a Section 145 proceeding, the Court held that when new evidence was provided, review by the District Court would be *de novo*. If new evidence were not provided on an issue, substantial evidence would be the standard. In neither circumstance, was the patent applicant entitled to raise new issues in the proceedings. The Court indicated that its decision was supported not only by the legislative history, but Supreme Court precedent.

The Impact of the *En Banc* Decision

Although only about 30 Section 145 proceedings are filed in a year, the lack of limitation on the admissibility of evidence, coupled with *de novo* review for issues that rely on new evidence, indicate that the number of these actions will increase.

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A patent applicant should pay particularly close attention during patent prosecution to make sure that all necessary legal issues have been raised. New issues cannot be raised in Court, but new evidence can be presented on all issues. This includes live fact and expert testimony. Further, the pendency of a Section 145 proceeding will not shorten the patent term. Thus, for commercially important patent applications, a patent applicant should consider bypassing continuation practice and instead file a Section 145 proceeding to present a strong factual record to a new fact finder who will conduct a *de novo* review and decide the case without a jury.

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False Patent Marketing: What You Need to Know

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Patentees should implement an effective patent marking program to maximize the recovery of damages resulting from patent infringement. However, in view of recent U.S. District Court and Federal Circuit decisions, such patent marking programs must be periodically reviewed to guard against false marking.

Patent Marking

Federal law specifies that patentees give notice to the public that a patented article be "marked" by affixing to the article the word "patent," or its abbreviation, "pat.," followed by the relevant patent number. 35 U.S.C. § 287. Failure to mark the patented article precludes the recovery of infringement damages until notice is given to the infringer. *Id.* If marking the patented article itself is impractical, then the patentee should mark the packaging of the patented article. *Id.* The statute does not apply to patented methods.

When the claims of only a single patent cover the patented article, the marking of that patented article, or its packaging, is straightforward. However, when the claims of several patents cover the patented article, compliance with the patent marking statute is more difficult, because the patentee must determine which patent numbers should be affixed to the patented article.

False Patent Marking

False patent marking has been traditionally asserted when the patent marker is alleged to mark articles, either with an incorrect patent number or with a patent number that does not cover the article, and with the intent to deceive the public. Such false patent marking, prohibited under 35 U.S.C. § 292(a), is believed to "wrongfully quell competition...thereby causing harm to the [United States] economy." *Stauffer v. Brooks Bros., Inc.*, 619 F.3d 1321, 1324 (Fed. Cir. 2010). As provided under the statute, false marking is punishable by a fine of not more than \$500 for every such offense. 35 U.S.C. § 292(a) Section (b) of this statute provides for a *qui tam* suit in which anyone may sue for the penalty and share in half of any judgment with the federal government. 35 U.S.C. § 292(b).

Recently, the false patent marking statute has been asserted against patentees that have failed to remove expired patent numbers from their patented articles. Patentees have attempted to defend against these lawsuits by claiming that just "anyone," without a false marking injury, lacks standing. However, the Federal Circuit has recently confirmed that the statute provides broad standing for anyone to bring suit on behalf of the federal government. *Brooks Bros.*, 619 F.3d at 1325 (emphasis added). Patentees have also unsuccessfully attempted to lessen the impact of any potential damages by arguing that the \$500 fine is per decision and not per article. *The Forest Group, Inc. v. Bon Tool Co.*, 590 F.3d 1295, 1304 (Fed. Cir. 2009) (holding that the fine is \$500 per article).

In view of the increase in false patent marking litigation, patentees should establish steps to limit exposure to false marking lawsuits while observing the need to mark their patented articles. As a first step, patented articles should be regularly audited after marking to ensure that the marked patents have not expired or that the claims of the marked patents covering the articles have not been held invalid or been amended in post-grant proceedings to no longer cover the articles. As a second step, patentees should implement a plan for the timely removal of non-compliant patent numbers that are affixed to their articles, even if such removal is not immediate. Consultation with a patent attorney regarding proper patent marking as well as the execution of a written plan to audit marked patent numbers and timely remove non-compliant patent numbers may limit exposure to false marking litigation by creating at least some "credible evidence that [the patentee's] purpose was not to deceive the public." *Peguignot v. Solo Cup Co.*, 608 F.3d 1356, 1363 (Fed. Cir. 2010).

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Andrews Kurth LLP has patent attorneys experienced in patent marking matters. We are available for consultation if you or your company are interested in learning more about proper patent marking or would like more information on how to limit exposure to the increasing number of false patent marking lawsuits. The patent law is ever-changing, and future false marking litigation may be curtailed by a patent reform bill pending before Congress and/or by current appeals to the Federal Circuit challenging the constitutionality of the *qui tam* actions. Nonetheless, patentees should implement a proper patent marking program to maximize the recovery of any patent infringement damages while steering clear of any false marking.

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New Directions in the Federal Circuit: Motivation to Combine

Aldo Noto and Eden Burgess

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Through two recent panels, both including Judge Lourie, the Federal Circuit expanded upon the Supreme Court's leading obviousness case, *KSR International Co. v. Teleflex, Inc.*, 550 U.S. 398 (2007), finding motivation to combine references to render the patents-in-suit invalid as obvious. Both panel decisions indicate the Federal Circuit's increasing readiness to find motivation to combine, even when explicit motivation is not present in the references.

Moreover, in both cases the Court ruled on motivation to combine without the benefit of expert testimony, perhaps illustrating a growing willingness to decide obviousness on summary judgment. Both cases involved simple mechanical inventions, however, so it remains to be seen whether the Federal Circuit will apply its apparent openness to determining obviousness on summary judgment to more complicated technologies that may require the assistance of experts.

***Wyers v. Master Lock Co.*¹**

In *Wyers v. Master Lock Co.*, 616 F.3d 1231 (Fed. Cir. 2010), *cert. denied* the Federal Circuit, reversing a jury decision that three trailer hitch lock patents were valid and infringed, found that even in the absence of expert testimony, judges can make a common sense determination to combine the prior art to find patent claims obvious and thus invalid. Prior to *Wyers*, the Federal Circuit rarely relied on common sense as the basis for finding a motivation to combine prior art. *Wyers* confirms that successful obviousness challenges are possible without expert testimony. On February 22, 2011, the Supreme Court declined to grant *Wyers*' petition for a writ of *certiorari*.

Tokai Corp. v. Easton Enterprises, Inc.

In *Tokai Corp. v. Easton Enterprises, Inc.*,—F.3d—, 2011 WL 308370 (Fed. Cir. 2011), the Federal Circuit in a split decision affirmed a grant of summary judgment which found the patents-in-suit to be invalid as obvious. Tokai's March 3, 2011 petition for panel rehearing and rehearing *en banc* is pending.

Tokai's patents relate to automatic child-safety mechanisms for safety utility lighters. Judge Lourie wrote for the majority: It would have been obvious to one of ordinary skill and creativity to adapt the safety mechanisms of the prior art cigarette lighters... to fit a utility lighter as disclosed by [the prior art], even if it required some variation in the selection or arrangement of particular components.

The Court concluded that "the undisputed facts in this case – including the state of the prior art, the simplicity and availability of the components making up the claimed invention, and an explicit need in the prior art for safer utility lighters – compel a conclusion of obviousness." The Court also affirmed the exclusion of expert declarations because Tokai failed to submit expert reports.

Impact of *Wyers* and *Tokai*

These decisions support a summary judgment strategy for invalidity claims in three ways: (1) by making it easier to find a motivation to combine, (2) by not requiring expert testimony to establish a motivation to combine and, (3) in cases where a strong *prima facie* case of obviousness is established, by making it difficult for secondary considerations to save the patents. "[T]he ultimate inference as to the existence of a motivation to combine references may boil down to a question of 'common sense,' appropriate for resolution on summary judgment," *Wyers*, 616 F.3d at 1240, and "expert testimony concerning motivation to combine is unnecessary and, even if present, will not necessarily create a genuine issue of material fact." *Id.* at 1239, *citing KSR*, 550 U.S. at 427.

Tokai also makes it challenging for a simple mechanical patent to withstand an obviousness challenge particularly when there is a known need.

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1. Andrews Kurth LLP represented Master Lock Corporation before the Federal Circuit.

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“Data Pass” and Online Negative Option Marketing Now Deceptive Trade Practices

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Data Pass

A “Data Pass” is the transfer of payment card data (without notification to the consumer) from one merchant to another to complete a sales transaction. In practice, as a consumer is finalizing a purchase on the Internet, he or she is prompted to click on an advertisement that promises cash back, free shipping or another benefit. When a consumer clicks on the advertisement, the initial merchant transfers the consumer’s payment card information to the advertising merchant and the consumer is automatically enrolled in (and charged for) a monthly service. It has been estimated that this practice has resulted in 30 million Americans being charged over \$1.4 billion in unauthorized charges.

The Restore Online Shoppers’ Confidence Act

In response to this practice, Congress passed the Restore Online Shoppers’ Confidence Act (“Act”), which prohibits any post-transaction third-party seller from charging a consumer’s payment card, bank account or other financial account (each a “Financial Account”) for any goods or service, unless the post-transaction seller has: (a) *before obtaining the consumer’s billing information*, clearly and conspicuously disclosed to the consumer all material terms of the transaction, including: (i) a description of the goods/services, (ii) the cost of the goods/services and (iii) the fact that the post-transaction seller is not affiliated with the initial seller; and (b) received the express informed consent for the charge of the Financial Account by obtaining *from the consumer* the full account number, the consumer’s name and address and requiring the consumer to click or otherwise confirm consent.

To further emphasize the requirement any post-transaction seller must get the consumer’s Financial Account information directly from the consumer, the statute makes it unlawful for any merchant conducting a transaction with a consumer on the Internet to disclose Financial Account information to any post-transaction seller which is not a corporate affiliate of the initial merchant.

Thus, unless the post-transaction seller is a subsidiary or other corporate affiliate of the online merchant, a consumer is now required to type in all of his or her billing information again to complete a post-transaction sale. While these provisions appeared sufficient to stop the shady “data pass” transactions from occurring, the Act goes even further and prohibits certain negative option transactions online.

Negative Option Marketing

A “negative option” is an offer or agreement to sell goods or services, under which a consumer’s silence or failure to take an affirmative action to reject the goods or services is interpreted by the seller as acceptance of the offer. This form of marketing has a long history in book clubs, magazine subscriptions and other subscription sales transactions.

Because negative options were used in connection with “data pass” transactions, the Act prohibits charging or attempting to charge a consumer for a negative option transaction effected on the Internet unless the merchant has: (a) *before obtaining the consumer’s billing information*, clearly and conspicuously disclosed to the consumer all material terms of the transaction; (b) received the express informed consent for the charge of the Financial Account; and (c) provided simple mechanisms for the consumer to stop recurring charges from being placed on the Financial Account. It is important to note that these requirements apply to all negative options marketed online, not just those associated with data pass transactions.

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Violations of the Act are treated as unfair or deceptive trade practices in violation of regulations promulgated under Section 18 of the Federal Trade Commission Act. The Federal Trade Commission and State Attorneys General have express authority to enforce the Act in the same manner as the Federal Trade Commission Act.

What You Need to Do

If your client is engaged in e-commerce, you should take steps to confirm that your client's web operations are in compliance with the requirements of this Act, including:

- Consider clicking through the purchase process on your client's website to see if advertisements or offers are presented to purchasers. If so, you will need to determine if these are coming from affiliated entities or third parties. This may require you to locate and review "Joint Marketing," "Linking" and other marketing agreements. If the offers are from third parties, you should confirm that: (a) clear and conspicuous disclosure of the material terms of the transaction occurs before obtaining billing information, and (b) Financial Account information is obtained from the consumer together with the express consent of the consumer to charge the Financial Account.
- Determine if your client ever transfers payment card or other financial account information to a third-party merchant to conduct a new transaction under any circumstances. If so, this practice will have to be stopped unless the third party is a corporate affiliate of your client.
- Determine if your client offers any goods or services online via negative option marketing (whether or not such offer is made via a data pass arrangement). If so, you should confirm that: (a) clear and conspicuous disclosure of the material terms of the transaction occurs before obtaining billing information, (b) Financial Account information is obtained from the consumer together with the express consent of the consumer to charge the Financial Account and (c) there are simple mechanisms for the consumer to cancel the agreement.

The Technology Transactions Practice at Andrews Kurth LLP includes attorneys with significant experience in e-commerce, the Payment Card Industry Data Security Standards, and data privacy and security generally.

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[Click here](#) to contact the author of this article regarding the Restore Online Confidence Act, or other questions relating to data privacy or security, or e-commerce.

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Apple's Expanding App Reach

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On February 15, 2011, Apple unveiled its new application store subscription and content sale policy, which purports to apply to “publishers of content-based apps.” The new policy becomes effective on June 30, 2011, and, for the first time, enables iOS application (“app”) publishers to sell subscriptions through their apps (iOS is the operating system for Apple mobile devices). The new policy will apply to new and existing apps. Existing app publishers are being required to comply with the new policy by the effective date or risk having their apps removed from Apple’s application store. This new policy, consequently, presents a number of issues or problems for new and existing app publishers.

Among the many problems, the policy mandates that apps for publishers that sell content must include an in-app purchase option and may no longer contain links to external sites where content is sold. In other words, such apps must enable app purchasers to directly purchase or subscribe to the content through the app and may not direct purchasers to an external site for purchase. Moreover, publishers of such content-based apps are required to pay Apple 30% of all revenues, including subscription revenues, generated through the app. Previously, many publishers had paid this 30% only on the app download cost charged to customers (download costs were typically $\\$10$). Now, if a purchaser signs up for a new subscription through an app, Apple will receive 30% of the revenue whether the subscription purchase is processed via a website or otherwise outside of the app. Moreover, any subscription offers made outside of the app must be no better than the subscription offers available through the in app purchase option.

Many app publishers may think that this policy does not apply to them because they do not offer “content” or subscriptions to “content” through their apps. However, the key determination to be made when evaluating whether an app is subject to the new policy is what is meant by “content” or the phrase “publisher of content-based apps.” While examples provided by Apple in connection with the release of their new policy revolved around publishers of content in a traditional sense, such as publishers of “magazines, newspapers, videos, music, etc.,” Apple has not provided a specific definition of content that is so limited. Moreover, an examination of Apple’s iOS developer agreement, which states that “apps utilizing a system other than the In-App Purchase API to purchase content, *functionality or services* in an app will be rejected,” indicates that the policy will not be limited to content apps in the traditional sense. Illustratively, a new app which would not have provided content per se (*i.e.*, the Readability app, which would have provided a service enabling purchasers to remove advertisements and other elements from webpages, providing only pure-text) was rejected from the App store within days of the new policy announcement, providing a further indication that the policy may not be limited solely to content publishers.

The new policy has been met with resistance by various apps developers and publishers. A number of companies have publicly rejected the new policy and are exploring legal options in connection with fighting it. In addition, the FTC and the Justice Department are currently taking preliminary steps to investigate the new policy for possible anti-trust violations. Although, the true impact of this new policy will not be known until it actually goes into effect and Apple begins to enforce it, it is likely to affect all companies who publish or are considering publishing an app.

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