World Intellectual Property Indicators 2017

Foreword

With the world economy on a firmer footing than in recent years, global intellectual property (IP) filings have reached new highs. Global patent filings grew by 8.3% and global trademark filing activity by 13.5% – making for seven years of straight increases. Following an 8% decline in 2014 and 1% growth in 2015, industrial design filing activity rebounded strongly in 2016 with 8.3% growth. As seen in previous years, China remained the main driver of global growth in filings. From already high levels, patent applications in China increased by 21.5%, as did filing activity for trademarks (+30.8%) and industrial designs (+14.3%). The United States of America also saw increases in filing activity for patents, trademarks and industrial designs, which grew by 2.7%, 5.5% and 12.1%, respectively. Other notable trends include large increases in trademark filing activity in Japan (+30.8%), the Russian Federation (+14.8%) and India (+8.3%), and rapid growth in industrial design filing activity in the Russian Federation (+9.4%) and at the European Union Intellectual Property Office (EUIPO; +6.5%). For the first time, however, the Republic of Korea saw declines in filing activity for all three intellectual property (IP) rights – patents (-2.3%), trademarks (-1.7%) and industrial designs (-4.6%). The 2017 edition of WIPO’s World Intellectual Property Indicators documents these and many other developments that shaped the global IP system in 2016. This year’s special theme presents new statistics on certain dimensions of the operational performance of IP offices, including the size of their examiner workforce, application pendency times and patent examination outcomes. We are mindful that differences in IP filing procedures limit direct comparability of operational statistics across offices, but believe nonetheless that they can usefully inform decision-makers, especially when monitoring trends over time. For the first time ever, this year’s edition also publishes statistics on geographical indications (GIs). Noting the absence of statistical information on this form of IP, we initiated a new statistical survey and received responses from 54 national and regional authorities responsible for administering GIs. Correctly capturing the number of GIs in force in different jurisdictions is challenging due to the multiple ways in which GIs can be protected. We recognize that the statistics collected are incomplete but view them as a first step toward establishing a more complete picture of GI activity worldwide in the future. Readers wishing to go beyond the statistics presented in this report can use the statistical tools on WIPO’s website (www.wipo.int/ipstats), notably the IP Statistics Data Center and the Statistical Country Profiles. Finally, I would like to thank our Member States as well as national and regional IP authorities for sharing their annual statistics with WIPO. Their invaluable cooperation makes the World Intellectual Property Indicators possible.

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World Intellectual Property Report 2017

Foreword

Technological innovations and openness of trade have profoundly changed the face of global production. Converting raw materials into parts and components, assembling final products and delivering them to the end consumer involves supply chains that span an increasing number of economies across the globe. The emergence of these so-called global value chains has been a force for good: they have made a large range of consumer products more affordable, stimulated economic growth and promoted the integration of developing countries into the global economy – creating opportunities for economic development and the alleviation of poverty. Intangible capital – notably in the form of technology, design and branding – permeates global value chains in important ways. It accounts for a good part of what consumers pay for in a product and determines which companies are successful in the marketplace. It also lies at the heart of the organization of global value chains: decisions on where to locate different production tasks and with whom to partner are closely tied to how companies manage their intangible capital. A large number of research reports have been published on the causes and consequences of the rise of global value chains, and many of these reports have acknowledged the key role played by intangible capital. However, few insights are available on why, how and how much. With our World Intellectual Property Report 2017, we hope to help unpack the intangibles black box, in particular by shedding light on how intellectual property (IP) fits into this box. The report begins by reviewing how global value chains have come about and how they are organized. Against this background, it reveals new estimates of the macroeconomic contribution of intangible capital to global value chain production. These estimates show that intangibles account for around one-third of production value – or some 5.9 trillion United States dollars in 2014 – across 19 manufacturing industries. Following the approach of our 2015 report, we complement these economy-wide perspectives with case studies of specific global value chains – namely, coffee, photovoltaics and smartphones. These three cases highlight the different mix of intangibles embedded in different consumer products and provide concrete insight into the role that different forms of IP play in generating returns to investments in innovation and branding. In addition, they explore how developing economies – notably China – have succeeded in participating in global value chains by building their own intangibles, and what opportunities may exist to pursue similar strategies in the future. The evolution of global value chains has been disruptive, with some companies thriving and others failing. It has accelerated the structural transformation of economies, with some workers losing their jobs and others seeing their skills richly rewarded. Technology continues to transform global patterns of production and is bound to lead to further disruption. For example, advances in 3D printing, robotics and automated manufacturing may well lead companies to relocate certain production tasks closer to the end consumer. In addition, the fast growth of emerging economies is set to prompt shifts in the geography of global value chains. Policymakers need to respond to the disruptive forces unleashed by globalized production. Global value chains are a human creation and could be reversed, but this would risk even bigger disruption. Shaping them in such a way that they benefit societies as a whole is thus an important policy imperative. As always, a report of this nature leaves important
questions open. Most importantly, while we present – for the first time – concrete estimates of how much income accrues to intangibles in global value chain production, it remains to be established who ultimately gains this income. At the level of countries, cross-border ownership and sharing of intangible assets make it difficult to associate assets and earnings with a particular country location. At the level of individual earnings, little systematic evidence exists on how intangibles affect the compensation of workers at different skills levels. Future research that offers empirical guidance on these questions would be of great value. We hope that this report will inform discussions on the evolving nature of global value chains taking place in different policy forums, and look forward to exploring the contribution of the IP system to global value chain production in our ongoing dialogue with Member States.

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Analysis

Brands Are Turning Trademark Cease-And-Desists Into Ads

By Bill Donahue

Law360, New York (December 6, 2017, 4:24 PM EST) -- Bud Light used an actor dressed as a medieval town crier last week to ask a Minnesota brewery to stop using the company's trademarks, becoming the latest brand to transform a cease-and-desist into a marketing stunt.

For full article, visit

SUPREME COURT OF THE UNITED STATES

STAR ATHLETICA, L.L.C. v. VARSITY BRANDS, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 15–866. Argued October 31, 2016—Decided March 22, 2017

The Copyright Act of 1976 makes “pictorial, graphic, or sculptural features” of the “design of a useful article” eligible for copyright protection as artistic works if those features “can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.” 17 U. S. C. §101.

Respondents have more than 200 copyright registrations for two-dimensional designs—consisting of various lines, chevrons, and colorful shapes—appearing on the surface of the cheerleading uniforms that they design, make, and sell. They sued petitioner, who also markets cheerleading uniforms, for copyright infringement. The District Court granted petitioner summary judgment, holding that the designs could not be conceptually or physically separated from the uniforms and were therefore ineligible for copyright protection. In reversing, the Sixth Circuit concluded that the graphics could be “identified separately” and were “capable of existing independently” of the uniforms under §101.

Held: A feature incorporated into the design of a useful article is eligible for copyright protection only if the feature (1) can be perceived as a two- or three-dimensional work of art separate from the useful article, and (2) would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated. That test is satisfied here. Pp. 3–17.

(a) Separability analysis is necessary in this case. Respondents claim that two-dimensional surface decorations are always separable, even without resorting to a §101 analysis, because they are “on a useful article” rather than “designs of a useful article.” But this argu-
Syllabus

The decision is inconsistent with §101’s text. “[P]ictorial” and “graphic” denote two-dimensional features such as pictures, paintings, or drawings. Thus, by providing protection for “pictorial, graphical, and sculptural works” incorporated into the “design of a useful article,” §101 necessarily contemplates that such a design can include two-dimensional features. This Court will not adjudicate in the first instance the Government’s distinct argument against applying separability analysis, which was neither raised below nor advanced here by any party. Pp. 4–6.

(b) Whether a feature incorporated into a useful article “can be identified separately from,” and is “capable of existing independently of,” the article’s “utilitarian aspects” is a matter of “statutory interpretation.” Mazer v. Stein, 347 U. S. 201, 214. Pp. 6–10.

(1) Section 101’s separate-identification requirement is met if the decisionmaker is able to look at the useful article and spot some two- or three-dimensional element that appears to have pictorial, graphic, or sculptural qualities. To satisfy the independent-existence requirement, the feature must be able to exist as its own pictorial, graphic, or sculptural work once it is imagined apart from the useful article. If the feature could not exist as a pictorial, graphic, or sculptural work on its own, it is simply one of the article’s utilitarian aspects. And to qualify as a pictorial, graphic, or sculptural work on its own, the feature cannot be a useful article or “[a]n article that is normally a part of a useful article,” §101. Neither could one claim a copyright in a useful article by creating a replica of it in another medium. Pp. 7–8.

(2) The statute as a whole confirms this interpretation. Section 101, which protects art first fixed in the medium of a useful article, is essentially the mirror image of §113(a), which protects art first fixed in a medium other than a useful article and subsequently applied to a useful article. Together, these provisions make clear that copyright protection extends to pictorial, graphic, and sculptural works regardless of whether they were created as freestanding art or as features of useful articles. P. 8.

(3) This interpretation is also consistent with the Copyright Act’s history. In Mazer, a case decided under the 1909 Copyright Act, the Court held that respondents owned a copyright in a statuette created for use as a lamp base. In so holding, the Court approved a Copyright Office regulation extending protection to works of art that might also serve a useful purpose and held that it was irrelevant to the copyright inquiry whether the statuette was initially created as a freestanding sculpture or as a lamp base. Soon after, the Copyright Office enacted a regulation implementing Mazer’s holding that anticipated the language of §101, thereby introducing the modern separa-

For complete decision, visit:https://www.supremecourt.gov/opinions/16pdf/15-866_0971.pdf
By Caroline K. Simons and Claire A. Collins

Our colleague Olga May recently blogged about how to plead a claim under the DTSA. In this next installment of the DTSA series, we’ll take a deeper look at some samples from the rapidly-expanding set of decisions addressing motions to dismiss DTSA claims. As courts grapple with this new statute, a number of lessons have how to plead a DTSA claim to survive some common attacks. (Lessons abound for defense counsel, too.) In many cases, defects can often be cured with an amended complaint. In others, however, the dismissal of a DTSA claim could result in a federal court declining to exercise supplemental jurisdiction over any remaining state law claims, landing the parties back in state court. A perusal through some recent DTSA cases can help companies and their counsel avoid needless expense and headache.

Takeaway 1 – Alleged facts sufficient to infer interstate commerce.

A DTSA claim—a federal cause of action—arises only where the alleged trade secrets are “related to a product or service used in, or intended for use in, interstate or foreign commerce.” 18 U.S.C. § 1836(b)(1). Whether these magic words need to be specifically pled in a DTSA complaint is still developing, but counsel would do well to keep this requirement in mind when conducting pre-suit diligence and at least plead sufficient facts to infer interstate commerce.

For instance, in Hydrogen Master Rights, Ltd. v. Weston, 228 F.Supp.3d 320, 338 (D. Del. 2017), the court granted a motion to dismiss based on, in part, the plaintiff’s failure to allege any nexus between the misappropriated trade secrets and interstate commerce. On the other hand, in Wells Lamont Industry Grp. LLC v. Mendoza, No. 17 C 1136, 2017 WL 3235682 (N.D. Ill. Jul 31, 2017), the court found that while plaintiff did not specifically plead that its goods were used in or intended for use in interstate commerce, its allegations that (1) plaintiff had a multi-year relationship with a particular customer; (2) the ex-employee defendant attended a sales meeting with that same customer in their regional office in a different state, using plaintiff’s product replicas; and (3) the customer subsequently cancelled a previously-arranged meeting with the plaintiff, together sufficiently allowed the court to “reasonably infer” that the plaintiff was doing business with the customer, and that “its goods were intended to cross state lines and thus intended for use in interstate commerce.”

Takeaway 2 – Make sure you can plead post-enactment conduct.

A complaint that lacks sufficient allegations showing that some form of misappropriation conduct happened after the enactment of the DTSA—May 11, 2016—may be dismissed for failing to state a claim. In Cave Consulting Grp., Inc. v. Truven Health Analytics Inc., No. 15-cv-02177, 2017 U.S. Dist. LEXIS 62109 (N.D. Cal. Apr. 24, 2017), the plaintiff alleged that the defendant stole its trade secrets and used them in a 2014 client meeting. The court dismissed plaintiff’s claims because they failed to make “specific allegations that defendants used the alleged trade secrets after the DTSA’s May 11, 2016 enactment.”

So what would suffice? A single conclusory allegation that there is “continuing use” of the trade secret may not be enough, as the plaintiff in Hydrogen Master Rights discovered. But if the facts support it, pleading that a misappropriation that occurred before May 11, 2016, continued past May 11, 2016—such as a competitor’s continued use of a trade secret that was acquired pre-enactment of the DTSA—would likely get you over the bar. As Fish explained earlier in this series, courts have allowed for alternative theories of

Adams Arms was particularly interesting because it directly tackled the application of the phrase “a continuing misappropriation constitutes a single claim of misappropriation” in 18 U.S.C. § 1836(d), the subsection dealing with the period of limitations. While the language of § 1836(d) states that this particular phrase is “for purposes of this subsection”—i.e., for purposes of calculating whether the 3-year statute of limitations has accrued—the defendant in Adams Arms attempted to argue that this also applied to limit recovery under the DTSA altogether, such that a DTSA claim would fail if an act of continuing misappropriation began before the DTSA. The court rejected this reading and expressly limited the subsection to determining when a claim accrues for statute of limitations purposes.

In another interesting decision we also blogged about earlier, Molon Motor & Coil Corp. v. Nidec Motor Corp., No. 16-cv-03545, 2017 U.S. Dist. LEXIS 71700 (N.D. Ill. May 11, 2017), a plaintiff overcame the defendant’s motion to dismiss argument that “no acts occurred after the effective date of the Act” via the inevitable disclosure doctrine. Using this doctrine, the court held that “[i]f it is plausible that some of the alleged trade secrets maintain their value today, then it is also plausible that [defendant] would be continuing to use them.”

**Takeaway 3** – Consider what extrinsic evidence is out in the public domain when assessing whether an alleged trade secret was publicized.

While the conventional practice is to confine motion to dismiss arguments to the facts pled in the pleadings and any documents that are attached to the complaint, remember that courts may also take judicial notice of facts that can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. See Fed. R. Evid. 201(b)(2). In practice, courts have taken judicial notice of the fact that certain information appears in press coverage or other publications, without regard to its truth. Because trade secret information must “derive[] independent economic value . . . from not being generally known,” 18 U.S.C. § 1839(3)(B), evidence that alleged trade secret information has been made public may be fertile ground for defense counsel to explore even at the motion to dismiss stage.

Fish has already briefly discussed Veronica Foods Co. v. Ecklin, No. 16-cv-07332, 2017 U.S. Dist. LEXIS 101325 (N.D. Cal. June 29, 2017), where the court dismissed a complaint alleging theft of customer and supplier lists based, in part, based on evidence that the alleged trade secret was already publicized. A closer look at the mechanics the defendant used to persuade the court is instructive. Plaintiff Veronica Foods had pled that its “full Customer List” was a trade secret and that it was not available from any non-public source. The defendant moved to dismiss, requesting the court to take judicial notice of Veronica Foods’ website and social media posts, as well as media reports and pages from third party websites, all of which reflected at least a portion of Veronica Foods’ customers. The court took judicial notice of the plaintiff’s own disclosures, but declined to take judicial notice of media reports or third party websites because it was unable to determine the veracity of those exhibits at the motion to dismiss stage. But based on the evidence that was accepted, the court held that the plaintiff’s original allegation that the “full” list of customers was its trade secret could not be reconciled with the partial disclosure given the absence of other allegations. In dismissing the claim, the court wrote that “[i]n light of that disclosure, Veronica Foods’ allegations that the ‘full’ list of customers is kept secret means only that some of its customer relationships are secret, and there is no specific allegation to support the conclusion that Veronica Foods’ relationships with the particular stores poached by [defendant] . . . were trade secrets.”

**Takeaway 4** – Plead factual allegations supporting reasonable measures to protect the trade secret.

Pleadings should allege specific facts that support a finding that reasonable measures were taken by plaintiff to protect the trade secret—conclusory allegations here will likely come under fire. In Raben Tire Co., LLC v. McFarland, 16-cv-00141, 2017 U.S. Dist. LEXIS 26051 (W.D. Ky. Feb. 24, 2017), the court granted the defendant’s motion to dismiss because the complaint was “entirely devoid of any allegations of how [plaintiff] protected the information in question from dissemination,” beyond merely stating that the information was “confidential and proprietary.” Similarly, in Singer v. Stuerke, No. 2:16-cv-02526, 2017 U.S. Dist. LEXIS 92773 (D. Nev. June 14, 2017), the plaintiffs did not allege that they had used reasonable measures to keep the information at issue secret and were ordered to replead. The court noted that the original complaint had failed to allege any provisions or agreements—whether written or oral—that would have “established a duty to maintain the secrecy of the trade secret or limit the use of the trade secret.” See also 18 U.S.C. § 1839(5)(B)(ii)(ll).
Conclusion

In sum, taking care when pleading a DTSA claim will not only help a complaint survive, it will also help narrow the number of issues the parties can fight over, build credibility with the court, and conserve the parties’ time and resources. Based on the lessons parties have learned so far, the diligence to be invested upfront certainly seems worth it.

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Trade Secrets  DTSA

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Lego Wins its first Chinese legal case against imitators

AP December 7, 2017, 8:21 AM

HONG KONG - Danish toymaker Lego said Thursday it has won a major legal victory in China, where a court ruled in its favor in a copyright case against companies making knockoffs of its famous colored bricks. The company said it was the first time it has won an unfair competition case against imitators in that country.

For full article, visit


Breaking Down the Jury Verdict in ZeniMax v. Oculus

Guest Article by Matt Hooper & Brian Sommer, IME Law – Road To VR

After only a few days of deliberating, the Oculus jury returned a verdict in favor of Plaintiffs ZeniMax and id Software totaling $500 million. ZeniMax was awarded money damages against Oculus, founder Palmer Luckey, (former CEO) Brendan Iribe and CTO John Carmack, but parent-company Facebook escaped monetary liability (although Oculus is a subsidiary of Facebook).

For full article, visit


Inventors Tell Justices Courts Can't Ax Patents Under Alice

By Steven Trader

Law360, New York (December 7, 2017, 2:41 PM EST) -- A group of inventors and entrepreneurs have thrown their support behind a patent holder’s request that the U.S. Supreme Court step in and decide that patents cannot be invalidated under Alice for covering an abstract idea or other ineligible subject matter.

For full article, visit