STATE BAR OF GEORGIA

INTELLECTUAL PROPERTY LAW SECTION
NEWSLETTER

W. Scott Petty, Chair | Spring 2002 | Schuyla Goodson-Bell, Editor

CHAIR'S COMMENTS

W. Scott Petty,
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Greetings! We have had another year of opportunities for your involvement with the Intellectual Property Law Section. I look forward to seeing you at one or more of our Section's forthcoming events. As you make your plans to attend a Section event, I invite you to visit the Section's Web site at www.georgiaip.org for event schedule and location information. Thanks to **Julie Sinor**, the Section's Webmaster, we enjoy the benefits of an updated Web site featuring an event calendar, membership information, and past newsletters. You will find more information about Section events and volunteer opportunities in this newsletter. In her capacity as Newsletter Editor, **Schuyla Goodson,** has once again produced a great newsletter for our Section!

INSIDE:

Building on the excitement of the 7th Annual IP Law Institute in November 2001, the Section sponsored a 3-hour CLE Program covering Patent, Trademark and Copyright Law Updates at the Mid-Year State Bar meeting in Atlanta on January 11, 2002. **Jeff Kuester** (Patent Prosecution), **John Fry** (Patent Litigation), **Michael Hobbs** (Trademark), and **James Trigg** (Copyright) provided excellent presentations on recent IP law decisions. This IP CLE Program attracted over 75 attendees, which represented the largest attendance of a CLE seminar at the 2002 Mid-Year State Bar meeting. In further support of the Mid-Year State Bar meeting, the Section also hosted a luncheon featuring presentations by **Rodgers Lunsford**, **Miles Alexander**, **George Thomas** and **Bob Kennedy** on a historical view of the practice of intellectual property law in Georgia. Thanks to **Art Gardner** for serving as the moderator for this panel discussion.

Our Committees are actively planning events on your behalf for the Spring and Summer months. Thanks to the efforts of **Griff Griffin** and the Patent Committee, the Section hosted a patent roundtable on February 7 covering the "On-Sale Patent Bar" and a patent roundtable on March 28 that focused on patent claim interpretation issues. **Frank Landgraff**, Chair of our

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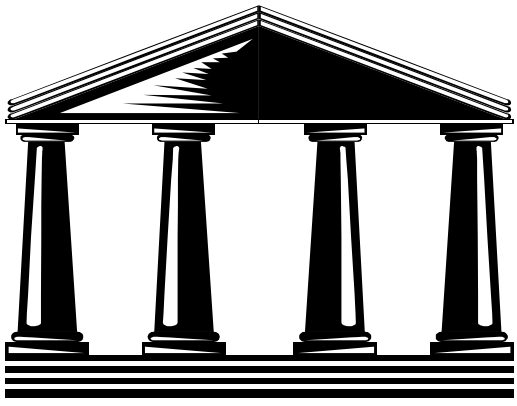

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Licensing Committee, hosted a March 14th CLE program on "Ethics and Professionalism Issues in Licensing." The Licensing Committee has applied to ICLE and to the Professionalism Board for approval to grant one hour of professionalism credit for attendance of this CLE program. On behalf of our Copyright Committee, **Judy Dray** planned the March 20th luncheon featuring the honorable Judge Stanley Birch. The Trademark Committee, headed by **Art Gardner**, has planned a trademark topic luncheon in April. **Todd McClelland**, Chair of our Social Committee, organized an after work social function at Jocks & Jills in mid April.

I encourage you to contact me or any member of the Executive Committee with your suggestions and comments about our Section. Thank you for your continued support of the Intellectual Property Law Section. ◆

EDITOR'S COMMENTS

Schuyla M. Goodson-Bell,
Trademark Counsel
The Coca-Cola Company
Atlanta, GA

Welcome to the Spring 2002 issue of OUR Newsletter. My comments will be brief given the extensive articles and edited interview spotlighting Joan Dillon of Kilpatrick Stockton LLP. Endless thanks to Larry Rosen and Leslie Smith for all their work, as well as article contributors, Mark VanderBroek and Laurie Farese of Troutman Sanders LLP, and Allen R. Jensen and Stacy D. Lewis of Finnegan, Henderson, Farabow, Garrett & Dunner LLP. Look for our next spotlight article highlighting Sandy Evans, Vice President/General Counsel of BellSouth Intellectual Property Corporation. I again encourage new members of the Section to get involved. Feel free to contact me with your ideas, suggestions, topics of interest and of course articles and commentaries via email at sgoodson@na.ko.com; via fax at 404-676-7682 or via telephone at 404-676-0582. I hope you enjoy this issue! ◆

SPOTLIGHT ON WOMEN IN IP IN GEORGIA

Joan Dillon is an exceptional woman and experienced trademark practitioner. She is a partner in the Atlanta office of Kilpatrick Stockton LLP. In this edited interview she shares her professional and personal life experiences and presents thought provoking advice for all lawyers.

Goodson: *Tell me about how you started practicing Trademark Law.*

Dillon: When I graduated from law school, I was one of two women in my class. The other was African-American and she went into the EEOC Division of the Justice Department. I had no connections in St. Louis, so I could not aspire to a private practice position because those were for "connected" people. I looked for a corporate job, and happily Ralston Purina Company, which was a major consumer goods producer was attracted to me — and hired me as its first trademark lawyer. I had taken a trade regulation course that touched on trademarks, but back in 1966, only NYU had a course in trademarks. Professor Walker Derenberg taught it. I did not take it. But I knew something – I had heard the word "trademark" so I said sure I will take the job. I was Ralston's first female attorney and its first in-house trademark attorney. So it meant that I had to go through years of unorganized files and bring in files from all the outside counsel who had, formerly, been handling Ralston's trademark work.

The beauty of having a corporate job first was that I was able to build my own office environment. I created my own docketing

and filing system. Before that, nothing was in place. So, I put it all together and I did it by "downloading" information from the then great people in trademarks. I learned litigation from Al Lee, then the best litigator in trademark law, and foreign practice from Horst Werder. Because I was with Ralston Purina, these people spent time with me. Each one of them shared his experiences and his practice history — well, I was a cute young woman then. Being an ingénue was useful to me because they just let me know everything they could tell me. They shared freely. You have to remember this was before Betty Freidan and Barbara Steinheim who basically pitted men against women and set women back materially. So, I had been spared this friction. I was mentored by some of the best in the business, and that was a fabulous experience for me. I had grown up on the very low end of the income spectrum. My family– my dad was literally a ditch digger. I got to travel all over the world with Ralston. It really was a growth opportunity. I cannot say enough good things about Ralston Purina. It was a beautiful experience.

Goodson: *What about your personal life at that time?*

Dillon: The problem with it was, at the time, I tried to have a family. I had three miscarriages – all of them on travel – one in Cologne, Germany, one in Paris, France and another one, I cannot remember where it was. But, to make a long story short, I could not have a child; I could not carry one, apparently I was too fragile.

Goodson: *Was that because of the demands of the job?*

Dillon: The demands of the job were such that since I was the only trademark counsel, if I needed something done in Germany I had to go do it. There was no one else I could delegate that responsibility to, so I did it. But I could not do that when I was pregnant, so I gave notice to the general counsel that the next time I got pregnant, I would probably only work until my second or third month – just long enough to know for sure I was pregnant, and leave the company. In those days, you did not get unlimited medical leave for pregnancy. You had a choice to make – you chose your job or you chose family. And so I chose family at that point. I stayed home three years, during which time I worked part-time for a general practitioner doing trademark work. I also was a member of a ten-member panel of arbitrators for the iron and steel industry and the U.S. Steelworkers Union. Doing this was interesting. It got me down into iron mines 2,400 feet under the ground and into the plants.

Goodson: *It seems as if you were mixing your professional aspirations with your personal desires.*

Dillon: I wanted to have a family – absolutely, and will never regret that decision. I think back about how I said that I had to have two children. There is an article that they wrote about me at Ralston Purina Company – way before I ever had any children and I said, "I was going to have a boy, and then a couple of years later I would have a girl." That is exactly what I did – two years and nine months later, I had a girl after I had my boy. I just decide to do things and then I do them.

When my daughter started nursery school I decided I was able to go back to work full-time. I went to work at Washington University and was Contract and Grant Administrator in the Research Office. For a couple of years, I negotiated about $52 million a year in funding for the University, and it was a great experience – I learned how to negotiate government contracts, research and collaboration agreements, development agreements, and dealt significantly with the NIH and other governmental agencies. I got a solid background in this area which helped me since in technology transfer work, which I did even more of later.

I did that for a couple of years, and then my husband and I got divorced. And when we

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did that, I decided I better get back on the horse that I loved. I decided that trademarks was my future. I had all the right connections. Ralston had invested a fortune in my education. They not only sent me around to attorneys, but they sent me to seminars — every seminar I wanted to go to. It was carte blanche — I could go. I started going to INTA in 1966, and have probably missed two or three meetings in my work life of about 35 years. There were only a few other people at my first INTA meeting. *(Laughter).*

I applied around, and Monsanto hired me and the same day, they let me go because they instituted a hiring freeze that day. So, I went to United States Steel in Pittsburgh. A few months after I got there, I began to get calls about St. Louis job offers. By then I had bought a house and I loved U.S. Steel. Again, another quality company with tremendous people in it. Very professional. U.S. Steel was so impressive. I would say I worked at the "steel company" because if you say you worked at U.S. Steel, that was almost like bragging. It was a great place to work. They had commercial marks, though and not a lot of consumer product marks. I got bored because there really was not enough work. I am a very high-energy person, and so I started doing product liability litigation work for U.S. Steel, and that was exciting. I would get to walk through six-foot diameter ducts that had ruptured because of thermal cycling and which were about 100 feet off the ground, and go into rolling mills and the like. I learned a lot about such things and have had great experiences, but then I realized I was going off in a different direction. So, I let it be known that I was interested in moving. Pittsburgh was not very good for my children either at the time.

Goodson: *When you say you "let it be known that you were interested in moving" what do you mean?*

Dillon: I let it be known. I have not often looked for a job. When I moved to Washington, D.C., it was the only time I looked for a job. Even my first job with Ralston Purina Company was gotten when a classmate came to me one day and said Ralston was looking for a trademark lawyer, so I went and I got the job — United States Steel – I let it be known, and at Levi's, I just let it be known I was ready to move.

You can let it be known through your connections. That is why I think going in anyplace – you have to network. For your own personal development. I mean, if you are good, you do not have to worry about getting a job - period. Even today, I call trademarks the dermatology of law. And right now we are in a bad economic decline, and, you know, you may see maybe a little falling off here and there because people do not go for facial appeal when money is tight. People have to pay for their bankruptcy action and their labor. But everything cycles.

Goodson: *Tell me about your work with Levi's.*

Dillon: I hated Levi's. Management, all Haas family, seemed to be paranoid. They never wanted to hear a negative opinion. The family had never been told "no". When I was there, I took on the responsibilities of two predecessor trademark attorneys. When they left Levi's, they got out of the trademark business entirely. I mean it was a sad, awful place. I stayed there about three years and decided "enough already." I was a single parent at this time so I had to be responsible. I went to Mel Owens, who was a senior partner with a firm in San Francisco. We met for lunch and he reminded me that when I was at Ralston Purina, I took over all of the Chicken of the Sea trademark work from him. He had been doing it for years, and when I went to Levi's, I pulled in more work from him. He said he could not afford to have me out there (in corporate) pulling in his work, so come work for him as of counsel. I loved working for Mel. He is a wonderful mentor in private practice. At this point, I had about 18 years of just corporate experience and now went to private practice. I worked with great clients for Owen, Wickersham & Erickson — toy companies, wine companies, the San Francisco French Bread Company, cheese

companies. He only liked clients that were fun. It was great – a great experience. I got married in San Francisco. To make a long story short, we were together eight years, off and on. My ex-husband accepted a partnership with Baker & Hostetler in Washington, D.C. and when I moved there, that is the first time I really looked for a job. There really were not many corporate trademark opportunities in D.C. – there's Marriott, Mars and Mobil in the D.C. area for corporate work – that was it at that time. There are probably more now. So, I had to stay in private. I started working for Herb Keil on a part-time counselship basis, with a minimum of $35,000.00 plus half of my billables. I worked for him for, maybe, six months. In all the jobs I have ever had, with the exception of Mel's, King & Spalding, where I met my dear friend Ginabeth, and my present firm, I have been the only trademark lawyer wherever I have been. I worked in D.C. for about three years. I became a partner in the Sterne, Kessler, Goldstein & Fox firm. Then I got a job offer from King & Spalding here in Atlanta. At that time, my husband and I were getting a divorce, I was looking to move to some place other than Maryland to live because the housing was expensive. So I came down and they made me a deal. I guess they wanted me for their trademark

work, because, when I was at Levi's in 1984, I did the U.S. trademark work for the Olympic Committee and some of that experience was needed for the Olympics in Atlanta. I worked with King & Spalding for six years. It tied with Ralston as the longest I have been in a job. I really enjoyed King & Spalding. They were quality people there; I cannot say enough about them. I really cared about people like Woody, Bruce and John. I left King & Spalding to come to Kilpatrick Stockton because after the Olympics, the work cooled down. I had known Miles forever. I had litigated with Miles on cases involving Levi's. From the beginning of time, I enjoyed King & Spalding, but I was the only solely trademark lawyer. I kind of felt like there was not enough emphasis on selling the trademark practice, and I really did not have enough to fill my shoes there. I do not like to feel like that because that is a very precarious position to be in and one in which you cannot stay busy. If you cannot stay busy, then you better find a place where you can stay busy. I came to Kilpatrick Stockton, and I have been busy ever since. As I said, trademark work can dry up and is cyclical, but you cannot worry about it too much when it does. July and August can be difficult, and holidays if you do a lot of work with foreign practitioners . . . .

Goodson: *How are things different today for women IP practitioners?*

Dillon: I've seen things change over time. When I started in practice as I said, people were friendly and very willing to share their experiences and their expertise with me to help me, guide me and counsel me; basically, to take me under their wing and I welcomed the mentoring experiences. It was primarily men because there were not very many women in the business at that time. There were a few – but very few – and I did not really meet them in my business.

I do not think it is the same anymore. There are so many women in the business. I mean, it is about equal now, men and women, and I think you take your mentors where you find them. I think a smart person, man or woman, will go to someone who is experienced and who's caring enough to share their experience with the young person; one who is generous about sharing, one who recognizes the human obligation to teach solely because the young person is coming to them for advice — on all levels. It is not just about legal issues necessarily, but professional growth, or how to manage or anything that they want to come for. I have found some of the associates in this firm, for example, will come and ask for advice. The ones who do

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not come — the ones who try to find out all of the answers on their own, are really handicapping themselves. Because it does not have to be that hard, you know? There are people here – Virginia Taylor, Miles, Jerre, I mean, you know, who are generous with their advice and with their experiences, and you can sit down with any of them at any time. I do not see people taking advantage of that as much, as say, I took advantage of those things when I was a kid. I really sucked up information. I was like a sponge; could not get enough of that kind of experience.

Goodson: *Why do you think associates don't take advantage of some of the more experienced lawyers?*

Dillon: I think they do not take advantage of all they could. Maybe they are threatened by asking a question; maybe they think they are exposing a weakness? Or maybe they feel they do not have the time or that they would rather spend the time billing a client than to find out something that might only take five minutes to find out if they had asked. You know there is a huge emphasis on billing these days. I mean kids are really stressing to make, their 1,800/2,000 hours.

If I were them today, I would be coming around asking to go to lunch with any of us old-timers. I seriously would. I would be seeking for an answer left and right because that's how I am. I am a total opportunist in that way. I do not mind getting my learning from any place I can, and I still do that. I still do. I go to Virginia Taylor, Miles Alexander and Jerre probably more than the kids do. I like bouncing my ideas off of these people and every one of them will put a different point of view on something. I will take all those points of view and will synergize them in my letter opinion to my client and that client is getting the benefit of some of the best brains in the business in that one letter. I do not see that happening as much as it should.

Goodson: *What should law firm leadership or management do to ensure that the associate is taking advantage of the intellect and experience in the firm?*

Dillon: I think they have the obligation certainly to encourage young people to take advantage of all of the educational opportunities

available. I also think that it is up to individual senior counsel to go by junior associates' offices occasionally – just drop in with a "How are you doing" kind of a thing. I regularly, probably at least once a week, do what I call my "walk-about," and I will go in and say – "how are you doing?" – and we will talk about anything. Usually, they will have a question about some matter, and if I had not stopped by, I would have never heard it. This also lets them know that I am accessible to them and my door is always open to anybody. Some associates want to know when they can come to see me to talk about an issue – I say "any time" – and I truly mean that. The firm culture has to say "we are here to help you" and then the attorneys have to make themselves available to do it. Now, a lot of senior attorneys may be busy — too busy, but they should not ever be too busy. You do not have to be too busy, and then the kids have to take the initiative. I mean, first of all, you are looking at the crème de la crème of the law school crop. These are people who obviously have worked hard to get where they are; they have got some skills, you have got to have that. As a lawyer, you have to have that anyway, plus your natural ability or you are never going to get anywhere as a lawyer. You have to take advantage of every opportunity you see and I see talking to Miles as an opportunity. We are not always going to have Miles, we are not always going to have Virginia – hell, I might even die, you know? Or retire or whatever. So, you need to take advantage of these

people and opportunities while they are here.

That is probably why I am here, I left King & Spalding – I loved the people there. I enjoyed the environment – it is a beautiful place. I loved the surroundings. But, here I had the ability to grow myself. I mean, I have been doing this 35 years, and I do not know everything. I can still learn every day, and every day I do, particularly when I ask Questions.

Goodson: *You've somewhat already answered one of my questions, or at least, I feel like you answered it, but I'm going to ask it anyway just to see if I get the same response…what guidance can you give the young woman practitioner today?*

Dillon: I would tell her first to sort out her priorities and decide what it is she really wants out of her life, and then look at what her answers are and see what she is trying to gain. What does she want to do with the capital that she has to invest. Once you know what direction you are going in, the rest will follow. I think young women, particularly, suffer from a wealth of opportunity, but with opportunity, comes choices and decision making. I have always felt that, one of the worse curses I have had were all the choices I have had to make. I lived with my choices simply by deciding that once you decide, you do not look back and second guess yourself. That way your choice is never wrong. You have to be prepared to make good choices. I think where a lot of women get stuck is they are not prepared to make those choices. They do not want to make those choices. They do not feel they have to make those choices. They want to have it all. Well, you know what? Get real – you are not going to have it all or you are not going to have a 100% of it all. You are going to have to make allocations of your time, your energy, your body and your investment. And there is a time when you can do this and a time when you can do that. I took three years, and I set it aside to get my kids into school. I say it was some of the best years of my life. I am so glad I did that. It gave the children a solid foundation and it also was a wonderful thing for me to be able to play with them that much.

But I was married too. I had the benefit of that at the time. Not a lot of women always do. Today, you almost have to have a half a million dollars to live in a decent house anywhere. You know, keep up with the Joneses. You have to decide if that is as important as having a good home and a loving family. Can I take a little less; have to live a little down? I know I could live up, but maybe I can live up when the kids get to be 12 and 13 and they do not need their mommy around as much. I think it sort of depends on what is important to you at the time, and you have to understand it is going to change.

Goodson: *What did you use to help you make your professional and personal choices?*

Dillon: I think as you grow up, you come to know what is valuable and important to you. You have to; nobody can make these choices for you. You have to do the prioritizing yourself. You do not have to stay with it. Priorities can change. They do not stay constant from year to year. There were times when my priorities were my children. And I will tell you, corporate work worked beautifully for them. I never got home past 5:30 p.m. when I worked for the first 18 years. My kids always got a good hot meal at dinnertime. and I helped with their homework and all of that. I had energy for roller-skating, and because the corporation gave me so much funding for travel and all, we took great trips together. I mean, my kids benefited a lot from my association in the trademark business. After I got into private practice, then life changed a lot since I did not have the same life and liberty. So, things just shifted.

With young women in law firms today having one to two children, with the firm's billable goals, it is a lot to handle. Plus, there is so much garbage – so much administrative crap that is thrown in on top of your regular billables, that puts you at about 2400 hours

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per year. If you can cut out a lot of that administrative, bureaucratic stuff, you are able to maybe have a little better lifestyle. I do not know today if I would try to be a trademark partner – I might be a trademark associate – but I would not try to become "of counsel" or a partner until my children were maybe 10 or 12 years old, and then I would probably go at it full force. I would be content with less money and more life.

I think in this millennium, young people are conflicted with wanting to have it all; they want to have the country club, they want to have the big houses, they want to have the two Mercedes vans. And you know what, the kids will suffer. You don't have to live like that. I see today that most upwardly mobile people in our society are putting their kids into holding pens. I am thinking what is going to happen with that generation? No wonder they are growing up so detached emotionally.

Goodson: *Would it be a fair statement for me to say that you believe that women can have it all, but not necessarily have it all at the same time? Having it all may mean you have to spread it out over time.*

Dillon: They need to set aside the time and the energy to get what they want. If they want good, strong, sound children, they have got to set aside the time to raise those children. And they have to have strength and conviction in their own ability, and know it will not matter to their long-term career to do that. It does not. Believe me. I think so many young people, get caught up in that trap from the time they graduate law school and make a quick run to be partner — if I step back for three or four years here, it is going to permanently affect me. I will never be a partner. No one is even going to notice it. In a blink of an eye – in the 35-year career that I have had — the time I spent away from work for my children was a blink of an eye. And I will tell you what, though, it was the best time – and I will never regret it, and it did not set me back.

Goodson: *Do you think it didn't set you back because of that period when you were the only woman and the only trademark attorney?*

Dillon: No. In today's environment, it would have delayed the timing, but it would not have permanently set me back. I have been a partner in two firms I was with, and you know what? Being a partner is wildly overrated. It really is — particularly a trademark partner. I mean, it never carries the prestige of a corporate partner. And it is such a mess – a partner is a partner – it is just a label. Points are what count in a partnership, if you are an equity partner. And so you can be an equity partner and make less than I can make as a salaried partner, for example, so I mean, it is no big deal. And that title does not mean anything to a person who has a certain amount of stand-alone ego.

Goodson: *Let's talk about the development of IP in Georgia. What have you seen since you've been here?*

Dillon: I think it has grown by leaps and bounds. First of all, the business of IP has grown. When I started in '66, trademarks were words and symbols. They were not colors. They were not smells. They were not sounds. They were only words and definable symbols. Now, trademarks are all of those things because of people like Miles and other far-thinking people, like Jerry Gilson and other practitioners.

These people pushed the envelope of the subject matter so much that now so much is encompassed within trademark law. The economy has grown and there are new kinds of businesses that did not exist in '66. Even in Georgia, in the ten years I have been here, I have seen the Trademark bar quadruple. The first year I was here, I was chair of the Trademark Subcommittee of the State Bar IP Section. And then, you know, it was no big deal, I mean, because there was nobody else much to do it. There were just a few people here like Jim Johnson and Rogers Lunsford and the Kilpatrick group. Of course, these people

were very active. But, other than that, most firms really did not have an IP group. This firm is unique in that it always had it – an IP group. It is just very odd, really, when you think about it, but I think the practice has grown and will continue to grow.

Goodson: *I've got two more questions, if you weren't doing what you are doing now, what would you be doing?*

Dillon: Well, that is a terrible question for me because I am single, and if you had told me when I was 35 that I would be single at 60 and working and not have very much else to do other than my hobbies, if I were not working, I do not know — I might have shot myself. But finding myself here, what would I do if I were not doing what I am doing now? Well, if I had all the money I want, I would probably be traveling, visiting all of those friends all over the world that I made through my trademark work, but probably still doing some trademark work because I love it.

Goodson: *Okay, this is it, — complete this thought or this statement – women in IP should —*

Dillon: Equip themselves intellectually. Accumulate as much knowledge as they can from every source available to them. Get involved in their practice so that they understand the history of the subject and know where it is now and then think about where they can take it.

Goodson: *and women in IP should not —*

Dillon: Limit their horizons, They are every bit as good as, if not better than, fellows because, in addition to the education and intelligence, they have the compassion and the understanding to do the job. Another thing women should not do is to slink around and say I'm sorry, when they know they are right.

Goodson: *Thank you.* ◆

TRADEMARK OWNERS CONTINUE TO PREVAIL IN BATTLES AGAINST CYBERSQUATTERS

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Growth in Internet domain names slowed considerably in 2001, as the economy weakened and speculators who once hoped to make money selling domain names dropped names they couldn't unload and, in many cases, were deemed "cybersquatters" by courts and arbitrators. Internet research firm Netcraft reports that the number of active web sites declined by 182,142 in November to reach 36.28 million web sites in December – only the second monthly decline in the past six years. VeriSign's registration of ".com," ".net" and ".org" names peaked at 32.4 million in June 2001 and dropped to 28.8 million on December 31, after more than doubling in 1999 and tripling in 2000. The World Intellectual Property Organization ("WIPO"), the most-used arbiter of domain name disputes under ICANN's Uniform Domain Name Dispute Resolution Policy ("UDRP"), reports that the number of cases filed with it fell from 1,841 in 2000 to a still substantial 1,502 in 2001.

The UDRP and the federal Anticybersquatting Consumer Protection Act ("ACPA") continue to provide effective remedies for trademark owners combating cybersquatters. In the two years since it was instituted, 4000 proceedings have been decided under the ICANN policy. Trademark owners have prevailed over domain name registrants in approximately 80% of them. Similar results have occurred in federal courts, with trademark owners succeeding in the sizeable majority of lawsuits filed under the ACPA. This article discusses some of the patterns of decisions involving classic cybersquatting; distributors' use of manufacturer trademarks in domain names; and "reverse domain name hijacking."

A. Classic Cybersquatting

Classic examples of what has consistently been found to amount to cybersquatting include: (1) registration of a domain name by someone attempting to rely on the goodwill associated therewith to sell the name at a profit; and (2) registration of a domain name with an intentional misspelling or variation of a well-known mark for the purpose of intercepting web users and diverting

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consumers from the trademark owner's site to an alternate (and often offensive) site. *See e.g., Victoria's Cyber Secret Limited Partnership v. V Secret Catalogue, Inc.*, 161 F. Supp.2d 1339, 1349 (S.D. Fla. 2001) (defendant violated plaintiff's rights under the ACPA by registering and using various misspelled domain names including, "victoriassexsecret.com" and "victoriassexysecret.com"); *The Snack Factory Inc. v. Neolgist, Inc.*, National Arbitration Forum, Case No. FA 94660 (May 25, 2000) (transferring the domain name "snackfactory.com" to complainant where respondent registered and acquired the domain name immediately upon its inadvertent lapse for the impermissible purpose of reselling it at a profit to the trademark owner).

"Typo-pirating" or "typo-squatting," as the latter practice has come to be known, can occur by adding characters or generic words to the domain name or trademark (e.g., victoriassexsecret.com, the infringing site, versus victoriassecret.com, the official site) or by registering common typos and misspellings of the domain name or trademark (e.g., www.wwwdisney.com in attempt to divert traffic from www.disney.com). The courts have consistently held that a domain name registrant's registration and use of Internet domain names which are intentional misspellings or variations of distinctive marks violates the ACPA and the ICANN policy. *See e.g., Northern Light Tech., Inc., v. Northern Lights Club*, 236 F.3d 57, 65 (1st Cir. 2001) (affirming district court's finding that defendant registered "northernlights.com" with the bad faith intent to divert traffic to its website from plaintiff's "northerlight.com" web site); *Shields v. Zuccarini*, 254 F.3d 476, 485 (3d Cir. 2001) (bad faith registration of five domain names that were intentional misspellings of plaintiff's famous Joe Cartoon trademarks violated the ACPA); *Electronics Boutique Holdings Corp. v. Zuccarini*, No. 00-4055, 2000 WL 1622760, at *9 (E.D. Pa. Oct. 30, 2000) (holding that defendant violated plaintiff's rights in "Electronics Boutique" under the ACPA by registering and using various "misspelled" domain names, including "electronicbotique.com" and "electronicsboutique.com"). Of course, should a trademark be considered generic or descriptive, it would not be accorded the same protection under either the ACPA or the ICANN policy. *See e.g., Cello Holdings, L.L.C. v. Lawrence-Dahl Companies, 89 F. Supp.2d 464 (S.D.N.Y. 2000)* (cello.com); *EAuto, L.L.C. v. EAuto Parts*, WIPO Arbitration and Mediation Center, Case No. D2000-0100 (Apr. 9, 2000) (eautoparts.com).

B. Distributors' Use of Manufacturers' Trademarks in Domain Names

Courts generally have held that a distributor violates a manufacturer's trademark rights by registering domain names that incorporate the manufacturer's mark, particularly where the registrant is a former or independent distributor which is not authorized to use the mark and is offering the same products or services offered by the trademark holder. *See e.g., Nav-Aids LTD v. Nav-Aids USA, Inc.*, No. 01 C 0051, 2001 U.S. Dist. LEXIS 17619, at *27 (N.D. Ill. Oct. 25, 2001); *Harrods Limited v. Sixty Internet Domain Names*, 157 F. Supp.2d 658, 679 (E.D. Va. 2001); *Washington Speakers Bureau v. Leading Authorities*, 33 F. Supp.2d 488, 499 (E.D. Va. 1999). Under these circumstances, consumer confusion, as noted by the courts, arises from the fact that "a domain name is more than a mere Internet address . . . . It identifies the Internet site to those who reach it, much like . . . a company's name identifies a specific company." *Cardservice International, Inc. v. McGee*, 950 F. Supp. 737, 741 (E.D. Va. 1997), *aff'd*, 129 F.3d 1258 (4th Cir. 1997). A former or independent distributor's use of a manufacturer's mark in its domain name is likely to lead consumers to erroneously believe that the web site is operated by the manufacturer or that the distributor or its web site is affiliated with, authorized, sponsored, or endorsed by the manufacturer. For example, a federal court in Florida recently found that the use and registration of the domain name <saturnusedparts.com> by Saturn Service, Inc in connection with its automotive parts business violated the trademark rights of the auto manufacturer Saturn Corporation. *Saturn Corporation Inc. v. Saturn Service, Inc.*, No. 01-6939, ___ F. Supp.___ (S.D. Fla. 2001).

Cases involving an authorized distributor's use of a manufacturer's trademark in its domain name have led to mixed results. In some of these cases an ICANN panel has ordered a transfer of the domain name to the manufacturer. *See, e.g., Easy Heat, Inc. v. Shelter Prod.*, WIPO Arbitration and Mediation Center, Case No. D2001-0344 (June 14, 2001); *Houghton Mifflin Co. v. Weatherman, Inc.*, WIPO Arbitration and Mediation Center, Case No. D2001-0211 (Apr. 25, 2001); *Motorola, Inc. v. NewGate Internet, Inc.*, WIPO Arbitration and Mediation Center, Case No. D2000-0079 (Apr. 20, 2000). In others, the distributor has obtained a favorable decision if it is using the domain name in connection with the bona fide offering of goods and services. *See Nicholas v. Magidson Fine Art, Inc.*, WIPO Arbitration and Mediation Center, Case No. D2000-0673 (Sept. 27, 2000); *Weber-Stephens Prods. Co. v. Armitage Hardware*,

WIPO Arbitration and Mediation Center, Case No. 2000-0187 (May 11, 2000). To be considered "bona fide" in this context, the offering of goods and services must meet several stringent requirements which include: (1) the registrant must actually be offering the trademarked goods or services at issue; (2) the registrant must be using the website to sell only the trademarked goods or services of the manufacturer, and not those of a competitor (e.g., use of Nikon-related domain names to sell Nikon and competitive cameras is not a legitimate use of the mark); (3) the website must accurately disclose the registrant's relationship with the trademark owner so as not to cause confusion as to who operates or sponsors the web site (it may not, for example, falsely suggest that it is the trademark owner, or that the website is the official site of the manufacturer or trademark owner); and (4) the registrant must not attempt to corner the market in all domain names incorporating a mark, thus depriving the trademark owner of reflecting its own mark in a domain name. *See, e.g., Oki Data Americas, Inc. v. ASD, Inc*., WIPO Arbitration and Mediation Center, Case No. D2001-0903 (Nov. 6, 2001); *Houghton Mifflin Co. v. Weatherman, Inc.,* supra; *Nikon, Inc. v. Technilab*, WIPO Arbitration and Mediation Center, Case No. D2000-1774 (Feb. 26, 2001).

C. Reverse Domain Name Hijacking

Trademark owners do not prevail in every case. Moreover, in limited situations where the trademark owner has commenced a proceeding in bad faith, the domain registrant will triumph on a claim for "reverse domain hijacking." "Reverse domain name hijacking" is defined by the ICANN policy as using the dispute resolution policy in a "bad faith attempt to deprive a registered domain name holder of a domain name." UDRP Rule 1. The phrase was coined as a few trademark owners began to misuse the dispute resolution procedure by knowingly and falsely alleging that a challenged domain name infringes or dilutes the mark.

To prevail on such a claim is very difficult. The domain name registrant must show that the trademark owner knew of the registrant's unassailable rights or legitimate interest in the disputed domain and nevertheless filed the complaint in bad faith. *See e.g., Cream Holdings Limited v. Nat'l Internet Source, Inc.*, WIPO Arbitration and Mediation Center, Case No. D2001-0964 (Sept. 28, 2001). Consequently, findings of reverse domain name hijacking are very rare, notwithstanding that the ICANN system has decided more than 4,200 cases in two years. Reverse domain name hijacking will be found only in those exceptional circumstances where the trademark owner makes an overly aggressive attempt to transfer or cancel the domain name. *See Goldline Int'l, Inc. v. Gold Line*, WIPO Arbitration and Mediation Center, Case No. D2000-1151 (Jan. 4, 2001) (bringing claim against Respondent for use of goldline.com to describe internet services is unreasonable given the multiple legitimate uses for which the laudatory term can be used); *Deutsche Welle v. DiamondWare Ltd.*, WIPO Arbitration and Mediation Center, Case No. D2000-1202 (Jan. 2, 2001) (reverse domain name hijacking found where Complainant knew that domain name was used in connection with an operating website with a bona fide offer of goods and services before notice of the trademark). For instance, a finding of bad faith is justified where a complainant's "wild allegations of bad faith" are made simply to harass the domain name holder, who it knows has legitimate interests in the domain name. *SMART DESIGN LLC v. Hughes*, WIPO Arbitration and Mediation Center, Case No. D2000-0993 (Oct. 18, 2000). Likewise, lack of candor concerning material facts in connection with the lack of legal merit to a complainant's position may also lead an arbitration panel to conclude the complaint was brought in bad faith. *Societe des Produits Nestle S.A. v. Pro Fiducia Treuhand AG*, WIPO Arbitration and Mediation Center, Case No. D2001-0916 (Oct. 12, 2001).

In the majority of cases, however, a finding of reverse domain name hijacking is not warranted as the trademark owner typically has a reasonable and good faith belief that its challenge to the domain name is a valid one – i.e. the complainant has reasonable grounds to believe the domain name registrant is cybersquatting. *State of California Managed Risk Med. Ins. Bd. v. Family Solutions*, WIPO Arbitration and Mediation Center, Case No. D2001-1032 (Mar. 29, 2001) (evidence that Respondent offered to sell domain name to Complainant was enough to show a reasonable belief of Respondent's bad faith); *see also Church of Houston v. Moran*, WIPO Arbitration and Mediation Center, Case No. D2001-0683 (Aug. 2, 2001); *Britannia Building Society v. Britannia Fraud Prevention*, WIPO Arbitration and Mediation Center, Case No. D2001-0505 (July 6, 2001); *Syndey Opera House Trust v. Trilynx Pty. Limited*, WIPO Arbitration and Mediation Center, Case No. D2000-1224 (Oct. 31, 2000).

D. CONCLUSION

Despite trademark owners' success in these legal proceedings, cybersquatters continue their efforts at

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Internet opportunism. ICANN recently designated seven additional top-level domain names: .biz, .aero, .coop, .pro, .museum, .name and .info; each of which provides new terrain for cybersquatters. Likewise, many businesses' domain names are up for renewal or expiration, sometimes resulting in lapses that create opportunities for speculators to once again hold hostage "tough-to-get" domains. Trademark owners should be apprised of the legal remedies available to them and remain vigilant, taking all necessary precautions to prevent cybersquatters from profiting on the goodwill associated with their trademarks. Based upon two years of case results, trademark owners generally will prevail in domain name disputes unless: (1) the domain name is a generic or descriptive word (e.g., apple.com); (2) the domain name registrant made legitimate use of the mark in its business prior to registering the domain name; or (3) the domain name registrant is making legitimate noncommercial or fair use of the mark (e.g., an authorized distributor using the domain name in connection with the bona fide offering of the trademarked goods). ◆

PATENT PROFANITY: WATCH YOUR MOUTH!

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Introduction

The phrase, "patent profanity," usually gets an audience's attention. The prospect of encountering "profanity," especially in the middle of an article on patent law, makes the audience sit up and take notice.

What we mean when we say "profanity," however, is not the profanities that got you in trouble as a child and prompted your parents to say, "Watch your mouth!" Instead, these are the words of "patent profanity," words completely inoffensive in any other context but words that cause all kinds of trouble in drafting patent applications. The trouble they cause warrants making them taboo for patent practitioners. So we call them "profanity." Using them may be fatal to the effectiveness of intellectual property protection.

Words to Watch Out For

A number of words can cause trouble for a patentee. Examples include *critical*, *key*, *special*, *peculiar*, *superior*, *essential*, *necessarily*, and *primary*. These are not unusual words. Nor are they rarely used. In fact, when drafting a specification or a response to overcome a rejection from the PTO, a practitioner might have a distinct urge to use them in an attempt to establish the patentability of the invention and distinguish it from the prior art.

But these words can limit the scope of claim language. When a court construes a claim, it may decide that the function of the invention, which the drafter described as "critical" to distinguish prior art, is a required element of the invention, even if not recited in the claim. Accused products or processes that do not perform the "critical" function will be held noninfringing.

Patentees Who Got Caught

Several cases show how patentees can pay a dear price for using patent profanity during prosecution. In *Pharmacia & Upjohn Co. v. Mylan Pharmaceuticals, Inc.*, 170 F.3d 1373, 50 U.S.P.Q.2d 1033 (Fed. Cir. 1999), Upjohn claimed a composition containing micronized glyburide and "spray-dried" lactose. In prosecution, Upjohn asserted the "criticality" of spray-dried lactose. Along comes defendant Mylan and its generic product containing anhydrous lactose, not spray-dried lactose. In the suit for infringement, the trial resulted in a finding of no infringement. The Federal Circuit affirmed. According to the court, a reasonable competitor would conclude that Upjohn "relinquished any interpretation of its claim that would cover glyburide compositions containing nonspray-dried lactose instead of spray-dried lactose."

In particular, the court focused on the following statements containing the profanity *critical* and *key*:

> As indicated in the specification, the use of spray-dried lactose is a critical feature of the present invention. Using lactose which is not spray-dried does not yield a formulation which is easily and readily manufacturable.

> The key feature of the present invention is the particular type of lactose employed in the composition. The claims in the specification clearly indicate the need for spray-dried lactose. If ordinary or nonspray-dried lactose is employed in place of the spray-dried lactose, then the advantages of the present invention are lost.

Pharmacia, 170 F.3d at 1377-78.

Upjohn tried to rely on the following statement in *Read Corp. v. Portec, Inc.*, 970 F.2d 816, 824, 23 U.S.P.Q.2d 1426, 1433 (Fed. Cir. 1992): "Every statement made by a patentee during prosecution to distinguish a prior art reference does not create a separate estoppel. Arguments must be viewed in context." *Pharmacia*, 170 F.3d at 1376. But according to the Federal Circuit, Upjohn's statements in favor of patentability could be reasonably interpreted as a broad disclaimer of what the invention was not . . . . Moreover, Upjohn's argument fails to address the clear and unequivocal statement in the first paragraph that spray-dried lactose was deemed to be a 'critical feature' of the claimed formulations.

Id. at 1378.

The court even noted Upjohn's reliance on the "criticality" of spray-dried lactose in the written description: "Critical to the success of the present composition is the employment of spray-dried lactose as the preponderant component by weight of the resulting composition." *Id.* at 1379, n.3.

Under *Pharmacia*, therefore, the term *critical* assumes its place in the list of patent profanities. Terms such as *peculiar* and *superior* also do, in view of the outcome in *Bayer AG v. Elan Pharmaceutical Research Corp.*, 212 F.3d 1241, 54 U.S.P.Q.2 1710 (Fed. Cir. 2000), *cert. denied*, 2000 U.S. LEXIS 7516 (2000).

Bayer's patent claimed a pharmaceutical composition containing nifedipine crystals with a defined specific surface area ("SSA") of 1.0 to 4 m2/g. Elan, a generic manufacturer, filed an ANDA with the Food & Drug Administration stating that its composition only covered nifedipine crystals of a SSA of 5 m2/g or greater. The district court granted a summary judgment of no infringement.

During prosecution, Bayer amended the SSA range of 0.5 to 6 m2/g to 1.0 to 4 m2/g. The Federal Circuit stated, "it is clear that, regardless of why it amended its claims, when it did so it unmistakably surrendered coverage to SSAs above 4 m2/g. As a result, it is precluded from asserting that the nifedipine composition that is the subject of Elan's ANDA infringes the '446 patent under the doctrine of equivalents." *Bayer*, 212 F.3d at 1252.

What made it so "clear" to the Federal Circuit were the arguments by Bayer before the PTO and the Board. In prosecution Bayer urged that nifedipine crystals with a SSA range of 1.0 to 4 m2/g provided the "peculiar" effect of maintaining a high blood level of nifedipine for a long period of time. Further, Bayer repeatedly argued that its claimed range of 1.0 to 4 m2/g was a superior and inventive range. The Federal Circuit concluded that a reasonable competitor would understand SSAs above 4 m2/g were therefore surrendered.[1]

The term *primary* also merits a spot on the list of profanities. Statements made by the patentees in *Transonic Systems, Inc. v. Non-Invasive Medical Technologies Corp.*, 2001 U.S. App. LEXIS 11993 (Fed. Cir. May 29, 2001) (unpublished), about the "primary features of the invention" resulted in a narrow claim construction.

Transonic argued that the disclosed equations were "critical" to achieving the purpose of the invention and were novel over the prior art. *Transonic*, 2001 U.S. App. LEXIS at *15. Therefore, the Federal Circuit held that the claims required the use of at least one of the equations included in the specification. In other words, assume the claim required the equation 2+2 to obtain the required variable of 4. If a competitor obtained the required variable of 4 using a different equation, e.g., 3+1, the competitor would not meet the limitations of the claims. *Id.*

Given this trend in the Federal Circuit to hold patentees to comments about the "criticality" of a patentable feature, we even express reservations about using the term *preferable*. As patent practitioners know, the term *preferable* is widely used and heavily relied on to try to broaden the scope of the claims. The current Federal Circuit has construed claims based on the intrinsic

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evidence to cover only the embodiments explicitly described in the specification, even if modified by the word *preferred*.

Although some patentees have succeeded in obtaining a claim construction broader than the "preferred embodiment," (*see Lampi Corp. v. American Power Products, Inc.*, 228 F.3d 1365, 56 U.S.P.Q.2d1444, 56 U.S.P.Q.2d 1445 (Fed. Cir. 2000); *Gart v. Logitech, Inc.*, 254 F.3d 1334, 59 U.S.P.Q.2d 1290 (Fed. Cir. 2001); *Generation II Orthotics, Inc. v. Medical Tech., Inc.*, __F.3d__, 2001 U.S. App. LEXIS 18420 (Fed. Cir. August 15, 2001)), many have not. In *Wang Laboratories, Inc. v. American Online, Inc.*, 197 F.3d 1377, 53 U.S.P.Q.2d 1161 (Fed. Cir. 1999), the Federal Circuit observed: "[W]hen the 'preferred embodiment' is described as the invention itself, the claims are not entitled to a broader scope than that embodiment.'" *Id.* at 1383, 53 USPQ2d at 1165, citing *Modine Manufacturing Co. v. United States International Trade Commission*, 75 F.3d 1545, 1551, 37 USPQ2d 1609, 1612 (Fed. Cir. 1996)). *See also Scimed Life Systems, Inc. v. Advanced Cardiovascular Systems, Inc.*, 242 F.3d 1337, 58 U.S.P.Q.2d 1059 (Fed. Cir. 2001); *Oak Technology, Inc. v. ITC*, 248 F.3d 1316 (Fed. Cir. 2001); *Watts v. XL Systems, Inc.*,232 F.3d 877, 56 U.S.P.Q.2d 1836 (2000), *reh'g denied*, 2001 U.S. App. LEXIS 1348 (Fed. Cir. 2001). In *Network, LLC, v. Centraal Corp.*, 242 F.3d 1347, 58 U.S.P.Q.2d 1076 (Fed. Cir. 2001), the Federal Circuit said: "Although the specification need not present every embodiment or permutation of the invention and the claims are not limited to the preferred embodiment of the invention . . . neither do the claims enlarge what is patented beyond what the inventor has described as the invention." *Id.* at 1352.

Conclusion

Choosing each word carefully, in drafting a patent application and prosecuting it, is paramount in light of the trend of the Federal Circuit to narrowly construe claims. Using patent profanity may do more harm than a mere rap on the knuckles; it may be fatal to the effectiveness of the patent itself. ◆

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(Footnotes)

[1] While the *Pharmacia* and *Bayer* decisions contain applications of prosecution history estoppel, the Federal Circuit also held that, irrespective of estoppel, there was no infringement under the doctrine of equivalents based on the admission of criticality, *Pharmacia* , 170 F.3d at 1378-79, or superiority, *Bayer* , 212 F.3d. at 1252. The absence of an element admitted by the patentee to be important should not be considered an insubstantial change for purposes of the doctrine of equivalents.

A GENERAL PRACTITIONER'S GUIDE TO TRADEMARK, COPYRIGHT, PATENT AND INTERNET LAW

The Intellectual Property Law Section is sponsoring a program at the State Bar Annual Meeting in Amelia Island, Florida. The title of the 3-hour program is "A General Practitioner's Guide to Trademark, Copyright, Patent and Internet Law," and the program will be Chaired by Jeffrey R. Kuester. The topics and speakers include: "Basic Trademark Practice Pointers" by Edmund B. (Pete) Burke, "Copyright for the General Practitioner" by W. Swain Wood, "What Every Lawyer Should Know About Patents" by N. Andrew Crain, and "Fundamental Internet Legal Issues" by Douglas M. Isenberg.

THE DEADLINE FOR SUBMITTING ARTICLES FOR THE NEXT EDITION OF THE NEWSLETTER IS JULY 4, 2002.

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