MVS BRIEFS

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In This Issue

USE OF COPYRIGHT REGISTRATION TO MAXIMIZE LEGAL REMEDIES

by Alexandria M. Christian

There are significant benefits to registering your copyrights early and often. A copyright protects your unique and creative expression of ideas. Although you may not be aware of it, people create copyrighted works every day. Unlike some other forms of intellectual property, copyright protection exists the moment artistic expression is put into a tangible medium, such as a book, painting, song, software program, etc. Under the current Copyright Act, registering a copyright with the U.S. Copyright Office is not required to receive protection over its work.

As a result, many people do not register their copyright. However, you should consider it because registration has many important benefits and incentives. It puts you in a much better position to assert infringement of your copyright and collect damages. It also provides constructive notice of the copyright to others and allowing the owner of a copyright to protect the copyright against importation of infringing copies from other countries.

There are many litigation-specific benefits to copyright registration as well. As an initial matter, registration is a prerequisite to bringing an infringement action in federal court. Registration is also helpful in establishing prima facie evidence in court of the validity of the copyright and to any of the facts stated in the certificate.

Perhaps the most important litigation-specific advantage of copyright registration is financial. If a copyright is timely registered, a copyright owner may elect statutory damages and demand that the infringing party pay the copyright owner's attorney's fees. This is a powerful tool to use against infringing uses of your copyright. It also can keep your costs down as well. Many times, the costliest part of enforcing a copyright in litigation is proving the amount of actual damages. Typically, proving actual damages suffered involves hiring an expert to testify at trial. Damages experts can present a large financial burden on the copyright owner, especially when the copyright owner is an individual. Worse, in light of the potential costs of copyright litigation, in many cases your actual damages suffered simply do not justify bringing a lawsuit.

However, the ability to elect statutory damages can substantially alleviate the financial burden of bringing a copyright infringement action. By electing statutory damages, the trier of fact determines damages a copyright owner is entitled to, basing the decision on a range allowed by the Copyright Act. Importantly, if a copyright is registered, it is evidence that can help meet the burden of proving willful copyright infringement. In the case of willful copyright infringement, the maximum statutory damage award rises from $30,000 to $150,000!

The second big benefit of timely copyright registration is a prevailing plaintiff's ability to seek attorney's fees. Like statutory damages, the ability to seek attorney's fees from the defendant can **significantly** decrease the overall cost of copyright litigation; a successful plaintiff's attorney's fees are paid by the defendant, rather than the plaintiff. The ability to seek reasonable attorney's fees can be a strong bargaining tool in settlement negotiations as well. In fact, the ability to seek attorney's fees can present such a burden to a potential defendant that in some cases it can effectively deter an individual from infringing the copyright without the need to initiate formal legal action.

Timing is everything. In order to take advantage of these litigation-specific benefits, a copyright owner **must** timely register their copyright. Registration is timely if it is either prior to infringement or within three months of the work's first print, whichever occurs first. However, in the event infringement begins within the first three months after publication, registration is timely if it is prior to the earlier of one month after infringement begins or three months after first publication. Some examples are helpful here:

- X creates a musical work and uploads it to a social media site on January 1. X registers its copyright on April 1. Because X is within the three month period, X may elect statutory

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damages and seek its attorney's fees in an infringement lawsuit against Y.

- X creates a musical work and uploads it to a social media site on January 1. Y begins infringing the work on February 1. X registers its copyright on March 15. Because X failed to register the copyright within one month of Y's infringement, X cannot elect statutory damages or seek its reasonable attorney's fees in an infringement lawsuit against Y.
- X creates a musical work and uploads it to a social media site on January 1. Y begins infringing the work on February 15. X registers the work on March 1. Because X registered within 1 month of the infringing act, X may elect statutory damages and seek its attorney's fees in an infringement lawsuit against Y.

In today's culture of immediate access and constant sharing of information, the risk of copyright infringement is higher than ever. Where the possibility of infringement is so high, it is more important than ever to register your copyright. The benefits of registration far outweigh the cost. If you have any questions regarding copyright protection or registration, MVS attorneys can help.

MVS ATTORNEYS ACTIVE AT AMERICAN CHEMICAL SOCIETY NATIONAL MEETING

by Jill N. Link and Jonathan L. Kennedy

The 246th American Chemical Society (ACS) National Meeting took place September 8–12, 2013 in Indianapolis, Indiana. Three MVS attorneys from the biotech and chemical practice group attended the meeting and provided CLE for attendees. Jonathan Kennedy, Daniel Lorentzen and Jill Link attended the meeting and provided legal programming, including a two-hour symposium on "Protecting and Capitalizing on Your Intellectual Property" for the division of Chemistry and the Law. PDF copies of their presentation are available upon request from MVS.

A highlight for the MVS attorneys was attending a session provided by Alton Brown of The Food Network to celebrate publisher C & EN's 90th year of publication. You may be familiar with Alton Brown as an author, speaker and TV host for The Food Network Series *Iron Chef America, Good Eats, The Next Food Network Star,* or *Cutthroat Kitchen*. Alton Brown spoke to a limited group of attendees about the intersection between food and science. He shared numerous antidotes of his culinary teaching and upbringing along with his passion for understanding the science behind food and cooking techniques. Notably, Brown's discussion interweaved ten culinary beliefs that have been or can be disproved by science, namely by principals of chemistry. For example, we explored concepts of French culinary techniques including flambé and other uses of alcohol in food, and confirmed the presence of alcohol is not, in fact, entirely cooked off when using these techniques. Another example included the myth that searing meat seals in juices and moisture. Again, Mr. Brown analyzed the cellular makeup of meat tissues to confirm that protein damage caused by searing in fact releases moisture as a result of cellular denaturing. These and other myths and misnomers about cooking techniques were discussed with the group in a very fun presentation.

The ACS meeting energized MVS attorneys to further delve into the area of food processing (i.e., large industrial scale methods of cooking and/or preparing foods) to analyze the effects and importance of innovations that may be protectable by trade secrets and patents. The public does not often consider food preparation or cooking methods to contain patentable subject matter. Although many products and processes involving food are not patent protected, culinary innovations including both products and processes of making food products represent patentable subject matter. Often, products and/or processes may instead be kept as trade secrets to better obtain the full returns for innovations. We are all familiar with Coca-Cola and the formula that remains a trade secret after more than 100 years. Although this may be one of the most well-known examples of a trade secret for a food product, there are many others. However, Coca-Cola provides a quintessential example of proper trade secret management in the food industry. Despite research and development, reverse engineering and use of various analytical techniques, no competitor has been able to identify the exact recipe required to make Coca-Cola. The company has also taken great extremes to protect its trade secret, including withdrawal of the product from markets including India for nearly two decades as its formula was not believed to be adequately protected in that country. In addition, the formula is said to be known by only two individuals, whose identities have never been revealed. Each person is said to know only one half of the formula and both individuals have never been allowed to travel together. These of course are great stories of maintaining trade secret protection. However, patenting remains available for food and processing techniques as well.

Research and development and innovations in the food industry clearly represent patentable subject matter. Most often, patents are pursued to protect methods of making a food product and/or the machinery that is employed for such methods. For example, improvements in food processing have allowed improved methods of slicing, grading, shredding and otherwise processing foods, such as cheeses. Patent protection has also involved labor enhancing techniques. The possibilities are endless and represent further areas for innovation and improvement for companies to obtain patent protection.

RENEWED EMPHASIS ON INNOVATION IN IOWA (PLACES TO GO FOR HELP)

INTRODUCTION

Historically Iowa has a very respectable ranking in innovation. The Froelich "Waterloo Boy" tractor was the John Deere precursor. The early Collins inventions evolved to Rockwell Collins which remains central in military and related technology invention. The buffered aspirin was invented at the University of Iowa. Iowa State enjoyed George Washington Carver's work in agriculture and Isaac Atanasoff's pioneering in digital computers at Iowa State. The University of Northern Iowa has patents in the chemistry field and such things as soybean-based dielectric fluids. Names such as George Gallup for the Gallup public opinion poll, Maytag for home appliances and ACT for academic testing are nationally renowned.

The more recent biotechnology revolution in field crops, along with the search for renewable energy fuels, has put Iowa in the center of an agricultural boom in innovation. This has rippled out from the plant sciences to almost all phases of agribusiness. Higher yields need new ideas for planting, harvesting, transport and processing. GPS technology can be applied to field work. Internet and software methods help producers in buying, selling and planning.

Iowa is typically in the top half of the fifty states in number of patents granted to its citizens. This is indicative of a high level of innovation in light of Iowa being in the bottom half of population.

THE RENEWED EMPHASIS

Although not new, a variety of private, public, and public/private joint ventures are being emphasized to advance innovation in Iowa. As indicated above, our public academic institutions have long been leaders in not only public innovation but collaboration with private industry. More recently government has concluded innovation can translate into more and better jobs for its citizens.

EXAMPLE - THE IOWA INNOVATION CORPORATION

In 2011, the Iowa Legislature founded the Iowa Innovation Corporation. IIC advertises the following goals:

- Accelerate good ideas into bankable ventures.
- Build partnerships to create a statewide sustainable innovation network.
- Advocate for ongoing innovation-based resources to grow Iowa's economy.

More information is available at iowainnovationcorporation.com/about-us. IIC is funded by a mix of public and private funds. In turn it provides both technical and financial assistance to Iowa businesses, both big and small.

Examples of the assistance and results can be seen at their website. IIC worked with a northeast Iowa (Elkader) company to advance its product line of equipment to help engineers evaluate structural soundness of buildings and other infrastructure. An Ames based company innovating in online workforce and employee training software is expanding into other areas.

Whether a long-existing company or a startup, Iowa innovators can at least investigate this type of option. Sometimes a little assistance can push an idea from the drawing board to reality.

OTHER POTENTIAL SOURCES OF ASSISTANCE

IIC frequently works with federal programs such as the Small Business Administration's SBIR/STTR programs (see "small business research/small business technology transfer website at www.sbir.gov). The SBA provides assistance in starting businesses as well as managing them. Loans and grants are also offered for qualifying entities. Iowa's small business development centers associated with SBA are distributed around the state (Ames, Fort Dodge, Burlington, Council Bluffs, Davenport, Dubuque, Iowa City, Marion, Mason City, Ottumwa, Spencer, West Des Moines, Waterloo, Creston and Sioux City).

At www.iowaeconomicdevelopment.com, another state government program advertises a specific "Iowa Innovation Acceleration Fund." Its website describes the fund "promotes the formation and growth of businesses that engage in the transfer of technology into competitive, profitable companies that create high paying jobs." The funding is focused on commercializing research, launching new start-ups and accelerating private investment and industrial expansion efforts that result in a significant capital investment. The website describes a number of different programs that try to match up with different types of innovation and needs.

CONCLUSION

The conventional American method of funding your own innovation personally or through private debt or venture capital is supplemented with other options of government or government/private programs. Whether you might meet eligibility requirements or these programs fit for your purposes depends, of course, on case-by-case factors. But it is important to know about these options. At a minimum, these programs touch a wide variety of public and private entities, so they might have referral information that would fit your situation even if their programs do not.

THE VALUE OF PATENT APPLICATIONS

by Kirk M. Hartung

Patent applications can give you value from several perspectives: offensive and defensive values, marketing value, and portfolio asset value. One or more of these are present in every patent application.

ON THE OFFENSE:

Protecting your own innovations and particularly those that are or will be commercialized is a play by your offense to gain an advantage over the competition. You score when the application issues as a patent to preclude your competitors from making, using, selling, or offering for sale a product or service that is covered by your patent. Even before issuance of the patent, the pending application may deter your competition because of the risks they face simply by having "patent pending" status. For example, a patent application is confidential for at least the first 18 months after it is filed. Therefore, your competitors do not know the scope of protection you are seeking or when the application was filed. This uncertainty may be sufficient to keep them from copying your products or services which have been publicly disclosed. Otherwise, they run the risk of having inventory and marketing materials that may infringe your patent which may issue at some unknown time in the future. So you get a head start in the market place.

ON THE DEFENSE:

Even if you do not plan to introduce everything that comes out of your research and development, filing a patent application on your non-commercialized products or processes can keep a competitor from getting their own patent on the same or similar invention. A patent application is normally published 18 months after the filing date. The published application can be cited against a later-filed application by another party, and potentially preclude issuance of a patent to them. Thus, your published application precludes anyone from getting a monopoly on that invention or any obvious variation of the invention. Your competitor may also have spent time and money pursuing a patent on an unprotectable invention, since you beat them to the Patent Office with your earlier filed patent application.

MARKETING VALUE:

When you file a patent application on an invention, you are allowed to use "patent pending" on all marketing relating to the invention. This designation often times carries the connotation or impression in the minds of consumers that the product or process is innovative, new and unique. For some, that is a good reason to buy your product or service. The average patent pendency is approximately three years, so you can use "patent pending" during that time to your advantage in the market place. The cost of the patent application may be less, or far less than the value of saying that your product or service is "patent pending." So even in those situations where issuance of a patent may be questionable for one or more reasons, the marketing value may be worth the cost of the application.

PORTFOLIO VALUE:

Just like an issued patent, a pending patent application is an intangible asset that adds value to your business. Multiple patents and applications create a portfolio which may increase your worth to potential purchasers and licensees. This portfolio also may provide leverage for cross licensing with a competitor, such as in an infringement situation. One or more patent applications may also be important to potential investors and venture capitalists. A patent application can also be used as collateral with some lending institutions. These different aspects of portfolio value are, in part, a result of the offensive, defensive and marketing values derived by filing patent applications.

WE'RE THERE

October 9-10
Ed Sease attended a seminar on Patent Litigation in Chicago, IL.

October 18
Ed Sease spoke on the Impact of America Invents Act (AIA) on Patent Litigation at the 75th Anniversary Celebration of the Iowa State University Research Foundation in Ames, IA.

October 29
Cory McAnelly and Alexandria Christian coached teams participating at the Iowa Bar Association Middle School Mock Trial Program competition.

November 1
Scott Johnson served as a judge at the 14th Annual International Intercollegiate Mediation Tournament.

November 7-9
Kirk Hartung attended the Fall meeting for LEGUS International Network of Law Firms in Washington, D.C.

December 18
John Goodhue, Kyle Coleman and Luke Holst will present at the National Business Institute's *Find it Free and Fast on the Net: Strategies for Legal Research on the Web* in Des Moines, IA.

February 20-23
Jill Link will attend the Association of University Technology Managers (AUTM) Annual meeting in San Francisco, CA.

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