

Intellectual Property Section

Alabama State Bar Association



MAY 2006

VOLUME 3, ISSUE 1

EXAMINING THE ELEMENTS OF PATENT INFRINGEMENT



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The day has arrived when your client comes to you, his crown jewel patent for building houses using blue widgets in one hand, and a competitor's brochure in the other, ready to go guns blazing into court alleging patent infringement. He is selling blue widgets like gangbusters from his newly built factory, his coffers are overflowing with cash, and he needs to stop this competitor before he starts losing market share to the competitor who already has distribution chains and big accounts with all of your client's burgeoning customers.

Patent infringement is defined in 35 U.S.C. §271. The section sets out the different types of direct and indirect infringement. Direct infringement, as defined in sections 271(a), (e), and (g), is alleged when the entity being sued has made, used, offered to sell, imported or sold a product or a method that includes all of the elements of a claim in a patent. Indirect infringement, as defined in sections 271(b), (c), and (f), is alleged when the entity being sued does not directly infringe, but performs acts which induce another to infringe or contribute to another infringing. It is important to note that when alleging an indirect infringement, a direct infringement must occur.¹ In order to analyze any infringement you must answer the Who, What, Why, Where, and When of infringement.

- ♦ **WHO** is the infringer?
- ♦ **WHAT** act infringes the patent?

- ♦ **WHY** is the act an infringing act?
- ♦ **WHERE** did the infringing act occur?
- ♦ **WHEN** did the infringing act occur?

We will take these questions out of the order they are presented above, so that we can answer the ones generally universal to all types of infringement first.

Why an act is an infringing act is a two step process. "First, a claim is construed without regard to an accused product.... Second, the claim is compared to the accused product, to determine whether all of the limitations of the claim are present either exactly or by a substantial equivalent."² Claim construction is a matter of law,³ and is usually determined in a *Markman* hearing. Once the claim is construed, the test, as explained in *Warner-Jenkinson Co. v. Hilton Davis Chemical Co.*, is "does the accused product or process contain elements identical or equivalent to each claimed element of the patented invention?"^{4,5}

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When an activity occurs is important in determining whether an infringement has occurred. A patent may only be infringed during the term of a patent. In some instances, this time period may begin before the issuance of the patent, if the client can prove the infringer was given notice of the claims that eventually issued in the patent. After issuance, the patent may be infringed until the date the patent expires. Expiration may occur after the statutory period for the term of the patent has expired, or after the patent is expressly abandoned or abandoned from failure to pay a maintenance fee.⁶

Where an infringing act takes place is of importance because patent laws are meant to protect activity within the United States.⁷ However, activity aboard vessels that are only temporarily in the United States generally will not be considered an infringement.⁸

Turning now to the remaining questions, it will be most efficient to discuss the questions with respect to each type of infringement. Let us now examine the “who and what” of infringement.

271(A) DIRECT INFRINGEMENT

Section 271(a) of the patent code prohibits the unauthorized making, selling, offering to sell, using and importing into the United States of any patented inventions.

Who infringes a patent is of obvious importance when considering patent litigation. In most instances, the direct infringers will be the easiest infringers to go after.⁹ So determining who made, sold, offered to sell, used, and/or imported the patented invention in the United States is important. By examining the different “who”s also answers the question: what was the infringing act.

Reviewing the hypothetical, we know the competitor has offered to sell the patented blue widget. Once he has sold a blue widget, he has violated the “sell” provision of the statute. Thus, he is an infringer for offering to sell and will be an infringer once he has sold the widget. If the competitor purchases the blue widgets from a U.S. manufacturer, then the manufacturer has infringed by making the patented device. Making requires the operable assembly of the whole, and not simply the manufacture of the parts.¹⁰

Now, if the manufacturer is outside the United States, then, the manufacturer is not an infringer of the U.S. patent for making the patented invention. He may, however, be an infringer by selling or offering to sell the patented device in the United States. Regardless of the status of the manufacturer, when the competitor imports the blue widget into the United States, the competitor has infringed by importing the blue widget.

Finally, a person who uses the invention is an infringer. This would include the customers who have bought the blue widget from the competitor. Buying, though, is not enough. Use likely requires more than the mere display or possession of an infringing device.¹¹ For business reasons, though, suing a person who uses the infringing device may not be in the best interest of the client. The client’s goal includes building a relationship with all of these customers so that they will become the client’s customers. A lawsuit against the customer will probably strain this relationship.

SECTION 271(B) ACTIVE INDUCEMENT OF INFRINGEMENT

Active inducement requires actively and knowingly aiding and abetting another’s direct infringement.¹² The “who” must be a person who actively induces infringement, meaning a “specific intent to encourage another’s infringement.”¹³ The “what” is the intent for an infringing act to occur. The intent may be inferred from the circumstances, but requires, at a minimum, evidence of awareness of the patent.¹⁴

Let’s assume our blue widget patent includes claims directed to a method of using a blue widget for building houses. The competitor does not build houses, and does not directly infringe these claims of the patent. But in the competitor’s brochure, a picture shows a carpenter with a blue widget building a house, and accompanying text that states “using a blue widget to build houses saves you time, money, and makes a better house. CALL 867-5309 for all your house building needs using blue widgets.” Further, the patent was sent to the competitor prior to this brochure, and the client particularly pointed out the method claims. Obviously, the competitor is actively inducing infringement of the patent.

SECTION 271(C) CONTRIBUTORY INFRINGEMENT

Contributory infringement requires (1) the sale, offer to sell, or import (2) a material component of a patented article or a material for use in practicing a patented process (3) which is not a staple article of commerce suitable for substantial non-infringing use (4) with knowledge that the article is especially made or adapted for use in an infringing act.

For contributory infringement, the “who” of infringement requires (1) selling, offering to sell, or importing a material component and (2) knowledge that the article is especially made or adapted for use in an infringing act. Knowledge requires the contributory infringer was on notice that such a use was patented and was not authorized.¹⁵

“What” infringes hinges on two elements: (1) what is a material component and (2) when is a material component a staple article. A product provided by the infringer need not be the heart of the invention, but some components may be so trivial that they are not considered a material part of the invention.¹⁶ Whether the product provided by the infringer is a staple article of commerce must compare the product of the infringer and not only the features or components of the product that may infringe.¹⁷

Returning to the blue widget, let’s assume the competitor sells primed, but unpainted, widgets. Everything else about the widgets reads on the claims of the patent. The brochure still says the widgets are used for house construction, just like the patent, and that the customer should paint the widgets blue. It would seem obvious that the widget is a material component. You search for other uses (that is, whether there is a substantial non-infringing use of widgets) and find nothing. The competitor rightly believes he is clear from direct infringement (the widgets are not blue), but selling the widgets is an indirect infringement once you show that a customer has painted the widget blue.

SECTION 271(E) INFRINGEMENT BY ANDA SUBMISSION

Under the provisions of 271(e), a “new (and somewhat artificial) act of infringement for a very limited and technical purpose that relates only to certain drug applications” was

created in order to protect pioneer drug patent holders from threats presented by new drug applications under review by the FDA. Under this section, a filer of an abbreviated new drug application (ANDA) submits a patent certification¹⁹ and states that the patent is invalid, not infringed or unenforceable.

SECTION 271(F) EXTRATERRITORIAL INDUCED AND CONTRIBUTORY INFRINGEMENT

Section 271(f) tracks sections 271(b) and 271(c) for extraterritorial activity. The purpose of section 271(f) is to prohibit the exportation of a part of the manufacturing process to a foreign location in order to avoid infringement.

Section 271(f)(1) is directed to the active inducement of combining uncombined parts that when combined would infringe the patent if the combination was made in the United States. The statute requires that the infringer provide “all or a substantial portion of the components of the patented invention” to the foreign entity for combination. This section, then, is similar to active inducement under 271(b), except it is only directed to patented products, not patented methods²⁰ and includes the additional requirement that the infringer must provide “all or a substantial portion” of the patented product.

Returning to the blue widget, when the competitor exports an unpainted widget out of the country, he may still be an infringer under 271(f)(1). The same analysis is required regarding his “active” inducement of getting the foreign entity to paint the widget blue, and you must also analyze whether the widget alone is enough for a substantial portion of the components.”

Section 271(f)(2) is directed to extraterritorial contributory infringement. Like 271(c), the statute excludes staple articles or commodities with substantial non-infringing uses. The difference, however, is that 271(f)(2) may be applied to *any component* of a patented invention and is not limited to components that are a “material part of the invention.”

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Fair Use Of Trademarks:

Recent Strengthening Under

KP Permanent Make-Up, Inc. v. Lasting



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Intellectual property rights refer to the legal entitlement that attaches to the expressed form of an idea, or to some other intangible subject matter. This legal entitlement generally provides its owner with certain limited exclusive rights -- or legal monopoly -- in the expressed idea, such as an invention, identifying mark, or literary or artistic expression. Congress reasoned that by granting private parties these monopolistic rights for a limited time, innovation would be incentivized and society as a whole would ultimately benefit. At odds with these exclusive rights, however, is the immediate public interest in free competition and the flow of information. Therefore, by its nature, the concept of intellectual property is at the center of competing public and private interests.

As a practical matter, the balance of these competing interests and the extent to which intellectual property rights exist, are largely determined by the extent to which a court will allow a person utilize another's intellectual property without actually misappropriating any legal rights thereto. The legal concept of "fair use" reflects this safe harbor to what would otherwise be infringing use of another's intellectual property.

In late 2004, the United States Supreme Court issued an opinion in the matter of *K.P. Permanent Make-Up, Inc. v.*

Lasting Impression I, Inc. et al., 543 U.S. 111 (2004) that resolved a split among the circuit courts of appeal over the burden of proof a party bears when asserting a fair use defense. In so doing, the Court markedly strengthened the defense of fair use to claims of trademark infringement and unfair competition under the Lanham Act and brought into focus the precarious balance between competing private and public interests that intellectual property straddles.

In 1990, K.P. Permanent Make-Up ("KP") began using the word "microcolor" to identify and describe the range of colors and shades of pigments that it offered for its permanent makeup services (microinjections of pigment into the skin somewhat akin to tattooing).

In 1992, Lasting Impression, KP's competitor, began using the words MICRO COLORS to identify its line of permanent makeup pigments and subsequently obtained registration of the mark in 1993. Lasting's registration became incontestable in 1999. Also in 1999, KP substantially expanded its use of the term "microcolor," releasing a ten-page advertising brochure that featured "microcolor" in large, stylized typeface. This prompted Lasting to send a cease and desist letter to KP, demanding that it stop all use of the word "microcolor" for its products and services. KP, in turn, filed a complaint against Lasting in the Central District of California, seeking declaratory judgment that its use of the microcolor mark did not infringe upon Lasting's registered trademark, and Lasting counterclaimed for infringement.

KP sought summary judgment on the infringement counterclaim based on the statutory affirmative defense of fair use, as provided by Section 33(b)(4) of the Lanham Act. The fair use affirmative defense is available to an alleged infringer provided that its use of the registered mark “is descriptive of and used fairly and in good faith only to describe the goods or services” of a business. After finding that KP used the term only to describe its goods and not as an identifying mark, the district court held that KP was acting fairly and in good faith because the undisputed facts showed that KP had used the term “microcolor” continuously from a time before Lasting adopted the two-word, plural variant as an identifying mark. Without inquiring whether KP’s use of the trademark was likely to cause confusion, the district court concluded that KP had established its affirmative defense of fair use and entered summary judgment for KP on Lasting’s infringement claim.

On appeal to the Ninth Circuit, Lasting argued that the District Court erred by failing to consider whether KP’s practice of using “microcolor” was likely to cause consumer confusion. In reversing the entry of summary judgment, the Ninth Circuit determined that “KP could only benefit from the fair use defense if there is no likelihood of confusion between KP’s use of the term ‘microcolor’ and Lasting’s mark.” Stated otherwise, the Ninth Circuit effectively placed the burden of proof on KP to show absence of consumer confusion in order to establish a defense of fair use. Because there was a split among the circuit courts of appeal as to what party bears the burden of confusion under a fair use defense, the Supreme Court granted certiorari. The Court held that the defendant bore no such burden.

In a unanimous decision of the Court reversing and remanding the case back to the Ninth Circuit, Justice Souter relied upon both statutory construction and public policy for its conclusion. First, the Court noted two points that it deemed particularly evident: (i) that the Lanham Act squarely “places a burden of proving likelihood of confusion (that is, infringement) on the party charging infringement even when relying on an incontestable registration; and (ii) when setting out the elements of the fair use defense in Section 33(b)(4), Congress remained silent insofar as the defendant having to disprove confusion.

Second, the Court relied on the long-standing public policy as reflected in common law, that some degree of confusion is to be tolerated:

The common law’s tolerance of a certain degree of confusion on the part of consumers followed from the very fact that in cases like this one an originally descriptive term was selected to be used as a mark, not to mention the undesirability of allowing anyone to obtain a complete monopoly on use of a descriptive term simply by grabbing it first.

The Court went on to state that nothing in the Lanham Act indicated Congress’ desire to “deprive commercial speakers of the ordinary utility of descriptive words.”

Further, the Court utilized old-fashioned common sense, finding it nonsensical to place the burden of negating any confusion on the alleged infringer because “it is only when a plaintiff has shown likely confusion by a preponderance of the evidence that a defendant could have any need of an affirmative defense.” Stated simply, there was no need for an affirmative defense to an illegitimate claim of infringement.

However, the Court left unanswered the question of how much confusion would be tolerated under the umbrella of fair use: “It suffices to realize that our holding that fair use can occur along with some degree of confusion does not foreclose the relevance of the extent of any likely consumer confusion in assessing whether a defendant’s use is objectively fair.” The Court also explained that “we do not rule out the pertinence of the degree of consumer confusion under the fair use defense, [and] we likewise do not pass upon the position . . . that the ‘used fairly’ requirement [] demands only that the descriptive term describe the goods accurately.”

Therefore, the Court declined to establish a bright-line rule that confusion was wholly irrelevant to a fair use defense and left open the possibility that a plaintiff who demonstrates a strong likelihood of confusion may override any good faith limited use of the allegedly infringed mark. Indeed, on remand, the Ninth Circuit

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SECTION 271(G) INFRINGEMENT BY IMPORTATION

Section 271(g) attempts to close the loop on extraterritorial workarounds to infringement. §271(g) protects a product by process patent where the process steps are performed in a foreign country. The infringer is the person who imports the product into the U.S.²¹ The statute also includes two exclusions for infringement: a product materially changed by additional processes and where the product is a trivial and nonessential component of another product.

CONCLUSION

When faced with a possible patent infringement action, it is important to consider the different types of infringement and the questions that each type of infringement raises. The questions will have a profound effect on the proofs required later in the case, and should be regularly revisited during the discovery process so that focused, complete discovery may occur.

Endnotes

¹ *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365 U.S. 336, 128 USPQ 354 (1961); *Met-Coil Sys. Corp. v. Korners Unlimited, Inc.* 803 F.2d 684, 687, 231 USPQ 474 (Fed. Cir. 1986) (“Absent direct infringement of the patent claims, there can be neither contributory infringement... nor inducement of infringement...”).

² *Jurgens v. McKasy*, 927 F.2d 1552, 1560, 18 USPQ2d 1031 (Fed. Cir. 1991)

³ *Markman v. Westview Instruments, Inc.* 517 U.S. 370 (1996), *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448 (Fed. Cir. 1998)

⁴ *Warner-Jenkinson Co. v. Hilton Davis Chemical Co.*, 520 U.S. 17, 117 S.Ct. 1040, 41 USPQ2d 1865 (1997)

⁵ The Federal Circuit, more recently, has addressed the use of the “elements” in *Warner-Jenkinson Co. v. Hilton Davis Chemical Co.* to describe both “elements” of the claim and “elements” of the accused device. The Fed. Cir. now prefers to distinguish the use of “elements” by using the custom that a claim has “limitations” and an accused products has “elements” that are compared to the “limitations” of the claim.

⁶ The manufacture of components – to be finally assembled and used only after the expiration of a patent- is infringing where the manufacturer has tested the “operable assembly” of the components *Paper Converting Machine Co. v. Magna-Graphics Corp.*, 745 F.2d 11, 223 USPQ 591 (Fed. Cir. 1984)

⁷ 35 U.S.C. 100(c) includes U.S. territories and possessions. 35 U.S.C. 105 further broadens coverage to inventions made, used or sold in U.S. controlled objects in outer space.

⁸ 35 U.S.C. 272.

⁹ Consider that in order to prove an indirect infringement, a direct infringement must be proven (*see* footnote 1). So at a minimum, whether the infringement is a direct infringement or an indirect infringement, determining who directly infringes is necessary.

¹⁰ *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 173 USPQ 769 (1972)

¹¹ *L.A. Gear Inc. v. E.S. Originals Inc.*, 859 F. Supp. 1294, 32 USPQ2d 1613 (C.D. Cal. 1994)

¹² *Water Tech. Corp. v. Calco Ltd.*, 850 F.2d 660 Fed. Cir. 1988)

¹³ *Manville Sales Corp. v. Paramount Sys., Inc.* 917 F.2d 544, 553 (Fed. Cir. 1990)

¹⁴ *Apple Computer, Inc. v. Articulate Sys., Inc.* 991 F.Supp. 1189 (N.D. Cal 1997)

¹⁵ *Aro Mfg. Co. v. Convertible Top Replacement Co.* 377 U.S. 476, 488.

¹⁶ *Aro Mfg. Co.*, 365 U.S. at 345.

¹⁷ *Hodosh v. Block Drug Co.*, 833 F.2d 1575 (Fed. Cir. 1987)

¹⁸ *Eli Lilly & Co. v. Medtronic, Inc.* 496 U.S. 661 (1990)

¹⁹ For more information regarding ANDAs, see section 505(j) of the Federal Food, Drug and Cosmetic Act.

²⁰ Patented products also includes software. *Eolas Techs. Inc. v. Microsoft Corp.*, 399 F.3d 1325 (Fed. Cir. 2005)

²¹ *Pfizer Inc. v. Aceto Corp.*, 853 F.Supp 104, 106 (S.D.N.Y. 1994)

USPTO Disavows "Technological Arts" Test of Patentable Subject Matter



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In *Ex parte Lundgren*, 76 U.S.P.Q. 2d 1385 (B.P.A.I. 2005), the USPTO's Board of Patent Appeals and Interferences in a 3-2 decision reversed an examiner's rejection that certain claims were drawn to non-statutory subject matter and held that there is no "technological arts" requirement under 35 U.S.C. § 101. The Board extended its decision no further, however, and explicitly declined the opportunity to state what an appropriate test or standard might be to delineate statutory from non-statutory subject matter in the context of non-technological method claims.

The claims at issue related to a method of compensating a manager of a firm in an oligopolistic industry in order to reduce the incentive for collusion among the firms in the industry. Basically, the claims required that the manager of the subject firm be compensated according to the profitability of his firm *relative* to that of an average of the other firms, rather than according to the profitability of his firm standing alone. *Id.* at 1385-86. By tying compensation to relative performance, collusion that increases the average profitability among the industry firms would not result in a commensurate increase in the manager's compensation.

Rejecting the claims, the examiner stated that because "both the invention and the practical application to which it is directed [are] outside the technological arts, namely an economic theory expressed as a mathematical algorithm without the disclosure or suggestion of computer, automated

means, apparatus of any kind, the invention as claimed is found non-statutory." *Id.* at 1386. The examiner relied upon what he viewed as a "technological arts" requirement found in *In re Musgrave*, 431 F.2d 882, 167 USPQ 280 (CCPA 1970). In that case, the court stated that "all that is necessary, in our view, to make a sequence of operational steps a statutory 'process' within 35 U.S.C. § 101 is that it be in the technological arts so as to be in consonance with the Constitutional purpose to promote the progress of 'useful arts.' Const. Art. 1, sec. 8."

The Board dismissed the technological arts requirement out of hand and construed *Musgrave* as confirming that an invention in the technological arts is within the bounds of statutory subject matter, but not as imposing a separate technological arts requirement on all applications. *Lundgren*, 76 U.S.P.Q.2d at 1387. The Board also found support in *In re Toma*, 575 F.2d 872, 197 USPQ 852 (CCPA 1978), where the court overturned a "mental steps" rejection based on Section 101. Moreover, the Federal Circuit, the Board observed, found that "a process claim that applies a mathematical algorithm to 'produce a useful, concrete, tangible result without pre-empting other uses of the mathematical principle, on its face comfortably falls within the scope of § 101.'" *Lundgren*, 76 U.S.P.Q.2d at 1386 (quoting *AT&T Corp. v. Excel Comm'ns, Inc.*, 172 F.3d 1352, 1358, 50 U.S.P.Q.2d 1447, 1452 (Fed. Cir. 1999)). The Board accordingly reversed the examiner's rejection of the manager-compensation claims based on the technological arts test.

Interestingly, the Board did not find that the manager-compensations were within statutory subject matter. Nor, as

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USPTO Disavows “Technical Art” Test
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noted above, did the Board attempt to articulate any standard or test to guide future applicants.

Judge Barrett filed a lengthy dissent (his is a twenty-one page opinion as compared to the majority’s less than four), in which he closely examined the law and policy in this area and articulated various standards under which a statutory rejection of these claims might lie. Judge Barrett argued that neither of the Federal Circuit’s decisions in *AT&T Corp.* or *State Street* controlled the outcome of this case because both of those decisions involved computer-implemented processes, whereas this case did not. Noting the importance of the particular question at issue given the increase in “non-machine-implemented” process claims since these decisions, the Board should have maintained the examiner’s rejection so that the applicant could appeal to the Federal Circuit and give that court the opportunity to resolve this issue. As it stands, Judge Barrett observed, applicants might file and the USPTO might issue innumerable patents under the rationale of *Lundgren*, only later to find their patents invalid if the Federal Circuit disagrees with that decision.

Until called into question by a federal court, *Lundgren* frees inventors and patent attorneys from stating their method or process in claims in terms of a computer or other machine, and it appears to clear the way for method claims stated in terms of purely mental steps. The one certain requirement for statutory subject matter that can be drawn from *Lundgren* is that the claimed invention must achieve a “useful, concrete, and tangible result.” How that result is achieved appears immaterial.

Lundgren may not be the law for long, however. The United States Supreme Court has agreed to hear the case of *Laboratory Corp. of America Holdings v. Metabolite Laboratories, Inc.*, which likewise includes a “non-machine-implemented” method claim. The Supreme Court may therefore take note of the *Lundgren* decision (and of Judge Barrett’s lengthy dissent) and provide additional guidance on this issue. [Stay tuned.](#)

Fair Use Of Trademarks
(Continued from page 4)

again declined to affirm the district court’s entry of summary judgment for KP on the fair use defense, noting that “the degree of consumer confusion remains a factor in evaluating fair use” among others including the strength of the mark, descriptive nature of defendant’s use, the availability of alternative terms, the extent of the use of the mark prior to registration and any differences in the actual use of the mark in commerce. Thus, while the Court resolved the uncertainty surrounding the burden of proof a party bears when asserting a fair use defense, the factual scenarios under which the fair use defense may overcome a trademark infringement claim must be decided on a case-by-case basis that includes consideration of the degree of likelihood of confusion arising from defendant’s use of the mark.

The Supreme Court’s decision in *K.P. Permanent Make-Up* does not signify a departure from established trademark law. Rather, it strengthens and reaffirms the legislative intent which underlies intellectual property rights and strikes a balance between private interests of exclusive rights and public interests in free expression. But, it is notable if for nothing else than as a speed bump in the expanding bundle of rights comprising intellectual property, as evidenced by federal legislation over the past decade extending copyright terms, broadening copyright protections under the Digital Millennium Copyright Act, banning cybersquatting and protecting famous marks from both actual and threatened dilution.

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