

Intellectual Property

The newsletter of the Illinois State Bar Association's Section on Intellectual Property Law

Important Changes to Copyright and Trademark Law

BY BEVERLY A. BERNEMAN

On December 27, 2020, two significant changes to Intellectual Property were signed into law as part of HR 133, Consolidated Appropriations Act 2021. The following are highlights of the new laws.

Copyright Law Changes

First, the new law enacted the Copyright Alternative in Small Claims

Enforcement Act (CASE Act). The CASE Act establishes a small claims court for copyright infringement cases. The law requires the Copyright Office to establish a Copyright Claims Board within one year. The Board will become a forum for hearing copyright infringement claims that fall under \$30,000.00 in damages. The three member Board will first determine

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Nothing-but-Cheese and the Uncommon Sense of the Reasonable Consumer: *Bell et al. v. Publix et al.*

BY JESSICA GUARINO & A. BRYAN ENDRES

"[A]n otherwise false advertisement is not rendered acceptable merely because one possible interpretation of it is not untrue."¹

Constructing legal definitions of "reasonableness" is an impossible

practice. Such a determination requires factfinders to reduce the unquantifiable to components one might weigh and measure as if the result is a mathematical certainty.

Law was once viewed "as a completed

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if the plaintiff has a case and, if so, allow it proceed. The proceedings will have expedited discovery and will be adjudicated based on written submissions only. Participation is voluntary. Plaintiffs seeking damages under \$5,000.00 may request a hearing before a single Board member. The CASE Act is designed to provide a less costly and time-consuming way to address copyright infringement in smaller cases.

Second, the new law gives the Department of Justice authority to bring felony charges against digital transmission services that are designed to stream copyrighted works without permission and have no other commercially significant purpose. Individual users are excluded from criminal prosecution.

Trademark Law Changes. Trademark Modernization Act (TMA) creates many new United States Patent and Trademark Office (USPTO) procedures.

First, the TMA establishes a third party's ability to submit evidence disputing the registerability of a trademark during the examination period. Second, an expungement request allows a party to bring an action to remove some or all of the goods and services from a registered trademark that the registrant never used in commerce. This request has to be brought between three and ten years after the registration date. Third, a reexamination request allows a party to seek removal of some or all goods or services that were not used in commerce on or before a particular date. Reexamination will be a tool to reduce the reach of a registered mark by disputing questionable specimens of use. This request must be made within the first five years after registration. The Director of Trademarks will determine if these requests state a prima facie case and then will institute a proceeding to adjudicate the request. According to the USPTO, the new procedures are designed to strengthen the accuracy and integrity of the federal trademark register and help U.S. businesses make better informed marketing and branding decisions regarding their

trademarks.

Second, in order to resolve inconsistencies in the courts' analysis in injunction proceedings, TMA provides that a trademark owner seeking injunctive relief is entitled to a rebuttable presumption of irreparable harm upon a finding of infringement or a likelihood of confusion on the merits.

Third, TMA also made some changes to the procedure for examining trademark applications. Originally, an applicant would automatically have six months to respond to an Office Action. TMA permits the USPTO to set a shorter period of time for a response but not less than 60 days. This change will require extra diligence on the part of an applicant in responding to Office Actions.

Conclusion

These changes are intended to create cost efficient flexibility in both copyright enforcement and trademark portfolio development. Review of intellectual property portfolios is recommended to see if any works of authorship or trademarks may be impacted by these changes. ■

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Intellectual Property

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Nothing-but-Cheese and the Uncommon Sense of the Reasonable Consumer: *Bell et al. v. Publix et al.*

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formal landscape graced with springs of wisdom that judges needed only to discover, with the admirable goal of “enhancing the stability or predictability of the law.”²² Yet courts have long abandoned this notion in light of the view that the “judicial role of boundary finding requires the exercise of reason—a reason now conceived, not as an embodying universal moral principles and knowledge of the public good, but strictly as the application of objective methodology to the task of defining the scope of legal right.”²³ The philosophy of legal realism posits that jurists are usually subject to a “half-conscious battle on the question of legislative policy,” a question central to the determination of the reasonable food consumer.⁴

Legal realists are also famously known for asserting—often in jest—“that a judge’s decision could be traced to what he ate for breakfast.”²⁵ In the context of food law cases, this may be true in a literal sense. When judges solely rely upon their own personal judgment to determine whether a consumer has acted in accordance with the elusive, to-date-un-extrapolated reasonable consumer standard, they are necessarily relying upon their own independent knowledge and understanding of food. Just as “legal realism primarily sought to prove the existence of the ‘socially constructed character of frames of reference, categories of thought, and legitimating concepts,’”²⁶ it is these frames of reference and categories of thought that are prominently revealed in judicial decisions in food law cases resolved by individual judges rather than juries of six people or more.

The “reasonable consumer,” as envisioned some, is an “erudite reader of labels, tipped off by the accent grave on the word ‘crème,’ and armed perhaps with several dictionaries, a bit like a federal judge reading a statute.”²⁷ The Seventh Circuit recently came to a far different conclusion, reversing an Illinois district court for its dismissal⁸ of Plaintiffs’ consumer protection claims over numerous manufacturers’ use of labels advertising parmesan cheese products as “100% Grated Parmesan Cheese.”²⁹ Plaintiffs alleged that the product’s use of “between four and

nine percent added cellulose powder and potassium sorbate” (to prevent caking and molding) renders the use of the “100%” claim deceptive under state consumer-protection laws.¹⁰

Plaintiffs’ claims all concerned “Little-FTC Acts,” designed to “broadly prohibit unfair business practices, including deceptive advertising.”¹¹ These state consumer protection statutes “require plaintiffs to prove that the relevant labels are likely to deceive reasonable consumers,” which “requires a probability that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.”¹²

Defendants set forth several theories that the Seventh Circuit did not find persuasive: (1) that any ambiguity as to the “100% Grated Parmesan Cheese” claim could easily be dispelled upon a look at the ingredient/back label; (2) that common sense defeats the Plaintiffs’ claims because the reasonable consumer is “well aware that pure dairy products spoil, grow blue . . . or otherwise become inedible if left unrefrigerated for an extended period of time”; and (3) that Plaintiffs’ claims were federally pre-empted¹³ by the Food, Drug, and Cosmetic Act (“FDCA”) labeling requirements and the FDA’s power to set forth the standard of identity for “grated cheese.”¹⁴

The district court originally concluded, following a string of cases in other jurisdictions, that because the ingredient label on the back of the package “would dispel any confusion, the crucial issue is whether the misleading content is ambiguous; if so, context can cure the ambiguity and defeat the claim.”¹⁵ The Seventh Circuit, however, disputed this logic and joined three other circuits “in holding that an accurate fine-print list of ingredients does not foreclose as a matter of law a claim that an ambiguous front label deceives reasonable consumers. Many reasonable consumers do not instinctively parse every front label or read every back label before placing groceries in their carts.”¹⁶

The question of what a reasonable

consumer can or should know and contemplate when purchasing food products prompted the court to propose the use of an altered version of the reasonable consumer standard. The Seventh Circuit recognized that “Lots of advertising is aimed at creating positive impressions in buyers’ minds, either explicitly or more subtly by implication and indirection. And lots of advertising and labeling is ambiguous. Deceptive advertisements often intentionally use ambiguity to mislead consumers while maintaining some level of deniability about the intended meaning.”¹⁷ Drawing parallels to debt collection, trademark, and false advertising, the opinion compared the relative forgiveness with which the law treats the average consumer in those contexts to the much more stringent standard held against the reasonable food consumer.¹⁸ Under the Lanham Act, courts factor in the “likelihood of confusion test,”¹⁹ and further recognize that “even literally true claims may deceive, that implied messages in advertising may deceive, and that what matters is how consumers actually understand the advertising.”²⁰ Similarly, consumer ambiguity under the Fair Debt Collection Practice Acts likens the standard to which shoppers are held to the “unsophisticated consumer.”²¹ Though the court did not articulate the content or definition of the reasonable food consumer standard, it did call into question the existing analysis and held “[p]laintiffs are entitled to present evidence on how consumers actually understand these labels.”²²

Judge Kanne’s concurring opinion expounded upon the perplexities underlying the present usage of the reasonable consumer standard and its stark departure from the reality of consumer behavior:

[The standard] is impractical because, while lawyers and judges can find ambiguity in just about anything, that’s not what we expect of the reasonable consumer . . . That, at bottom, is the flaw in the district court’s rule: a court could decide as a *matter of law* that a

statement is not deceptive even where it could deceive reasonable consumers *as a matter of fact*. . . . Just as important, however, is the corollary to this principle: that if a plaintiff's interpretation of a challenged statement is *not* facially illogical, implausible, or fanciful, then a court may *not* conclude that it is nondeceptive as a matter of law. The "determination of likelihood of deception" is an impressionistic one more closely akin to finding of fact than a conclusion of law."²³

The concurring opinion reasoned that reversal was especially warranted because of the district court's erroneous analysis of ambiguity's relation to the reasonable consumer standard.²⁴ The district court "did not conclude that Plaintiffs' interpretation of the '100% Grated Parmesan Cheese' statement is illogical, implausible, or fanciful," but rather "necessarily found the opposite: that reasonable consumers may interpret the statement multiple, plausible ways," which the concurrence noted was the very definition of ambiguity.²⁵

In sum, the court's rejection of a rule imposing on the average consumer an obligation to legalistically parse prominent front-label claims by examining the fine print on the back provides some clarity on what claims may survive a motion to dismiss and aligns the Seventh Circuit with similar rulings in the First, Second and Ninth Circuits.²⁶ From a practical perspective in advising clients on labeling claims, however, we are still a long way from determining with any sort of precision the reasonable consumer, or in the food context, the reasonable eater. And therein lies the challenge, as manufacturers and retailers seek to distinguish and promote their products in a competitive marketplace without stepping across the elusive reasonable consumer line. ■

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1. *Bell et al. v. Publix et al.*, nos. 19-2581 & 19-2741 (7th Cir. 2020), at 12.

2. G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION* 301-02 (New York: Oxford University Press, 1976).

3. Elizabeth Mensch, "The History of Mainstream Legal Thought," in *The Politics of Law: A Progressive Critique*, 28-29 (New York: Basic Books, 1998).

4. *Id.* at 34.

5. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* 188 (New York: Oxford University Press, 1992).

6. *Id.* at 182.

7. *Bell et al.*, at 8.

8. Applying the Rule 12(b)(6) standard. The standard under the dismissal rule is that plaintiffs' claims must be "plausible," as opposed to a demonstration by the non-movant, during summary judgment proceedings, that there is no "genuine issue of material fact." *Id.* at 2, 19.

9. *Id.*

10. *Id.*

11. *Id.* at 4.

12. *Id.*

13. *Id.* "First, [Defendants] point out that the federal Food, Drug, and Cosmetic Act (FDCA) and its accompanying regulations expressly bar states from imposing labeling requirements that are not "identical" to the FDCA's, and they contend plaintiffs seek to use state law to impose different labels on them. Second, defendants say the FDA approved Kraft's use of the "100% Grated Parmesan Cheese" label in 1999 and 2000, thus rendering the plaintiffs' challenge both conflict-preempted and barred by state-law safe harbor provisions. These arguments do not persuade us. The first reads the FDCA's express preemption provision too broadly. The second fails at the first step because defendants have not shown that the FDA approved Kraft's "100%" labeling as nondeceptive." *Id.* at 22.

14. *Id.* "The defense theory seems to be that if the FDA defines 'grated cheese' in a way that allows added cellulose and potassium sorbate, their products with those additives thus qualify as '100% grated cheese.' We have no quarrel with defendants' ability to call their products 'grated cheese.' The problem lies in the '100%,' especially since the pleadings provide reason to think that consumers understand '100% grated cheese' to mean that the cheese does not have the additives. And how could a manufacturer of grated cheese without those additives differentiate its product from these defendants' products if, *pace* George Orwell, the courts said the products with the additives could lawfully claim to be '100% cheese?'" *Id.* at 19.

15. *Id.* at 5.

16. *Id.* at 7.

17. *Id.* at 9.

18. *Id.* at 12-16.

19. Based on real market conditions and real consumers' behavior. *Id.* at 12.

20. *Id.* at 13.

21. *Id.* at 16.

22. This evidence, the court noted, might include consumer surveys or affidavits from linguists to prove deception. *Id.* at 17.

23. *Id.* at 44.

24. The binding opinion noted the same, stating "Under the district court's ambiguity rule, as a matter of law, a front label cannot be deceptive if there is any way to read it that accurately aligned with the back label. And this would be so even if the label actually deceived most consumers, and even if it had been carefully designed to deceive them." *Id.* at 8.

25. *Id.* at 44.

26. See *Domont v. Reily Foods Co.*, 934 F.3d 35 (1st Cir. 2019); *Mantikas v. Kellogg Co.*, 910 F.3d 633 (2d Cir. 2018); *Williams v. Gerber Products Co.*, 552 F.3d 934 (9th Cir. 2008).

A Seventh Amendment Right to Fair Use Determinations?

BY JUSTIN HUGHES

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Practically everyone in the intellectual property (IP) community knows the *Oracle v. Google* litigation¹ has centered on the copyrightability of the Java language’s application programming interfaces (APIs) and, if they are protected by copyright, whether Google’s use of 37 Java APIs was fair use. The second of these issues has generated interest in a topic that previously had received little attention from courts and commentators: the respective roles of judges and juries in fair use determinations. In *Oracle v. Google*, an initial jury concluded that the APIs were protected by copyright but deadlocked on fair use; a trip to the Federal Circuit (because the case included patent claims) confirmed the jury’s copyrightability determination and remanded for fair use to be considered anew. A second jury concluded that Google’s repurposing of the 37 APIs was fair use, but the Federal Circuit disagreed, reversing the fair use determination and leaving Google liable for infringement.

Because this is widely believed to be the first time that an appellate panel has reversed a jury’s finding of fair use—and did so on a *de novo* review standard—the ruling has triggered a lively discussion about the relative roles of judges and juries in fair use determinations. Fair use is a mixed question of law and fact, so, of course, there is the *policy* issue of how these mixed questions should be resolved and who should make those resolutions. But before the policy debate, there is the

constitutional issue: whether defendants in copyright infringement cases have a Seventh Amendment right to jury determination of fair use. Presumably, if there is such a Seventh Amendment right, judges—trial or appellate—may only review jury determinations on a “clearly erroneous” standard.

As in many such discussions, some people are jumping to conclusions colored by the substantive outcome they seek in the litigation; others are simplifying things in a way that undercuts a careful analysis of the precedent, doctrine, and history. In *Oracle v. Google*, the Federal Circuit presented such simplification in a footnote: “Justice Joseph Story described fair use as a ‘question of fact to come to a jury’ in 1845.”² An amicus brief before the U.S. Supreme Court repeats this.³ Both the Federal Circuit footnote and the amicus brief refer back to Justice Story’s 1845 decision while riding circuit in Massachusetts, *Emerson v. Davies*.⁴

The problem is that Justice Story said *no such thing* in *Emerson v. Davies*. Instead of appealing to historical authority that really does not exist, this article proposes that there is only a moderate case for a Seventh Amendment right to jury determination of 17 U.S.C. § 107 fair use—and there are many junctures at which one could conclude that no such right exists.

To see this, we must put the history of copyright cases pre-1791 against the Seventh Amendment analytic framework the U.S. Supreme Court uses. There is no question that an action for copyright infringement *could* be brought before a jury in 18th century England, although there is also no question that many or most cases occurred in courts of equity.⁵ But in modern Seventh Amendment jurisprudence, the question is not whether the *cause of action* would have been heard before a jury; the question is whether the *particular trial decision* or its “analogue” came before juries.

So the answer to the Seventh Amendment question turns partly on what, if anything, is understood as the “analogue” of modern fair use in 18th century English case law.

A Brief Pre-1791 Copyright History

Professor Ned Snow—also cited on this point in the amicus brief—believes that “[t]he early history of copyright law demonstrates that English common-law courts heard the issue of fair use, expressly reserving the issue for juries to determine,” and, more boldly, “[f]or over two centuries, courts have treated the issue of fair use in copyright law as a question for the jury.”⁶ For anyone who learned that the fair use doctrine traces back to Justice Story’s 1841 decision in *Folsom v. Marsh*,⁷ Snow’s historical claims are jarring. And that is because they are a real stretch.

There is no question that when a plaintiff sued at law, early English cases sent the general question of *infringement* to juries, sometimes framed in words and concepts that now sound like fair use considerations. Professor Snow’s argument is that “fair use” was built into these primary findings of infringement, i.e., “[e]arly English copyright cases contemplated the sort of use that a defendant made of a work, deciding whether the use was permissible or not.”⁸ To prove this, Snow relies principally on language in two cases: *Sayer v. Moore* (1785)⁹ and *Cary v. Kearsley* (1802).¹⁰

Before we delve into what is actually said in those cases, remember that in the 18th century, English courts were divided into courts of law (king’s bench, common pleas, or exchequer of pleas) and courts of equity (chancery).¹¹ A plaintiff could bring a copyright infringement suit in a court of equity, which could award injunctive relief, and many of them did. Legal historians have yet to find any ruling or statement that a copyright infringement defendant in a court of *equity* had the right to refer the case to a court of law or to have any elements of the infringement action decided

by a jury sitting in one of the courts of law. Instead, as we will see below, just the opposite transpired.

As to *Sayer v. Moore* and *Cary v. Kearsley*, both cases were before the king's bench (law), and both involved what we would now consider principally *factual* works: *Sayer* concerned sea charts and *Cary* concerned road books, an early form of road atlases.¹²

In *Sayer*, the plaintiffs had expended substantial monies in preparing their sea charts, which used a “plain” projection, while the defendant's charts used the more modern Mercator projection. From this difference alone, we know that the “expression” of the facts presented in the two sets of sea charts was quite different. Professor Snow quotes Lord Mansfield's comments in *Sayer*: “In all these cases the question of fact to come before a jury is, whether the alteration be colourable or not? . . . [T]he jury will decide whether it be a servile imitation or not.”¹³ From those words, Snow concludes that “Lord Mansfield considered the issue of whether a defendant's use was permissibly fair or impermissibly infringing to be one for the jury.”¹⁴

But when one reads the entirety of what was testified and what Lord Mansfield said, it becomes evident that Mansfield's prospective jury charge addressed what we now call the fact/expression dichotomy and the *Arnstein*-esque question of whether the defendant copied at all.¹⁵ Lord Mansfield says:

The Act that secures copy-right to authors guards against the piracy of the words and sentiments; but it does not prohibit writing on the same subject. As in the case of histories and dictionaries: in the first, a man may give a relation of the same facts, and in the same order of time; in the latter an interpretation is given of the identical same words. In all these cases the question of fact to come before the jury is, whether the alteration be colourable or not? There must be such a similitude as to make it probable and reasonable to suppose that one is a transcript of the other, and nothing more than a transcript. So in the case of prints, no doubt different men may take engravings from the same picture. The same principle holds with regard to charts; whoever has it in his intention to publish a chart may take advantage of all prior publications.

There is no monopoly of the subject here, any more than in the other instances; but upon any question of this nature the jury will decide whether it be a servile imitation or not.¹⁶

Mansfield says that when dealing with two factual works (“histories and dictionaries”), the jury must consider the possibility that independent creation produced similar works: “[t]here must be such a similitude as to make it probable and reasonable to suppose that one is a transcript of the other, and nothing more than a transcript.”¹⁷ In modern American copyright parlance, this is “probative similarity” as evidence of *copying*.¹⁸ When Mansfield says “with regard to [sea] charts; whoever has it in his intention to publish a chart may take advantage of all prior publications,”¹⁹ he *might* have been addressing the copying of *expression*, but he definitely was addressing the copying of *facts*.

Sure, there may have been some fair use-like considerations in Mansfield's thinking, but that should not overshadow how much the dispute was about the fact/expression dichotomy and whether the defendant copied little more than facts or only facts from the plaintiffs. (And *this* passage above is what Justice Story was quoting in the 1845 *Emerson v. Davies* case; it wasn't Justice Story's own words. *Emerson v. Davies* was again about whether the defendant copied at all, and if so, how much—not fair use.²⁰) Similarly, the works at issue in the *Cary v. Kearsley* case were akin to road atlases, and the defendant's work had the same town names, the same distances between towns, and even some of the same errors that had appeared in the plaintiff's work. Lord Ellenborough noted that “the defendant was authorised to use *a work published as this of the plaintiff's*, to make extracts from it into any original work of his own”²¹—a statement that makes sense given that the plaintiff's work was largely a compilation of facts. Supporting that the dispute was about extraction of facts from a fact-based work, Lord Ellenborough compared what the defendant did to “only using an erroneous dictionary.”²²

Nonetheless, Lord Ellenborough and the plaintiff's counsel had a colloquy that seems to go much further. When the plaintiff's counsel asked whether copying “a whole essay” would be a “piracy,” Lord Ellenborough replied that “a man may fairly adopt *part* of the work of another.”²³ He added, “the question will be,

Was the matter so taken used fairly[?]”²⁴ Those comments *do* sound like a discussion of fair use considerations. Lord Ellenborough then made some comments about how two works compiling surveys and distances of various roads would be similar, saying he would convey all this thinking “to the jury, leaving them to say, whether what [was] taken or supposed to be transmitted from the plaintiff's book, was fairly done . . . or taken colourably, merely with a view to steal the copyright of the plaintiff.”²⁵

Is *Cary v. Kearsley* “the origins of fair use,” as Bill Patry believes?²⁶ Sure, but saying one detects the *origins* of fair use is not saying one detects *fair use*. It is fine to say that amino acids are the *origin* of life, but their detection in a petri dish does not mean one has detected *life*.

In her careful “micro” level legal history of the *Cary* case and its antecedents, Isabella Alexander notes:

[I]t becomes clear that words like “originality” and “fair use” are simply not being used in the same way that we use them today. While this does not mean that the cases are of no value, it does mean that judicial uses of such words can be less easily deployed as precedent supporting contemporary argument.²⁷

Instead of positing that *Cary* proves “fair use” was sent to a jury, Alexandra Sims is another academic who reaches the more measured conclusion that *Cary* “represents the beginning of a judicial recognition of fairness in relation to the use of factual materials in the creation of new works.”²⁸

Turning from these cases, another way one could argue for a Seventh Amendment right to jury determination of fair use is through “fair abridgment” case law. Scholars also generally agree that the defense of fair abridgment that sometimes arose in 18th century cases was the doctrinal ancestor of modern American fair use; indeed, *Folsom v. Marsh* was a fair abridgment case.²⁹ One can believe that fair abridgment should be treated as an “analogue” to modern fair use for Seventh Amendment analysis and use this to reason that there is a right to jury determination of fair use.

How Seventh Amendment Jurisprudence Might Apply

How all this plays out also depends partly on the choice between a couple of prior occasions when the Seventh Amendment met intellectual property.

In the 1998 *Feltner v. Columbia Pictures* decision,³⁰ the U.S. Supreme Court considered whether there is a Seventh Amendment right to jury determination of statutory damages under 18 U.S.C. § 504(c). The Court noted that English “copyright suits for monetary damages were tried in courts of law, and thus before juries,” both under the 17th-century common law and the 1710 Statute of Anne, which itself established statutory damages.³¹ The historical record recited by the Court also showed that some of the pre-1791 American copyright statutes specified that infringement actions would be tried at “law” or in an “action of debt,” both of which would go to a jury—and that three of those state statutes had statutory damage provisions. This evidence, coupled with one 1789 Connecticut decision in which a jury awarded the copyright owner £100 (under a statute with statutory damages),³² led the Court to conclude that the “right to a jury trial includes the right to have a jury determine the amount of statutory damages, if any, awarded to the copyright owner.”³³

Two years earlier, the Court had engaged in a more elaborate Seventh Amendment analysis in *Markman v. Westview Instruments*.³⁴ The *Markman* Court concluded that judges should handle the interpretation of patent claims and that such patent claim construction was not a “guaranteed jury issue” under the Seventh Amendment.³⁵ The 1996 *Markman* decision highlights one critical piece of the Seventh Amendment machinery: while “[t]he right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted,”³⁶ that does not mean every issue in such a trial must be decided by the jury. As the unanimous *Markman* Court noted:

[W]e ask, first, whether we are dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was. If the action in question belongs in the law category, we then ask whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791.³⁷

This was in keeping with the Court’s

reasoning in earlier cases that “the question whether a jury must determine [some issue] in a trial in which it must determine liability” turns on “whether the jury must shoulder [that] responsibility as necessary to preserve the substance of the common-law right of trial by jury,”³⁸ and that “the Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements.”³⁹ Again, in its 1999 *City of Monterey v. Del Monte Dunes* decision, the Court said the issue is “whether the particular issues, or analogous ones, were decided by judge or by jury in suits at common law at the time the Seventh Amendment was adopted.”⁴⁰

So, can we conclude that 18th century “fair abridgment” is an appropriate analogue to modern fair use and that fair abridgment was an issue for jury determination before 1791? First, it is not clear that prior to 1791 there was any regular practice of juries deciding fair abridgment.⁴¹ The vast majority of cases were brought in equity (before the chancery). Chancery court could not impanel a jury, but, generally speaking, a defendant sued in chancery could request that factual issues involving witnesses be sent to a court of law to be tried before a jury.

Did they have a right to such a jury determination? That sort of request is what happened in the 1740 chancery case *Gyles v. Wilcox, Barrow, and Nutt*⁴² concerning a work that had verbatim copied a prior law book with “only some old statutes hav[ing] been left out” and some translations added. The Lord Chancellor noted that “[w]here books are colourably shortened only,” that would be an infringement of the copyright, whereas “a real and fair abridgement” that showed new “invention, learning, and judgment” would not be.⁴³ (If you want to liken that to a determination of transformative use, go ahead.)

Confronted with a request to send the “factual” issues to a jury, the Lord Chancellor judging the case said:

Mr. Attorney-General has said that I may send it to law to be determined by a jury; but how can this possibly be done? . . . The court is not under an indispensable obligation to send all facts to a jury, but may refer them to a master, to state them, where it is a question of nicety and difficulty, and more fit for men of learning to inquire into, than a common

jury.⁴⁴

Again, this was a case of a court sitting in equity and does not directly show what a court of law would have done. At the same time, *Gyles* is not the only occasion where an 18th century English court of equity sent the fair abridgment question to a special master, not a jury.⁴⁵

Even if we found meaningful evidence that the question of fair abridgment before a law court was typically decided by juries, one could reason that fair abridgment is an ancestor of fair use without being what the U.S. Supreme Court calls an “analogue” in Seventh Amendment jurisprudence. In their careful reconstruction of the history of intellectual property in Great Britain, Brad Sherman and Lionel Bently conclude that the 1710 Statute of Anne was understood at the time as a “subject-specific statute” and that “there was no (modern) copyright law (as it is understood today) until the middle of the nineteenth century.”⁴⁶ If Sherman and Bently are correct, that is another reason why pre-1791 English jury determinations of fair abridgment may not be a reasonable Seventh Amendment analogue to fair use, especially in challenging technology-related areas—think intermediate copying for reverse engineering, Google Books, or copying APIs to build a new operating system.

All this makes for an equivocal case that there is a Seventh Amendment right to jury determination of the overall fair use inquiry.

Conclusion

In 2010, copyright scholar Ronan Deazley wrote, “definitive readings as to the meaning, impact, and legacy of the Statute of Anne, and the case law that it prompted, remain as elusive as ever.”⁴⁷ Perhaps that is an overstatement. There are things we definitely know about 18th-century copyright, but Deazley does speak to the modesty with which one should approach the historical record. Considering what English jurists said and did in 1740, 1774, 1785, and 1802, there is probably no clear answer on whether there should be a Seventh Amendment right to jury determination of modern § 107 fair use. If there is not such a right, then we fall back to the policy question of how we think the fair use mixed question of law and fact is best handled. For some, the answer will be juries know best. For

others, fair use’s role mediating copyright and free expression—and everyone’s needs for reasonably predictable outcomes—means the bench is a better place to lodge final fair use determinations. ■

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1. Oracle Am., Inc. v. Google LLC, 886 F.3d 1179 (Fed. Cir. 2018), cert. granted, 140 S. Ct. 520 (2019) (No. 18-956) (set for argument Oct. 7, 2020).
2. *Id.* at 1194 n.3.
3. Brief of Amicus Curiae American Intellectual Property Law Association in Support of Neither Party at 26, Google LLC v. Oracle Am., Inc., No. 18-956 (U.S. Jan. 13, 2020) (citing *Oracle v. Google*, 886 F.3d at 1194 n.3).
4. 8 F. Cas. 615, 623–24 (C.C.D. Mass. 1845) (No. 4,436).
5. H. Tomás Gómez-Arostegui, *What History Teaches Us about Copyright Injunctions and the Inadequate-Remedy-at-Law Requirement*, 81 S. CAL. L. REV. 1197, 1222–23, 1273 (2008); H. Tomás Gómez-Arostegui, *Equitable Infringement Remedies Before 1800*, in RESEARCH HANDBOOK ON THE HISTORY OF COPYRIGHT LAW 195, 196 (Isabella Alexander & H. Tomás Gómez-Arostegui eds., 2016); Isabella Alexander, *Sayer v. Moore (1785)*, in LANDMARK CASES IN INTELLECTUAL PROPERTY LAW 59, 66 (Jose Bellido ed., 2017) (noting that in the 1780s, “the Court of Chancery tended to be the forum of choice for copyright plaintiffs of the time”).
6. Ned Snow, *Who Decides Fair Use—Judge or Jury?*, 94 WASH. L. REV. 275, 276, 279 (2019).
7. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901).

8. Snow, *supra* note 6, at 292.
9. *Sayer v. Moore* (1785) 102 Eng. Rep. 138; 1 East 358. The spelling of *Sayer/Sayre* is contested; many think “*Sayer*” is the (more) correct form.
10. 170 Eng. Rep. 679; 4 Esp. 168 (1804). Of course, by the lights of Seventh Amendment jurisprudence, the 1802 decision can only be evidence of what English courts *might* have been doing prior to 1791.
11. The chancery court also had some limited jurisdiction as a court of law not relevant here.
12. Isabella Alexander, “*Manacles upon Science*”: *Re-evaluating Copyright in Informational Works in Light of 18th Century Case Law*, 38 MELBOURNE U. L. REV. 317, 326 (2014) (exploring a line of cases ending in *Cary v. Kearsley* and noting that the litigations concerned “road books [which] were an early form of road atlas”).
13. Snow, *supra* note 6, at 294.
14. *Id.*
15. See *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946).
16. *Sayer v. Moore* (1785) 102 Eng. Rep. 138, 140.
17. *Id.*
18. See, e.g., *Johnson v. Gordon*, 409 F.3d 12, 18 (1st Cir. 2005) (“[T]hat a sufficient degree of similarity exists between the copyrighted work and the allegedly infringing work [gives] rise to an inference of actual copying. We have referred to that degree of similarity as ‘probative similarity.’”); *Peel & Co. v. Rug Market*, 238 F.3d 391, 394 (5th Cir. 2001) (explaining that “factual copying” may be inferred from proof of access to the copyrighted work and “probative similarity”); Alan Latman, “*Probative Similarity as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement*,” 90 COLUM. L. REV. 1187 (1990).
19. *Sayer*, 102 Eng. Rep. at 140.
20. 8 F. Cas. 615, 623 (C.C.D. Mass. 1845) (No. 4,436) (“And the question then comes to this, whether [the defendant] has, in substance, copied these pages, in plan, method, arrangement, illustrations and tables, from the plaintiff’s work, with merely colorable alterations and devices to disguise the copy, or whether the resemblances are merely accidental, and naturally or necessarily grew out of the objects and scheme of the defendant, Davies’s work, without any use of the plaintiff’s.”).
21. *Cary v. Kearsley* (1802) 170 Eng. Rep. 679, 679 (emphasis added).
22. *Id.*
23. *Id.* at 680 (emphasis added).
24. *Id.*
25. *Id.* at 681.
26. WILLIAM F. PATRY, PATRY ON FAIR USE § 1:11 (2019).
27. Alexander, “*Manacles upon Science*,” *supra* note 12, at 324.
28. Alexandra Sims, *Appellations of Piracy: Fair Dealing’s Prehistory*, 2011 INTELL. PROP. Q. 3, 21.

29. Matthew Sag argues that the fair use doctrine should be “understood as the continuation of a long line of English fair abridgment cases, dating back to the beginning of statutory copyright law in 1710.” Matthew Sag, *The Pre-History of Fair Use*, 76 BROOK. L. REV. 1371, 1372–73 (2011). However, Sag notes that the transition from fair abridgment in the mid-1700s to the modern fair use doctrine was both “gradual” and “haphazard.” *Id.* at 1411. And he warns that “[d]espite the continuity and congruity between the premodern and contemporary understandings . . . the parallels should not be overstated.” *Id.* at 1404.
 30. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998).
 31. *Id.* at 348–49.
 32. *Id.* at 350–51 (citing *Hudson & Goodwin v. Patten*, 1 Root 133, 134 (Conn. Super. Ct. 1789)).
 33. *Id.* at 353.
 34. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996).
 35. *Id.* at 380.
 36. *Id.* at 376 (alteration in original) (quoting *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935)).
 37. *Id.* (citation omitted).
 38. *Tull v. United States*, 481 U.S. 412, 425–26 (1987) (quoting *Colgrove v. Battin*, 413 U.S. 149, 157 (1973)). In contrast to *Feltner*, in *Tull* the Court concluded that “the trial court and not the jury should determine the amount of penalty” under penalty provisions of the Clean Water Act, even assuming that there was a right to trial by jury on the basic question of liability. *Id.* at 427.
 39. *Galloway v. United States*, 319 U.S. 372, 392 (1943).
 40. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 718 (1999) (emphasis added).
 41. It is not even clear what kind of abridgments were thought prohibited, if any at all. See Ronan Deazley, *The Statute of Anne and the Great Abridgement Swindle*, 47 HOUS. L. REV. 793 (2010).
 42. 26 Eng. Rep. 489.
 43. *Id.* at 490.
 44. *Id.* at 490–91.
- According to Gómez-Arostegui, in *Strahan v. Newbery* (1774), at the interlocutory injunction phase, the court asked a master to decide whether a “Book published by the defendants is a fair abridgement.” Gómez-Arostegui, *Equitable Infringement Remedies*, *supra* note 5, at 209.
45. BRAD SHERMAN & LIONEL BENTLY, THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW 208 (1999).
 46. Deazley, *supra* note 41, at 816. For a deeper dive into these and other issues on whether judges or juries should decide fair use, see Justin Hughes, *The Respective Role of Judges and Juries in Copyright Fair Use*, 58 HOUS. L. REV. (forthcoming 2020).

Generic.com Trademarks: *USPTO v. Booking.com*

BY KRISTEN D. BROOKS

In a recent Supreme Court case, *USPTO v. Booking.com*, 140 S. Ct. 2298 (2020), the USPTO argued that generic terms coupled with generic top-level domains (gTLD), such as “.com”, “.net”, or “.org”, should be *per se* generic. The significance of this issue is that a term which is deemed to be a generic word for goods or services cannot serve as a source indicator and, therefore, cannot be eligible for trademark protections. Thus, a

rule stating that generic.com domains are *per se* generic would entirely rule out any chance of these domain names serving as registered trademarks. The USPTO’s argument follows from the logic of a previous case, *Goodyear’s Rubber Mfg. Co. v. Goodyear Rubber Co.*, 128 U.S. 598 (1888), in which the Court determined that the addition of “Company” to a generic term does not in itself convey any additional distinguishing meaning to the

generic term. Likewise, the USPTO argued, “.com” does not convey any distinguishing meaning to an otherwise generic domain name.

On June 30, 2020, the Supreme Court rejected the USPTO’s assertion that a generic term coupled with a gTLD is *per se* generic (*Booking.com*, 140 S. Ct. at 2308). Though this decision may clear the way somewhat for extending trademark protections for various

generic.com names, including booking.com, dating.com, or art.com, this is not to say these terms will easily qualify as trademarks or are advisable trademark options.

Without a per se rule, generic.com marks will be analyzed under the usual test for genericness: whether the combination of the generic term with “.com” creates new or additional significance among consumers, beyond the meaning of the generic term separately, capable of indicating a particular source of goods or services. The trademark examiner will inquire into how consumers would perceive the name in commerce – as the name of a class of goods or services or as an indicator of a particular source of the goods or services (USPTO, Examination Guide 3-20: Generic.com Terms after *USPTO v. Booking.com* (2020), <https://www.uspto.gov/sites/default/files/documents/TM-ExamGuide-3-20.pdf>).

Consider booking.com for example; if booking.com were a generic term, then it would be natural for consumers to use the term to discuss online hotel booking in a general sense, not in reference to a particular website. Referring to another online booking website, such as Travelocity, as a “booking.com” or asking travelers what is their go-to “booking.com” would be evidence of the domain name being used generically. Additionally, a term at risk for becoming generic may be protected from this fate through advertising campaigns intended to prevent generalized usage of an otherwise source identifying term (e.g. “Don’t Say Velcro,” www.youtube.com/watch?v=rRi8LptvFZY) or coupling the trademark with a general term (e.g. Jell-O gelatin). These genericness avoidance methods could also apply for a generic.com term (booking.com, a hotel booking site). Considering the domains in this fashion makes it more apparent that domain names such as booking.com can, in fact, be indicators for particular sources of goods and services, but do these generic.coms make good trademarks?

When an applicant first submits a generic.com mark application for registration on the Principal Register, the trademark examiner will not refuse registration for genericness but will instead most likely refuse registration on the basis that the

mark is descriptive (Examination Guide 3-20). These generic.com marks fall into the category of descriptive marks because they essentially merely describe that a particular good or service can be obtained from an online source. For instance, booking.com provides booking services at an online domain, rendering the name booking.com highly descriptive of its service. Descriptive marks, if they are not generic, may be registered on the Supplemental Register or on the Principal Register with a showing of acquired distinctiveness. At this point in the examination process, if the examiner determines that the mark is likely to be considered a generic term by the office, the examiner will instead advise that the applicant reconsider amending to the Supplemental Register or claiming acquired distinctiveness to avoid a genericness refusal (Examination Guide 3-20).

To claim acquired distinctiveness and obtain Principal Register registration for a descriptive mark requires a high evidentiary burden which may include consumer surveys, consumer declarations, advertising expenditures, or letters or statements from the trade or public demonstrating that consumers associate the mark with an identifiable source of goods or services (Examination Guide 3-20). Note as well, even if the owner of the mark is able to overcome these hurdles, the actual scope of protection afforded by registration may be quite limited. In general, it is more difficult for a trademark owner to demonstrate likelihood of confusion for descriptive marks and, because granting trademark registration for a generic.com mark cannot prevent competitors from also using the generic term descriptively for their own goods and services, close variations will likely not be considered infringements (*Booking.com*, 140 S. Ct. at 2308).

In light of the recent *USPTO v. Booking.com* decision, though generic.com marks are green lit as a viable option for registered trademark protections, before going forward practitioners and trademark applicants should consider the potential evidentiary burden required to demonstrate acquired distinctiveness for these marks as well as the actual value of the protections afforded by registration of these types of marks. ■

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ISBA IP Section Council Patents/Trade Secrets Updates

BY KENNETH MATUSZEWSKI

Precedential Federal Circuit Opinions

- *Sionyx LLC v. Hamatsu Photonics*, 19-2359 (Fed. Cir. Dec. 7, 2020): The case dealt with infringement, patent ownership issues, and contract issues from a 2007-2008 collaboration to develop “black silicon technology.” The Federal Circuit declined to reach the willfulness issue but affirmed all other issues. First, contract issues related to statutes of limitations are properly decided by juries. SiOnyx could not obtain a permanent injunction because the parties’ sensors were competitive with each other, and money damage could not help SiOnyx, because Hamatsu breached the NDA by using confidential information. SiOnyx also had sole inventorship of the patent, because Hamatsu did not contribute confidential information to the issued patents under the NDA. Hamatsu could not be a co-owner of the patents.
- *Simio, LLC v. FlexSim Software Products, Inc.*, 20-1171 (Fed. Cir. Dec. 29, 2020): The Federal Circuit first found that a claim directed to using graphics instead of programming to create object-oriented simulations was abstract, and lacked any meaningful application, causing the claim to be ineligible under Section 101. Further, the Federal Circuit affirmed the district court’s decision to deny Simio’s motion for leave to amend the complaint as futile, because the new factual allegations Simio would have plead were conclusory and would have repeated non-abstractness assertions the court already rejected. Second, the district court did not need to conduct claim

construction before making an invalidity determination, because Simio did not explain how any particular term’s construction under Section 101 would have changed the eligibility analysis.

- *Simo Holdings Inc. v. Hong Kong UCloud Link Network*, 19-2411 (Fed. Cir. Jan. 5, 2021): The Federal Circuit reversed a jury verdict in favor of Simo for several reasons. First, the claim term “non-local calls database” in claim 8 had a limiting preamble (specifically, “a plurality of memory, processors, programs, communication circuitry, authentication data stored on a subscribed identify module (SIM) card and/or in memory and non-local calls database, at least one of the plurality of programs stored in the memory comprises instructions executable by at least one of the plurality of processors”), and because the phrase “a plurality of” could not be interpreted to read s applying only to some items listed in the claim, but not others.
- *ABS Global v. Cytonome/ST, LLC*, 19-2051 (Fed. Cir. Jan. 6, 2021): The Federal Circuit dismissed the appeal as moot through voluntary cessation, because Cytonome disavowed its right to appeal the district court’s noninfringement judgment. ABS also did not provide any evidence of current activity or plans to engage in activity that would infringe the patent at issue.

Pending Patent Cases Before the Supreme Court

- *Minerva Surgical Inc. v. Hologic Inc.*, 20-631

Question presented: Whether a defendant in a patent infringement action who assigned

the patent or is in privity with an assignor of the patent, may have a defense of invalidity heard on the merits.

Case status: The Supreme Court granted the cert petition on January 8, 2021.

The court denied a cross-appeal filed by Hologic Inc.

- *U.S. v. Arthrex Inc.*, 19-1434

Issue presented: (1) Whether, for purposes of the Constitution’s appointments clause, administrative patent judges of the U.S. Patent and Trademark Office are principal officers who must be appointed by the president with the Senate’s advice and consent, or “inferior Officers” whose appointment Congress has permissibly vested in a department head; and (2) whether, if administrative patent judges are principal officers, the court of appeals properly cured any appointments clause defect in the current statutory scheme prospectively by severing the application of 5 U.S.C. § 7513(a) to those judges.

Current case status: The case is set for oral argument on March 1, 2021.

Other Patent Updates

- RPX Deal with Intellectual Ventures

As of January 13, 2021, Intellectual Ventures, a NPE focusing on patent licensing, has licensed a folder of 18,000 patents to RPX Corp., that offers patent risk management services. RPX is known as a defensive patent organization that usually works with defendants during patent litigation. Existing RPX members, such as Google, can sublicense these acquired patents. RPX members can use these patents as shields to prevent litigation. Jonathan Stroud, of Unified Patents, said that many of the patents licensed are likely not too strong, and would not survive a challenge at the PTAB. However, this does save RPX members costs in litigation and invalidation proceedings at the PTAB.

- Patent Grant Statistics for 2020

The number of patents granted by the USPTO in 2020 decreased by a little less than 1% than in 2019. However, the number of patent applications in 2020, compared to

2019, increased by 5%. IBM once again had the highest number of issued patents in 2020 by having 9,130 patents granted. ■

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A Flurry of Precedential Designations by the POP

BY MARGARET HERRMANN

At the end of the year, the Precedential Opinion Panel (POP) of the Patent Trial and Appeal Board (PTAB) designated five PTAB decisions precedential. Those decisions, relating to: (1) analysis of the *NHK-Fintiv* factors regarding its discretion to deny institution under 35 U.S.C. § 314(a); (2) real-party-in-interest issues; and (3) when multiple petitions challenging the same patent are not allowed, provide binding precedent to patent attorneys who pursue and oppose *inter partes* review (IPR) petitions.

In *Sotera Wireless, Inc. v. Masimo Corporation*¹ and *Snap, Inc. v. SRK Technology LLC*,² the PTAB panels instituted review of patents which were the subject of parallel, pending district court litigation. In both cases, the three-judge, PTAB panels chose not to exercise their discretion to deny institution under 35 U.S.C. § 314(a) after analyzing the *NHK-Fintiv* factors, which include:

1. whether the court granted a stay or evidence exists that one may be granted if a proceeding is instituted;
2. proximity of the court's trial date to the Board's projected statutory deadline for a final written decision;
3. investment in the parallel proceeding by the court and the parties;
4. overlap between issues raised in the petition and the parallel proceeding;
5. whether the petitioner and the defendant in the parallel proceeding are the same party; and
6. other circumstances that impact the Board's exercise of discretion, including the merits.^{3,4}

In instituting review in *Sotera Wireless, Inc.*, the PTAB noted a stipulation filed by Sotera, the district court defendant, indicating that, if the PTAB instituted review, Sotera would not pursue any invalidity arguments in the district court case that it raised or could have raised in the IPR, which heavily swayed factor (4) away from denying review. In instituting review in *Snap, Inc.*, the district court had already stayed the infringement case until the PTAB issues its final written decision (i.e., the IPR will determine whether the patent is valid.) This also heavily swayed factor (4) away from denying review.

Next, the PTAB designated two decisions precedential which addressed 35 U.S.C. § 312(a)(2), which requires that an IPR petition must name the real parties in interest. In *RPX Corp. v. Applications in Internet Time, LLC*,⁵ which was on remand from the Federal Circuit due to the PTAB's "impermissibly shallow"⁶ review of the evidence, the PTAB terminated the IPR it had previously instituted, because RPX Corp. did not name its client as an interested party. RPX was time-barred from seeking IPR because its client had received an infringement complaint over one year before the filing of the petition. In contrast, the PTAB in *SharkNinja Operating LLC v. iRobot Corp.*⁷ instituted review, rejecting iRobot's argument that SharkNinja's IPR petition should be denied because SharkNinja did not name its parent company as a real party in interest. The PTAB, however, rejected this argument reasoning that it did not need to resolve the issue if such resolution would not impact the PTAB's institution decision, as the

petition was not time-barred and SharkNinja did not gain an advantage from the omission.

Finally, in *Apple Inc. v. Uniloc 2017 LLC*,⁸ the PTAB denied Apple's IPR petition because Apple had previously challenged some claims of Uniloc's patent. In its decision denying institution, the PTAB analyzed the *General Plastic* factors, which help evaluate whether to exercise its discretion, under 35 U.S.C. § 314(a), to deny a petition that challenges a patent that was previously challenged before the Board.

These factors include:

1. whether the same petitioner previously filed a petition directed to the same claims of the same patent;
2. whether at the time of filing of the first petition the petitioner knew of the prior art asserted in the second petition or should have known of it;
3. whether at the time of filing of the second petition the petitioner already received the patent owner's preliminary response to the first petition or received the Board's decision on whether to institute review in the first petition;
4. the length of time that elapsed between the time the petitioner learned of the prior art asserted in the second petition and the filing of the second petition;
5. whether the petitioner provides adequate explanation for the time elapsed between the filings of multiple petitions directed to the same claims of the same patent;
6. the finite resources of the Board; and
7. the requirement under 35 U.S.C.

§ 316(a)(11) to issue a final determination not later than 1 year after the date on which the Director notices institution of review.⁹

The PTAB assessed that all of the factors (sans the last one, which was neutral) weighed in favor of denying institution. Apple previously filed a first petition on the Uniloc patent that was denied, but more recently, the PTAB instituted review on an IPR petition on the Uniloc patent filed by Microsoft. Apple then filed a second IPR petition (the instant case) on the same patent

with the same arguments as in Microsoft’s petition and requested joinder of the petitions. In denying Apple’s second petition and request for joinder, the PTAB noted that Apple’s multiple, staggered petitions was exactly the “kind serial attack that *General Plastic* was intended to address.”¹⁰ ■

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1. IPR2020-01019, Paper 12 (Dec. 1, 2020) (designated Dec. 17, 2020).
2. IPR2020-00820, Paper 15 (Oct. 21, 2020) (designated

- Dec. 17, 2020).
3. *NHK Spring Co., Ltd. v. Intri-Plex Techs., Inc.*, Case No. IPR2018-00752, Paper 8 (Sept. 12, 2018) (designated May 7, 2019).
4. *Apple, Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11 (Mar. 20, 2020) (designated May 5, 2020).
5. IPR2015-01750, Paper 128 (Oct. 2, 2020) (designated Dec. 4, 2020).
6. *Applications in Internet Time, LLC v. RPX Corp.*, 897 F.3d 1336, 1351 (Fed. Cir. 2018).
7. IPR2020-00734, Paper 11 (Oct. 6, 2020) (designated Dec. 4, 2020).
8. IPR2020-00854, Paper 9 (Oct. 28, 2020) (designated Dec. 4, 2020).
9. *Gen. Plastic Indus. Co., Ltd. v. Canon Kabushiki Kaisha*, IPR2016-01357, Paper 19, at *9-10 (Sep. 6, 2017) (designated Oct. 18, 2017)
10. *SharkNinja*, at *4.

Intellectual Improbabilities™

BY DANIEL KEGAN

TRADEMARKS

Brand New Oldies. The 131-year-old brand, Aunt Jemima, becomes Pearl Milling Company brand Summer 2021, joining the brand transformation of Ben’s Original (née, more properly né for male-identified, Uncle Ben’s rice), Cream of Wheat cereal, and Mrs Butterworth’s syrup, reflecting recent general concerns of racial injustice (since at least 1619) and stereotyped racial images, [<https://www.history.com/news/american-slavery-before-jamestown-1619>](https://www.history.com/news/american-slavery-before-jamestown-1619).

New New. In Chicago, the Vista Tower building, nearing completion along the Chicago River across from the former Spire site, now is the St Regis Chicago. [<http://www.chicagotribune.com/columns/blair-kamin/ct-biz-vista-tower-saint-regis-kamin-20201125-pk5wyxxlczd6vij4xmt7m5elp4-story.html>](http://www.chicagotribune.com/columns/blair-kamin/ct-biz-vista-tower-saint-regis-kamin-20201125-pk5wyxxlczd6vij4xmt7m5elp4-story.html).

Corporate Jargon Monoxide. Robert Sutton (Stanford University professor) thus described the linguistic innovation of Mondelez (Oreo cookies Ritz crackers, Philadelphia cream cheese) and Ogilvy ad agency with “humaning,” their “unique, consumer-centric approach to marketing.” Cf Sn 90,241,858. The New York Times translates several novel, and nonobvious, new marketing terms: Adlob, B4H, Brand heat, Customer journey, Hypertelling, Occasion, Phygital, Purpose-driven lifestyle

brand, Snakable content, Solutioning, Storytelling, Thumb-stopping, TLA (OTT, PDOOH, TLA), Top-of-funnel. [<www.nytimes.com/2020/11/25/business/media/thumb-stopping-humaning-b4h-the-strange-language-of-modern-marketing.html>](http://www.nytimes.com/2020/11/25/business/media/thumb-stopping-humaning-b4h-the-strange-language-of-modern-marketing.html).

Legal But Unethical. Dave Chappelle reportedly signed his contract with Comedy Central, now owned by ViacomCBS, when he had been a poor, expectant father. Chappelle left the show about 2007, saying he “was doing sketches that were funny, but were socially irresponsible.” November 2020 Chappelle let his fans know he saw Comedy Central’s licensing of “Chappelle’s Show” to Netflix and HBO Max without additional compensation or notice to Chappelle as legal but unethical, resulting in Netflix and then HBO Max dropping the show. February 2021 Chappelle thanked Netflix and ViacomCBS’s MTV, after a new agreement was reached.

A Rose by any other name. Pasadena Tournament of Roses Association, Inc, owner of the Rose Bowl and its trademark registrations (eg *1,032,549; 1,022,242; 1,021,701 etc) sued City of Pasadena (CD CA, 2:21-cv-01051) for the city’s campaign falsely convey that it had an ownership interest in the Rose Bowl Game and associated IP.

Pandemic Gifts. Harvard IP Professor Rebecca Tushnet is experimenting with short videos as part of her pre-class materials on

advertising law, posting twelve; they range from 2 to 10 minutes, [<https://www.youtube.com/playlist?list=PLHn0H0RnIcoErAzyv20HOUvUtd87ZXBQM>](https://www.youtube.com/playlist?list=PLHn0H0RnIcoErAzyv20HOUvUtd87ZXBQM).

Dropouts. Professor Tushnet summarized Barton Beebe’s (NYU) research on percentages of successful applications, [<papers.ssrn.com/sol3/papers.cfm?abstract_id=1998965>](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1998965). About 75% of ITU applications are published for opposition, but about half fail to file statements of use. In contrast, the registration rate for use-based applications is about 75%, or twice as large.

Social Media Content Moderation. “Content Moderation in an Age of Extremes,” Rebecca Tushnet, 10 *J L Tech & Internet*, 2019. Of social media, «everything is broken because people are broken. But that doesn’t mean we need to give up; rather, it means that we can’t.»

Improved Image. The PTO added two functions to its Trademark Electronic Search System (TESS). Image List allows a user to display the mark drawings for search hits. After completing a search, click the top of page “Image List” button to view the three column image results. By selecting a drawing via a mouse click, the user can also toggle to the document display of that selected mark. “Current List” returns the user to the last used view of the search hit list, the text view, or the images view.

Second, multiple searches can now be

submitted at a single time using the Free Form search screen. Multiple searches can be conducted by merely separating each search with a semicolon (;). For example, the three searches HELLO[BI, TI]; WORLD[BI, TI]; S1 AND S2; could be submitted as a first search of a session. All three searches will be performed, and an intermediate Multiple Searches screen appears with the results of each search. The user may then select which search results to review.

TMA CARES. The Trademark Modernization Act, part of the CARES Act signed 27Dec2020, provides new procedures to challenge applications and registrations with inaccurate claims of use, <https://www.uspto.gov/trademarks/laws/2020-modernization-act?utm_campaign=subscriptioncenter&utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=>>.

Deletion Fee. Under the new January 2021 PTO fees, responding to an audit letter, generally for more evidence of valid use specimens and valid use for asserted goods and services, may trigger a \$250 fee if some goods/services are deleted. No such fee if correcting the claimed goods/services pre-audit. Prudent attorneys will seek substantiation prior to PTO filings. Many clients are unaware that “use” for the PTO is a technical term, 15 USC § 1127.

Error Translation. Attempting to file a response to a PTO office action, a practitioner received this error message: “Numbers of source Raster bands and source color space components do not match. . . . to correct the error, scroll down directly on this page to access the referenced field,” but the user found nothing referenced. A colleague translated: when a program tries to read an image saved in an unexpected color space; for example, an RGB JPG file expecting it to be a grayscale image; for example an issue with the logo.

Digital Da. Starting 18Jan2021, the Russian PTO issues digital trademark registration certificates, paper certificates are available upon special petition.

Indigenous Andean Pact. The Andean Pact (Bolivia, Columbia, Ecuador, Peru) expressly prohibits trademark registration of indigenous community names, as well

as African American and other native communities, and applies to symbols that constitute the expression of their culture or practice. <www.inta.org/perspectives/trademarks-for-indigenous-co...SFdpNTFHaVYybnhIQ0dlR3pUY3Y2UU04MUVXanVLZ3RLbjBjQnJLM3hiln0%3D>.

Free Trade. The African Continental Free Trade Area (AfCFTA Agreement), established in 2018 by African Union (AU) members now has 37 membes. Trading under the agreement began 1Jan2021. Ghana hosts the AfCFTA Secretariat, <<https://www.africancfta.org>>.

COPYRIGHT

Happy Termination Year. Since the 1976 Copyright Act, many copyrighted works fall into the public domain 95 years after initial publication or registration. Welcome F Scott Fitzgerald’s The Great Gatsby, Anita Loos’ book Gentlemen Prefer Blonds, Ruth Plumly Thompson’s The Lost King of Oz, Harold Lloyd’s film The Freshman, Ben Bernie’s Sweet Georgia Brown, musical compositions by composers Richard Rodgers, Lorenz Hart, Jerome Kern, Duke Ellington, Jelly Roll Morton, George and Ira Gershwin, Vincent Youmans, Fats Waller, Bessie Smith, and Gertrude “Ma” Rainey, and other works. <<https://blogs.loc.gov/copyright/2021/01/the-lifecycle-of-copyright-1925-works-enter-the-public-domain/?loclr=eacop>>.

Ghost Authors, Zombie Crises. The Centers for Disease Control and Prevention, CDC, has become well known in parallel with the Covid-19 pandemic, <<https://emergency.cdc.gov>>. As a campaign to attract new audiences with preparedness messages, the CDC includes “zombie preparedness” <<https://www.cdc.gov/cpr/zombie/index.htm>>.

Calendar Stretched. The US Copyright Office is further extending temporary adjustments to certain timing provisions under the Copyright Act for persons affected by the COVID-19 national emergency. Under the authority of the CARES Act, the Copyright Office previously announced adjustments relating to certain registration claims, notices of termination, and section 115 notices of intention and statements of account through January 8, 2021. In light of the ongoing national emergency, however,

the Register is extending the modifications pertaining to registration claims and notices of termination for up to an additional sixty days, or through March 9, 2021. The Register has determined that the adjustments pertaining to section 115 are no longer needed, and therefore they will not be extended further at this time. <<https://www.copyright.gov/coronavirus/>>

Stream Lawfully. The Protecting Lawful Streaming Act, 18 USC § 2319C, was added to the omnibus Consolidated Appropriations Act, 2012 (Division Q, Title II, § 211) and signed by the President 27Dec2021. Under this new law, unauthorized large-scale streaming of copyright material becomes a felony.

Merger. The Copyright Office launched its new Copyright Public Records System (CPRS) pilot, which provides access to the same copyright records for both registrations and recordings. <<https://www.youtube.com/watch?v=XGJv19aX6ec>>.

Third Charm. The Compendium of US Copyright Office Practices, Third Edition, was released 28Jan2021, <<https://www.federalregister.gov/documents/2021/01/14/2021-00604/compendium-of-us-copyright-office-practices>>.

PATENT

School Not Over. The PTO is proposing beginning 1Mar2022 required continuing legal education (CLE) and biennial certification for patent practitioners before it. <<https://www.federalregister.gov/documents/2020/10/09/2020-22420/proposed-continuing-legal-education-guidelines>>.

Definite Indefinite. The Patent Trial and Appeal Board (PTAB) will now use the standard applied in federal district courts to determine whether a patent claim is indefinite. Aligning “the indefiniteness approach in AIA post-grant proceedings will promote consistency and efficient decision making among coordinate branches of government that decide similar issues in co-pending proceedings,” the 6Jan2021 PTO memo said.

Covid Benefit. Under a PTO pilot program, patent applications to treat or detect Covid-19 may be fast-tracked.

Launched May 2020, the PTO has approved 251 applications for the pilot.

Covid Patent Risk. South Africa and India have petitioned the World Trade Organization to suspend some IP protections from Covid-19 drugs, vaccines, and diagnostic techniques. The International Federation of Pharmaceutical Manufacturers and Associations, sees suspending vaccine patent rules as dysfunctional. <www.nytimes.com/2020/11/25/business/media/thumb-stopping-humaning-b4h-the-strange-language-of-modern-marketing.html>.

Stopped Clock Correct Twice a Day. The PTO recently sought estimates on the time it takes for a Power of Attorney and/or Change of Correspondence Address. David Boundy suggested some of the steps that might have been overlooked by the time estimator:

Question 1. What does it take for a Power of Attorney, end-to-end?

- * making sure you know who the client is
 - * confirming whether there's a comma before the "LLC" or not
 - * making sure you've got the right customer number
 - * preparing the Power doc
 - * attorney review of the Power before sending it to the client
 - * the email to the client explaining "this one's just plain old signature or a plain old /s/, no notarization"
 - * the client's time to sign it and send it back
 - * docketing a reminder that you're expecting a signature from the client, and nagging the client a couple weeks later
 - * getting the doc in shape to file
 - * filing the Power
 - * reviewing and filing the acceptance of power of attorney
 - * preparing an ADS when necessary to change or correct applicant
 - * phoning the PTO to figure out what's needed when the PTO bounces a perfectly good Power
 - * refiling if the PTO bounces the Power
 - * dealing with erroneous revocations of power
 - * etc.
- The PTO estimates at 3 (sic, three) minutes.
<www.federalregister.gov/

documents/2021/01/15/2021-00912/agency-information-collection-activities-submission-to-theoffice-of-management-and-budget-omb-for>

Holding Docket. Ron Katznelson explained: "Holding Docket" is a fictitious name of the "examiner" of record for non-provisional patent applications that are in status 30 in the PTO's PALM system—the status called "Docketed New Case—Ready for Examination." It is a placeholder examiner assignment for some applications that have been docketed with specific Working Group under a specific SPE. The SPE has a "holding docket" for holding the application until an examiner is ready to take it up for examination. The PTO's site at <ped.uspto.gov/peds/#/search> allows one to search for all published applications assigned to a named examiner and as of 2Jan2021 it shows 120,547 nonprovisional published applications to which the "examiner" "Holding Docket" has been assigned. See below. Because this site only shows information for published applications, this number includes.

Adam Smith & Fredrick Winslow Taylor. Jeffrey Wendt divides US patent prosecution into four stages: pre-exam, exam, post-exam, and "the dreaded Quality Review." Pre-exam and post-exam are staffed not with trained patent examiners. The trademark side has Legal Instrument Examiners (LIE, as sometimes displayed in TSDR). Equivalent to a paralegal, the clerical part of trademark examination, taking in filed papers, getting them to the proper files, checking i's and t's for dots and crosses.

Patenting As Sweet Sorrow. Makers of Latin America's favorite traditional sweetener, Panela, say new patent threatens them. US patent 10,632,167, method for making an unrefined sugar containing high policosanols levels, alcohols found in sugar cane wax that are purported to lower cholesterol. <www.nytimes.com/2021/01/26/science/colombia-panela-patent-gonzalez.html>.

MENA Substantive Examination. Patent prosecution challenges are reported rising in the MENA region—Middle East and North Africa. Many of the patent office now substantively examine patent

applications, rather than placing the burden on the applicant. Substantive examination decisions have been issued by United Arab Emirates, Saudi Arabia, Oman, Bahrain, Qatar, Iraq, Egypt, Jordan, Algeria, Morocco, and Tunisia.

CYBER

I am not a cat. Give yourself a few minutes before a video-conference to check the setup—especially if you are using an older, borrowed computer. Attorney Rod Ponton's usual computer was being used by another, so he borrowed his assistant's computer, which apparently had old Dell Webcam Manager software installed, including a filter that transforms a human face, with eyes and mouth moving as the user does. Judge Roy B Ferguson of the 394th Judicial District Court in Texas opined, "Mr Ponton, I believe you have a filter turned on in the video settings." Ponton, now Internet-meme-famously replied, "I'm here, live, I'm not a cat." <www.cnn.com/2021/02/10/tech/cat-lawyer-zoom-filter/index.html>.

Got No Respect. Major social media are being chastised for using computers and "algorithms" for preventing improper posts and advertisements. But an "algorithm" is merely "a finite sequence of well-defined, computer-implementable instructions," <<https://en.wikipedia.org/wiki/Algorithm>>. Having humans directly review and evaluate proposed posts would materially delay posts and increase costs. And the humans would likely often provide arbitrary and capricious evaluations, without substantial evidence (cf. Administrative Procedure Act of 1946, 5 USC et seq), unless guided by well-defined rules. The problem is not the use of algorithms, but poorly defined algorithms, insufficient attention to Type I and Type II errors, also known as false negatives and false positives (<https://en.wikipedia.org/wiki/Type_I_and_type_II_errors#Type_I_error>), difficult to find "abuse" email addresses, and often slow and poorly reasoned rejection of abuse reports. Eg, <<https://www.nytimes.com/2021/02/11/style/disabled-fashion-facebook-discrimination.html>>.

October Surprise. Former PTO-employee and current TESS-wizard Ken Boone analyzed the monthly pending

federal applications from December 2018 through 12 February 2021. Through July 2020 pending applications were stable, from 605 to 640 thousand, about 3% range. But starting August 2020, pendency linearly increased, to 824 thousand on 12Feb 2021, about 33%. Trademark attorneys are also reporting unusual delays for initial office actions. Perhaps partly Covid-19, but PTO examiners have been working remotely for some time before the pandemic hit us. (Ken's TESS search, 0[RN] not (DEAD[LD] `SN > 89000000 < 90000000)>).

CryptoTax. "Taxation of Cryptocurrency Block Rewards in Selected Jurisdictions," Library of Congress, Jan 2021, <<https://www.loc.gov/law/help/cryptocurrency/block-rewards/taxation-block-rewards.pdf>>.

INTELLECTUAL PROPERTY

Privacy Complaint Prevails. Meghan Markle, Duchess of Sussex, prevailed in her privacy suit against British tabloid The Mail on Sunday, 11Feb2021, for publishing extracts of a letter she wrote in 2018 to her estranged father.

Poster Chide. Retired soldier Nicholas Giovannelli sued Walmart and Amazon for ongoing trauma from online sales of posters of his combat service. Circuit Court of Cook County. Plaintiff knew the US military occasionally took promotional photos of him and fellow soldiers while on combat duty in Afghanistan, but he did not perviously know of nor grant permission for the photographs to be made into commercial posters. <chicago.suntimes.com/news/2021/1/14/22231301/soldier-nicholas-giovannelli-sues-walmart-amazon-posters-combat-duty>.

Better Mousetraps Need Public Relations? The PTO sought more comments on developing a National Consumer Awareness Campaign on Combating the Trafficking in Counterfeit and Pirated Products. <https://www.federalregister.gov/documents/2020/11/17/2020-25326/development-of-a-national-consumer-awareness-campaign-on-combating-the-trafficking-in-counterfeit?utm_campaign=subscriptioncenter&utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=>>.

Heavy Hangs the Crown. The PTO was seeking public comments of patent or trademark right holders' infringement experience by state entities without adequate remedie under state law. Since 1776 the Unites States of America has had no king, we do still maintain sovereign immunity.

Pages Not Found. The PTO shortened many PTO website internet addresses (URLs) "to provide a more consistent customer experience." You may need to update your PTO web browser bookmarks, and perhaps gray-matter memory.

Lost in Transition. IP practitioners have responded to the delays in US Postal Service mail delivery—and responded. Some are now enclosing two or three stamped, self-addressed postcard receipt acknowledgment cards with physical filings, both in person and via USPS or other delivery service. Office, Home, and perhaps PO Box. Sometimes the returned card arrives before the PTO docket acknowledges receipt, sometimes some of the multiple cards are quite delayed, or might be lost in the ether. Another advantage of the postcard receipt: it can itemize the included documents. <https://en.wikipedia.org/wiki/2020_United_States_Postal_Service_crisis>.

Digital Exhibits Electronically Filed. Beginning February 1, 2021, the District Court for the Northern District of Illinois allows NON-SEALED digital audio/video exhibits (MP4, MP3, MOV, etc) to be filed electronically via the court's website. These digital audio/video exhibits will then be available for purchase and download upon request via the Certified Copy Desk.

Bull Market in the China Shop. The US PTO issued "Trademarks and Patents in China: The impact of non-market factors on filing trends and IP systems," January 2021.

Eurasian IP Expands. The Protocol on the Protection of Industrial Designs to the Eurasian Patent Convention becomes effective 17Mar2021 for its first three members, Kyrgyzstan, Azerbaijan and Armenia. For other members the protocol enters into force three months after the member's accession or deposit of ratification. The eight Eurasian Patent Office (EAPO) member states are Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Russia,

Tajikistan and Turkmenistan. Tajikistan has signed the Protocol, while Belarus and Turkmenistan have announced the implementation of domestic procedures necessary for their participation in the Protocol. The countries that have ratified the Protocol are Russia, [Kazakhstan](#), Armenia, Azerbaijan and Kyrgyzstan. The Eurasian Trademark single registrations is expected to soon become effective.

For everything a time to be born and a time to die. As of 6Jan2021 the Gulf Cooperation Council (GCC) Patent Office no longer accepted new patent application filings. Applications for any of the GCC states—Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates—should timely, generally within 12 months from the earliest filed priority application, file via the Paris Convention, or file a Patent Cooperation Treaty application and then enter the national phase in the desired member nations.

Foreign Assets Control. IP transactions with Venezuela are generally exempt from the Executive Orders sanctioning Venezuela, 5August 2019.

COVID HELP. Several Illinois entities have collaborated to offer online help, COVID Housing and Economic Loss Prevention, <<https://covidhelpillinois.org>>. Information and referrals for common COVID-19 legal issues include housing, debt, unemployment, bankruptcy, and guardianship. ■

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Join the Intellectual Property Section Social Events

BY DANIEL KEGAN

In our noon meeting on March 17th, test your knowledge of Irish inventors and scientists – they’ve invented much more than the widget in the Guinness can. We may be joined by a member of Oifig Maíone Intleachtúla na hÉireann to assist in the quizzing. Speaking of Guinness – do you know when they received a trademark registration for their harp symbol, and how this affected the harp used as the symbol of the Irish state?

Join Zoom Meeting : <https://us02web.zoom.us/j/89303701036?pwd=d1dvYmVSVXVHSlJSbW5uMm16VDhzUT09>

Meeting ID: 893 0370 1036

Passcode: 773271


To join by phone:

Dial: 312 626 6799

Meeting ID: 893 0370 1036






In May you can join us on a virtual tour of the inventions of the Columbian Exposition of 1892. America was in the midst of a boom of creativity and innovation, and many of

the items we consider commonplace today were marvels at the end of the 19th Century. In addition to the expertly-guided tour we will have a virtual scavenger hunt for some of their modern-day descendants, so be prepared. Registration information is coming soon and space is limited, but we’ll keep a waiting list once the original slots are filled. This event will be in the early evening to allow a more relaxed time for us ‘at’ the fair. ■



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