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COULD SUBMISSION OF A GRANT PROPOSAL JEOPARDIZE YOUR PATENT RIGHTS?

BY: STEPHEN HARPER

Research programs investigating new technologies, particularly those under development by universities and small businesses, are frequently funded by grants from governmental agencies and other sources. Such grants usually require the submission of a proposal in which the applicant describes the objectives of the funded research and how the applicant expects to achieve these objectives. Grant proposals often include a considerable amount of technical information. If the proposed research is part of an on-going course of investigation, for example, the applicant may discuss the results achieved to date, including details that have not been published. By submitting such a proposal, however, the applicant may be jeopardizing possible patent rights in any inventions arising out of the subsequent funded research.



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A NEW TEST FOR DETERMINING DESIGN PATENT INFRINGEMENT FAVORS PATENT OWNERS AND INFORMS DESIGN STRATEGIES

BY: JOSHUA COHEN

The test for determining design patent infringement has been revised. It makes it easier for patent owners to enforce their rights. It also impacts the strategies used to protect those rights.

DESIGN PATENTS

In contrast to utility patents for technological innovations, design patents protect unique product shapes. They can provide powerful protection for design features that differentiate innovative products from competing products. This is especially true for many product categories—like consumer electronics—where distinctive design is critical to commercial success and aesthetic appeal drives purchase decisions.

Design patents confer the right to exclude competitors from exploiting the patented design. The scope of that right is defined by the patent figures. To determine whether a design

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COULD SUBMISSION OF A GRANT PROPOSAL JEOPARDIZE YOUR PATENT RIGHTS?

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A universal requirement for patentability in all countries is that the invention claimed in a patent application must be “novel” (e.g., not previously known or made available to the public). In the United States, the novelty requirements are defined by statute 35 U.S.C. §102, the relevant sections of which read as follows:

A person shall be entitled to a patent unless -

- a. the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or
- b. the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States...

Thus, with respect to the inventor’s own acts, the United States has a one year “grace period”. That is, an inventor has one year from his or her disclosure or offer for sale of any invention to file a patent application on the invention. In contrast, nearly all countries other than the United States are so-called “absolute novelty” countries; there is no grace period and a patent application, to be valid, must be filed before any public disclosure of the invention.

A grant proposal has been interpreted by at least one U.S. court to constitute a “printed publication,” making it prior art against a patent

filed more than one year after the grant proposal became available through the Freedom of Information Act.¹ The court acknowledged that the question of whether the grant proposal constituted a “printed publication” hinged on whether it was publicly accessible. In this particular case, the grant proposal was found to be publicly accessible in view of the fact it was a) filed and indexed by title, author, institution of grant number, b) available to any member of the public through the FOIA, and c) cited by grant number in an article written by the proposal’s author. The patent was consequently invalidated.

It is difficult to precisely determine when a grant proposal becomes “publicly accessible.” The answer is fact dependent. Therefore, the submission of a grant proposal creates an uncertain degree of risk.

In an ideal world, of course, the aforementioned risks can be easily avoided by filing a complete and detailed patent application discussing all aspects of the planned research and the expected results before submitting a grant proposal for such research. However, the costs of preparing such an application can be significant, depending upon the complexity of the technology, and there may be a reluctance to incur such costs prior to knowing whether in fact the research will be funded. Perhaps more importantly, a detailed patent application often takes a great deal of time to prepare, which obviously can interfere with the applicant’s ability to meet grant proposal deadlines.



With these practical considerations in mind, the following alternative approaches should be considered in order to minimize the risk that a grant proposal will interfere with securing valid patent protection:

1. Keep the grant proposal as general as possible.² Avoid including specific, detailed descriptions of the various approaches or methods that you plan to try in order to solve the defined technical problem. In general, making a patentable invention involves determining how to achieve a certain desired result, not just defining the result that is being sought. By omitting from the proposal the details of exactly what you intend to test and evaluate, it may therefore be possible to avoid disclosing the invention you would want to describe and claim in a subsequent patent application.
2. If it is not practicable to adequately “sanitize” the grant proposal because of the funding agency’s requirements that any research program be described in detail, consider filing a provisional patent application before submitting the grant proposal. The filing date of the provisional application can establish a priority date that can be used as a basis for further filings, both in the United States and in other countries. A provisional application does not need to meet all the formal requirements of a “regular” (non-provisional) patent application and the government filing fee for such an application is relatively small. However, it is critical that the provisional application include a disclosure which enables the use of the invention by others and meets other patent law requirements. Additionally, a narrow provisional application may not provide adequate support for broader claims that the applicant may later decide to pursue, thus compromising the scope of protection that might otherwise have been obtainable. For these reasons, although the Patent Office will accept the text of a grant proposal as a provisional application, having a patent attorney or agent involved in reviewing and supplementing the proposal before filing is strongly recommended.
3. Although grant proposals to federal agencies may become “publications” under the Freedom of Information Act, certain steps can be taken to increase the likelihood that the information contained in a proposal is maintained in confidence. If the relevant portions of the grant proposal are marked as confidential, this may exempt such information from being made publicly available through an FOIA request. However, many non-federal funding organizations are not required to keep submissions confidential. In fact, some organizations may have policies stating that any submissions received will not be kept secret. Therefore, a grant applicant should frequently check an agency’s policies regarding secrecy and comply with any marking requirements of the agency if the applicant desires to exempt certain information from being publicly available. ■



“...the submission of a grant proposal creates an uncertain degree of risk.”

1 E. I. du Pont de Nemours & Co. v. Cetus Corp., 19 USPQ2d 1174 (N.D. Cal. 1990).

2 See B.E. Goodrich Flight Systems Inc. v. Insight Instruments Corp., 22 USPQ2d 1832 (S.D. Ohio 1992), which held that an accused infringer failed to show that reports submitted in connection with a grant request were prior art. In particular, the reports were considered to be “no more than a proposal for a hypothetical system, which did not teach the reader how to build the device which was apparently in the mind of the author.”

patent is infringed, the patented design—typically depicted by black and white line drawings—is compared to the three-dimensional product design that is accused of infringement.

This comparison is easy for knock-off products that copy patented designs, but it can be difficult for designs composed of combinations of similar or overlapping elements. A framework is required to guide this comparison.

ORDINARY OBSERVER TEST

The Supreme Court established such a framework—the so-called “ordinary observer test”—long ago in 1871. It posed a simply-stated question: Would an ordinary observer be deceived by the sameness of the patented and accused designs such that (s)he would purchase one believing it to be the other, after giving the usual attention of a purchaser? If so, the patent is infringed.

The design patent infringement analysis evolved after 1871. The Court of Appeals for the Federal Circuit—the appeals court that reviews all U.S. patent disputes—built upon the framework of the ordinary observer test. In doing so, it encouraged an evolution of that test that ultimately departed from the Supreme Court’s original construct.

POINT OF NOVELTY TEST

The first step in this evolution came with the Federal Circuit’s 1984 introduction of the “point of novelty test.” It was intended to discount from the infringement analysis any similarities between the accused design and prior designs, focusing instead on the novelty of the patented design. The point of novelty test supplemented the ordinary observer test with an additional and distinct question: Did the accused design appropriate the point of novelty that distinguished the patented design from prior designs?

In addition to satisfying the ordinary observer test, the patent owner also had to establish that the accused design appropriated the novelty of the patented design. And more recently, yet another question was introduced: If the point of novelty was appropriated by the accused design, was it a “nontrivial advance” over prior designs?

NEW TEST OF “EGYPTIAN GODDESS”

Last year, the Federal Circuit reconsidered the test for design patent infringement in the *Egyptian Goddess* case. The court asked whether point of novelty should be a test for design patent infringement. In answering this question, the evolution of the Supreme Court’s ordinary observer test was stopped and reversed.

Most importantly, the Federal Circuit abolished the point of novelty test and the related nontrivial advance requirement. It concluded that the ordinary observer test is the only test for determining whether a design patent has been infringed. It also clarified that the ordinary observer is deemed to view the differences between the patented design and the accused design in the context of the prior art, and it placed the burden of producing the prior art for this analysis on the alleged infringer.

As stated by the court, the question is “whether an ordinary observer, familiar with the prior ... designs, would be deceived into believing the [accused design] is the same as the patented [design].” Though it did not provide a detailed framework for this newly-articulated ordinary observer test, the Federal Circuit did provide several helpful guidelines:

- “[W]hen the claimed design is close to the prior art designs, small differences between the accused design and the claimed design are likely to be important to the eye of the hypothetical ordinary observer.” In other words, are the patented and prior designs so similar that even small differences between the accused and patented designs stand out?
- “If the accused design has copied a particular feature of the claimed design that departs conspicuously from the prior art, the accused design is naturally more likely to be regarded as deceptively similar to the claimed design, and thus infringing.” Put differently, has the accused design appropriated a feature of the patented design that is distinct from prior designs?
- “If the claimed design consists of a combination of old features that creates an appearance deceptively similar to the accused design, even to an observer familiar with similar prior art designs, a finding of infringement would be justified.” So, does the patented design include combined features that appear deceptively similar to the accused design?

The Federal Circuit also recognized the difficulties in describing three-dimensional ornamental designs in words for this analysis. It concluded that a design patent claim is preferably not interpreted by creating a detailed verbal description of a claimed design. Instead, the figures should be the basis for such interpretation, guided by other factors impacting the scope of the patented design, including:

- features of the patented design as they relate to the accused design and prior designs;
- the role that design patent drafting conventions—e.g., the use of broken lines to show unclaimed features and the use of surface shading to illustrate surface contours—play in patent interpretation;
- the effect of communications between the applicant and the Patent Examiner during examination of the design patent application; and
- distinctions between ornamental and functional features of the patented design.

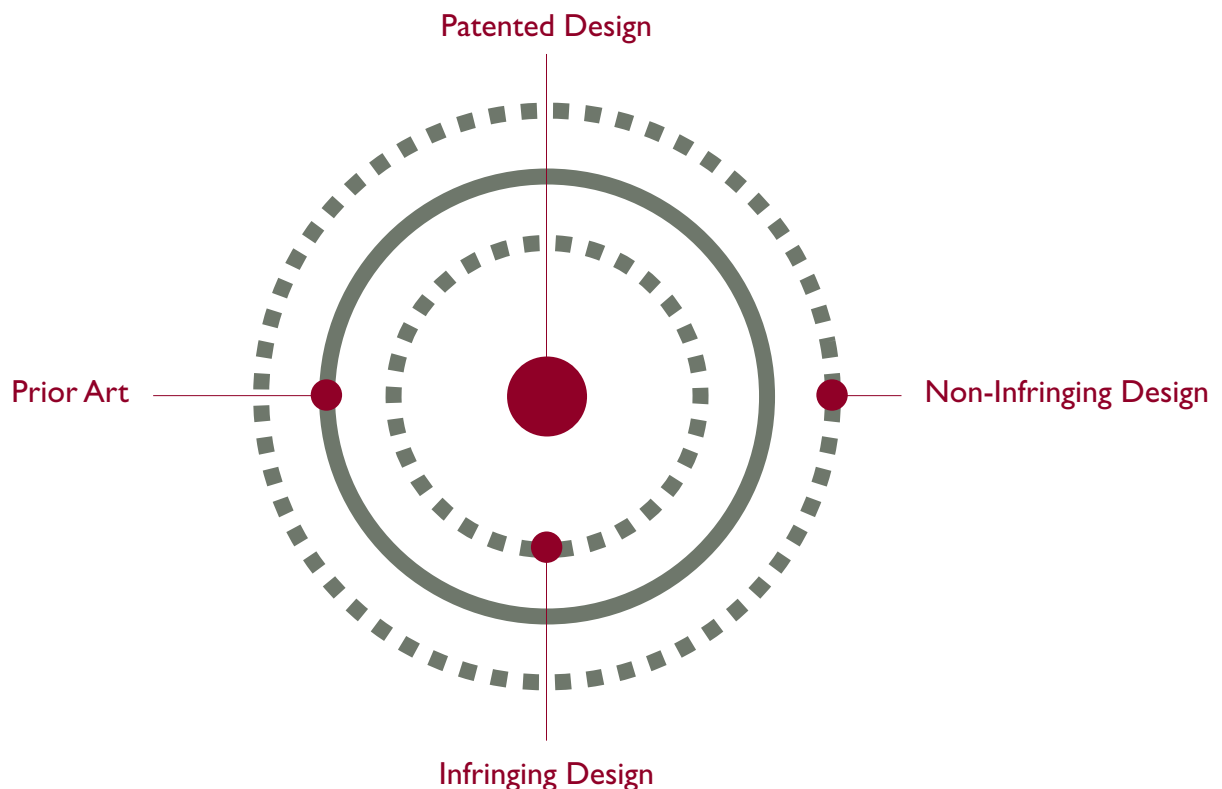
The Federal Circuit’s *Egyptian Goddess* test typically requires a three-way comparison among the patented design, prior designs, and the accused design. As illustrated in the accompanying diagram (opposite), the accused design is juxtaposed with the patented design and prior designs. If the accused design is deceptively similar to the patented design when viewed in the context of prior designs—e.g., the accused design is “closer” to the patented design than the prior designs—then infringement may be found.

PRACTICAL IMPLICATIONS

The new infringement test has several important and practical implications for design rights, design strategies, and the way in which designs are created:

- With the elimination of the point of novelty test as a second element of the infringement analysis, it is now easier for owners of design patents to enforce their design rights. Patent owners have one less hurdle to clear when proving infringement.
- As a flip side to the increased ease of design rights enforcement, increased vigilance and due diligence are required when introducing new product designs that may conflict with design rights of others. This is important from the perspective of proactive risk management.
- It has always been good business to develop and protect distinctive product designs. By emphasizing the three-way comparison among the patented, prior, and accused designs, the newly articulated ordinary observer test serves as a fresh reminder that design rights can be strengthened by establishing a strategic distance from prior designs—what can be called *strategic design differentiation*.
- The newly articulated test also serves as a reminder of the importance of carefully prepared design patent applications. This includes careful attention to patent drafting conventions and well-crafted communications with Patent Examiners.

The revision to the design patent infringement test made in *Egyptian Goddess* does indeed favor patent owners. The new test makes it easier to enforce design rights by eliminating the separate point of novelty test. It also informs design protection and risk management strategies—even the design process itself.





Gilbert W. Rudman

Gilbert W. Rudman joins RatnerPrestia's Patent Prosecution Group. Gil has over thirty years of intellectual property law experience, including serving as Associate General Counsel, Patents and Trademarks for a major pharmaceutical company and as Corporate Counsel for a publicly traded biopharmaceutical company. He most recently served as Deputy General Counsel, Intellectual Property for Arkema Inc., where he was responsible for directing the intellectual property legal function of this subsidiary of Arkema SA. Mr. Rudman received his J.D. from Temple University School of Law, his B.S. in Pharmacy from Temple University School of Pharmacy and is a member of the American and Philadelphia Intellectual Property Law Associations, and the Association of Corporate Patent Counsel.



Ken Nigon



Bob Seitter



Josh Cohen

Ken Nigon, a Shareholder with RatnerPrestia, spoke at the Advanced Patent Prosecution Workshop 2009: Claim Drafting and Amendment Writing, held in New York City on July 23 - 24, by the Practising Law Institute (PLI). The course provided a unique opportunity for participants to receive hands-on drafting experience under the guidance of experienced patent prosecutors. Ken discussed guidelines for preparing patent applications in view of recent court decisions such as KSR and Bilski to support broad claims and to avoid unintended claim limitations.

RatnerPrestia teamed up with *The Legal Intelligencer* to conduct a CLE Panel Discussion entitled "Managing IP & Commercial Disputes in a Challenging Economy," held in the firm's Valley Forge office on May 18th.

Bob Seitter and Harrie Samaras served as moderators for the panel, which included Anthony DiBartolomeo, Vice-President, Head of Global Litigation Group for SAP, Charles DiNardo, President of Aesculap, Inc., Vincent A. Maffeo, Senior Vice-President & General Counsel of ITT Corporation, and Cynthia Raposo, Vice-President, IP and Litigation for Under Armour, Inc. Topics discussed included evaluating business injury in resolving disputes, improving communications with outside counsel, and performing early case assessment. The Panel Discussion will be published in an upcoming issue of *The Legal Intelligencer*.

Josh Cohen, a Shareholder of RatnerPrestia, presented "Sustaining the Global Competitive Advantage of Strategic Design Differentiation" at the D2B2: Tsinghua International Design Management Symposium, held in Beijing on April 23-26. The symposium, organized by University of Salford School of Art and Design and Tsinghua University Academy of Arts and Design, represents a forum for advancing the debate on best practice, academic research and business implications by both academic researchers and industry practitioners from both East and West. The paper accompanying Mr. Cohen's presentation was selected for publication in the Conference Proceedings.

RatnerPrestia hosted the April 2009 Philadelphia Chapter Meeting of the Licensing Executives Society (LES) on "Making the Most of Your IP During a Recession." RatnerPrestia Shareholder **Bob Seitter** served as moderator for the panel of Corporate Counsel, which included Barbara Deptula, EVP and Chief Corporate Development Officer of Shire Pharmaceuticals, Alex Plache, Senior Intellectual Property Counsel of Saint-Gobain Corporation, Jeff Kelly, V.P. Legal Affairs of Kensey Nash Corporation, and Shawn Bridy, Managing Director, Bridy Advisors LLC.



Jonathan H. Spadt



Paul Prestia



Ben Leace



Zach Fransler



Andy Koopman



Jaimin Shah



Chris Rothe



Christine Brown



Brian Cocca



Stephen Harper



Joy Mulholland



Lauren Schmidt

Jonathan H. Spadt, shareholder of RatnerPrestia, published "Is There Another Chink in Your Patent Armor?" in the August 5th edition of *The Legal Intelligencer*.

RatnerPrestia is again ranked as a leading intellectual property law firm in Pennsylvania by *Chambers & Partners* in its 2009 publication, *America's Leading Lawyers for Business, The Client's Guide*. Also, **Paul Prestia**, co-founder and Chair of the Management Committee, has again been named as a leading intellectual property lawyer, along with RatnerPrestia Shareholders, **Ken Nigon** and **Ben Leace**.

RatnerPrestia is a proud sponsor of Hagley Museum and Library's "Nineteenth-Century Patent Models: Innovation in Miniature" exhibit, taking place now through December 2010. Located in Wilmington, Delaware, Hagley Museum and Library collects, preserves, and interprets the unfolding history of American enterprise. The Patent Model Exhibit will showcase over 120 one-of-a-kind patent models representing some of the most creative and imaginative ideas of the nineteenth-century.

Paul Prestia, Shareholder and Management Chair, along with **Zach Fansler**, **Andy Koopman**, and **Jaimin Shah**, All Associates of RatnerPrestia, published "A Different View of the Profession: First-Years Offer Perspectives" in the May 6th edition of *The Legal Intelligencer*.

Chris Rothe participated as a judge in the final round of the 2009 "Idea Pitch Competition" hosted by Pennsylvania State University's Farrell Center for Corporate Innovation and Entrepreneurship and the Smeal College of Business on April 30th. The annual competition is open to those interested in learning how to effectively formulate their innovative ideas and turn them into business opportunities.

RatnerPrestia participated in Temple University's 11th Annual Business Plan Competition, aka the "Be Your Own Boss Bowl" (BYOBB). The competition was open to students, faculty, staff and alumni from all 17 schools and colleges within Temple University and was sponsored by the Innovation and Entrepreneurship Institute at Temple's Fox School of Business. RatnerPrestia attorneys who participated as judges in the preliminary round of competition were **Christine Brown**, **Brian Cocca**, **Stephen Harper**, **Joy Mulholland**, and **Lauren Schmidt**. Finalists presented their plans before a panel of judges at the BYOBB on April 22, followed by an awards ceremony and networking session.

TRADEMARK CORNER

BY: REX DONNELLY AND JOHN MCGLYNN

This Trademark Corner provides an update on two issues addressed in previous articles and columns.

Fraud Update

Previous articles have discussed cancellation of trademark registrations for fraud stemming from filing a false Statement of Use. In the seminal case on this subject¹, the Trademark Trials and Appeals Board (TTAB) cancelled a single class registration because the Applicant filed a Statement of Use attesting to use in connection with both catheters and stents, when the mark was only being used in connection with catheters. U.S. trademark application and registration fraud jurisprudence has continued to develop, with some recent TTAB decisions clarifying a number of issues.

Fraud in a single class does not compel cancellation of a multi-class registration²

An opposer, facing cancellation counterclaims for fraudulently claiming use in one of two classes of its registration, attempted to cure the registration by moving to cancel the challenged class and moving to dismiss the counterclaim for the remaining class. Consistent with the well-settled proposition that fraud cannot be cured by deleting the goods or services that are the subject of the fraud claim, the TTAB denied the motion with respect to the challenged class. Equating a multiple-class application to a series of single class applications, however, the TTAB granted the motion to dismiss the counterclaims as to the remaining class. The TTAB held that when considering fraud, each class of goods and services in a multiple class registration must be considered separately, and a finding of fraud in one class does not require cancellation of the entire registration.

Amendment of an identification during prosecution can constitute fraud³

Amending an identification of services to adopt language proposed by an Examining Attorney is not a defense to a fraud claim. An applicant, defending against a fraud claim in an opposition, argued a distinction between its over-inclusive description, which originated in an amendment proposed by the Examining Attorney, and over-inclusive descriptions accompanied by a verified statement in a Statement or Declaration of Use. The Board disagreed, holding that an applicant is ultimately responsible for the accuracy of the information contained in the application, and that this responsibility remains throughout prosecution.

Misstatements in applications can be corrected to avoid fraud⁴

Amending an identification of goods to correct an inaccuracy before publication, creates a rebuttable presumption that the applicant did not commit fraud. In an opposition of a use-based application in which the original identification included goods later deleted during prosecution, the TTAB denied the opposer's motion for summary judgment on a fraud-based counterclaim, holding that amendment of the identification during *ex parte* prosecution created a rebuttable presumption that the applicant lacked the willful intent to deceive.

Errors in registrations can be corrected before validity is challenged to avoid fraud⁵

An opposer/registrant fighting a counterclaim seeking cancellation of its registration for fraud prevailed when the TTAB denied the applicant's motion for summary judgment regarding registrations corrected before validity was challenged. The TTAB found that the registrant's "timely proactive corrective action" when filing Declarations of Use to maintain the registrations created the rebuttable presumption that it did not intend to deceive the U.S. Patent and Trademark Office, and left a genuine issue of material fact as to whether it had an intent to commit fraud on the Office in connection with these registrations.

Ramifications

Although at least one recent decision opens the door to the possibility of curing fraud after an application matures to registration, re-filing an accurate

application is still the most reliable way to ensure that a mark covered by a vulnerable registration is insulated from challenge. Accordingly, any concerns regarding the accuracy of statements made in connection with registrations or applications for trademarks merit further consideration.

Internet Keyword Developments

Our Summer 2008 issue of INSIGHT included a discussion of "Trademark Issues Posed by Internet Keywords." Search engines use keywords to trigger "sponsored links" by advertisers. Thus, for example, a Google search for "toys" produces sponsored links for a number of toy companies at the top and to the right of the "organic" search results. Disputes arise when advertisers purchase and use competitors' trademarks as keywords. Until recently, U.S. courts were split on the threshold issue of whether using a trademark as a keyword was "use in commerce" under the Lanham Act, with several decisions from the second circuit, particularly from New York, holding that keyword use, by itself, was not use in commerce, largely because keywords are not seen by the consuming public.

Accordingly, the Second Circuit Court of Appeals' recent opinion in *Rescuecom Corp. v. Google, Inc.*⁶ has generated a lot of commotion because of its holding that Google's sale of RESCUECOM as a keyword to Rescuecom's competitors constituted trademark use. While this decision brought the Second Circuit in line with the rest of the country on the threshold issue of use, it did not address the underlying concern of whether keyword use actually creates the likelihood of confusion that establishes trademark infringement.

Thus, despite the attention *Rescuecom* has received, the decision has done nothing to change the ultimate considerations regarding keyword trademark infringement, which have never been inconsistent across the circuits. Even before *Rescuecom*, New York courts had held it was trademark infringement to use a competitor's trademark in the text of an ad triggered by using that mark as a keyword.⁷ Similarly, even those jurisdictions in which use in commerce was not a threshold issue have not issued any final decisions finding trademark infringement for ads triggered by keywords where the trademark was not in the text of the ad.

Google's internal keyword dispute policy in the United States has been generally consistent with such decisions, permitting trademark owners to stop others' use of their marks as keywords where the triggered ads feature text including their marks. In another recent development on June 15, 2009, however, Google's policy was modified to permit sponsored links for resellers and informational sites to use others' trademarks in ad text. This squares Google's policy with the principle of nominative fair use, which generally permits limited reference to another's mark when it is the most logical way to identify the goods and services (for example, ticket brokers must be able to advertise sale of "Phillies tickets" rather than "tickets for games featuring the professional baseball team from Philadelphia"). Google's policy still provides for disabling keyword-triggered ads featuring another's mark in a manner which is "competitive, critical, or negative." Thus, Google's policy is narrowly tailored to permit more flexibility in ad copy (meaning more money for Google from its AdWords program), while minimizing the potential for additional lawsuits.

While these recent developments are not drastic, they slightly affect the balance between the rights of trademark owners and internet advertisers. If any of these changes spark concerns regarding your own marks or practices, please let us know.

1 *Medinol Ltd. v. Neuro Vasx, Inc.*, 67 USPQ2d 1205 (TTAB 2003)

2 *G&W Laboratories, Inc. v. G W Pharma Limited*, 89 USPQ2d 1571 (TTAB 2009)

3 *Grand Canyon West Ranch, LLC v. Hualapai Tribe*, 88 USPQ2d 1501 (TTAB 2008)

4 *University Games Corp. v. 20Q.net Inc.*, 87 USPQ2d 1465 (TTAB 2008)

5 *Zanella Ltd. v. Nordstrom, Inc.*, 90 USPQ2d 1758 (TTAB 2008)

6 562 F.3d 123 (2d Cir. 2009)

7 *Hamzik v. Zale*, 2007 U.S. Dist. LEXIS 28981 (N.D.N.Y. Apr. 18, 2007)

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with an attorney. Comments on insight® and suggestions for future articles may be submitted to the editor, Christopher A. Rothe, Esquire, at our Valley Forge Office.

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