



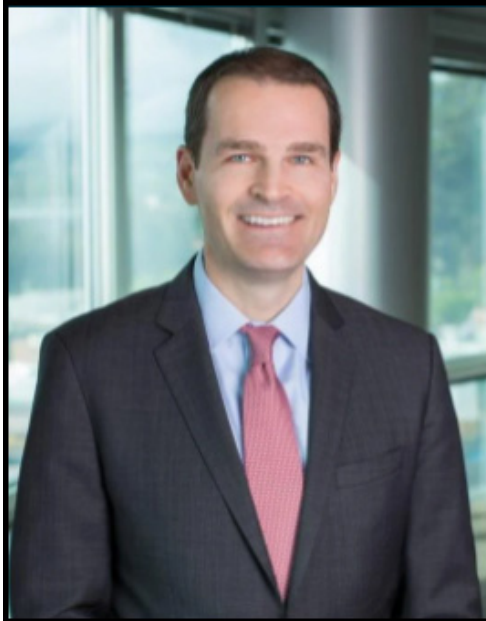
“You Violated Our IP!”

Prevention Strategies and Responses Every In-House Counsel Should Know

November 16, 2021



Meet the Speakers



Michael Headley
Managing Principal of
Fish's Silicon Valley Office



David Hoffman
Principal in
Fish's Austin Office

Agenda

- **The First Five Minutes**
- **You're Accused of:**
 - Patent Infringement
 - Trademark Infringement
 - Copyright Infringement
 - Trade Secret Misappropriation
- **Final Thoughts**



The First Five Minutes



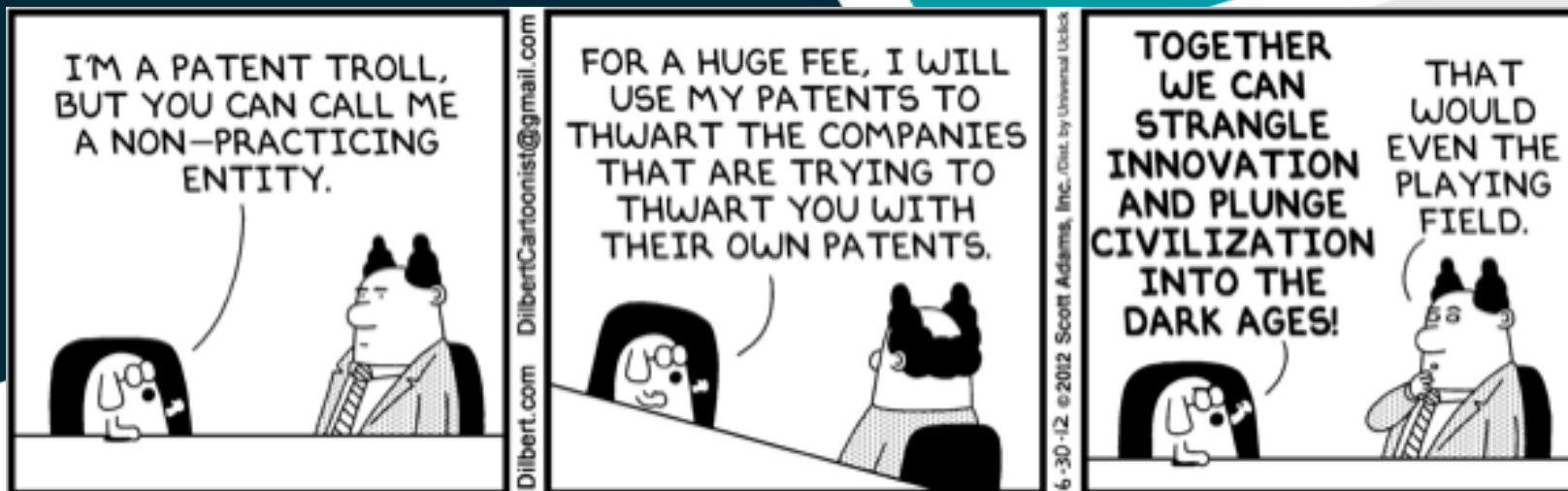
'We're going to need a bigger rug or we're sunk.'

5 Things To Do When You Receive a Letter (or suit)

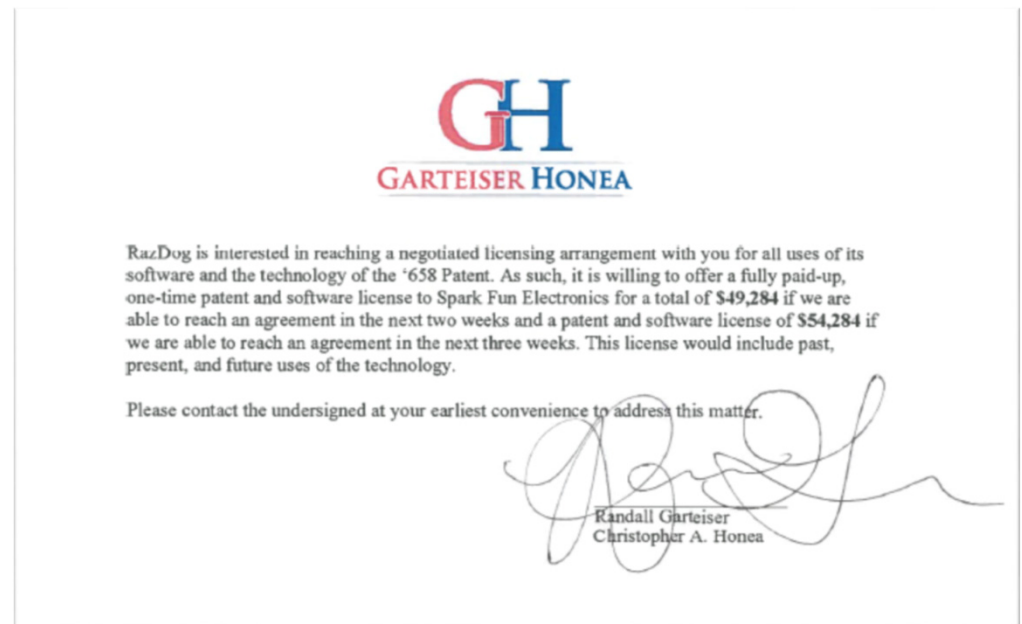
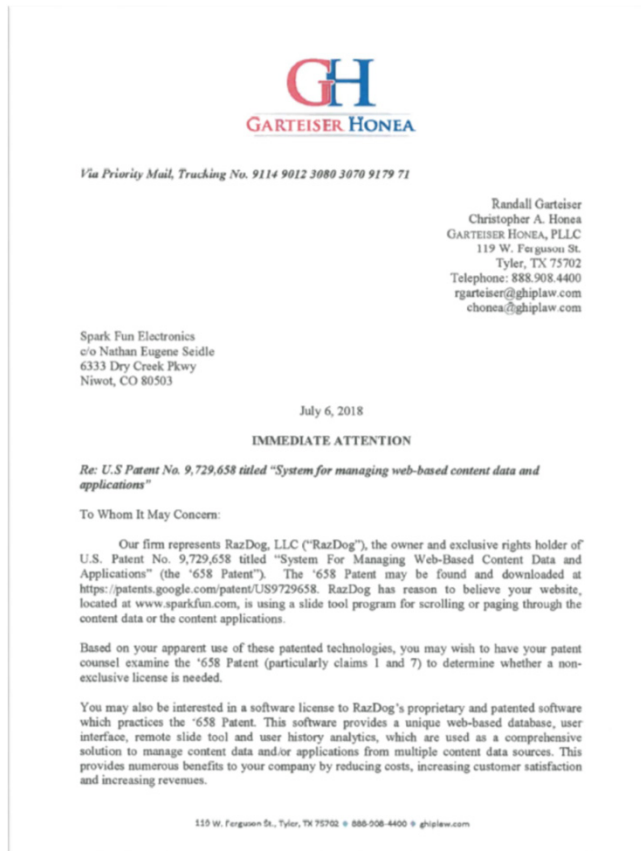
- 1. Breathe**
- 2. Pick up the phone**
- 3. Document Hold**
- 4. Calculate Exposure**
- 5. Investigate the Merits**



Patent Infringement

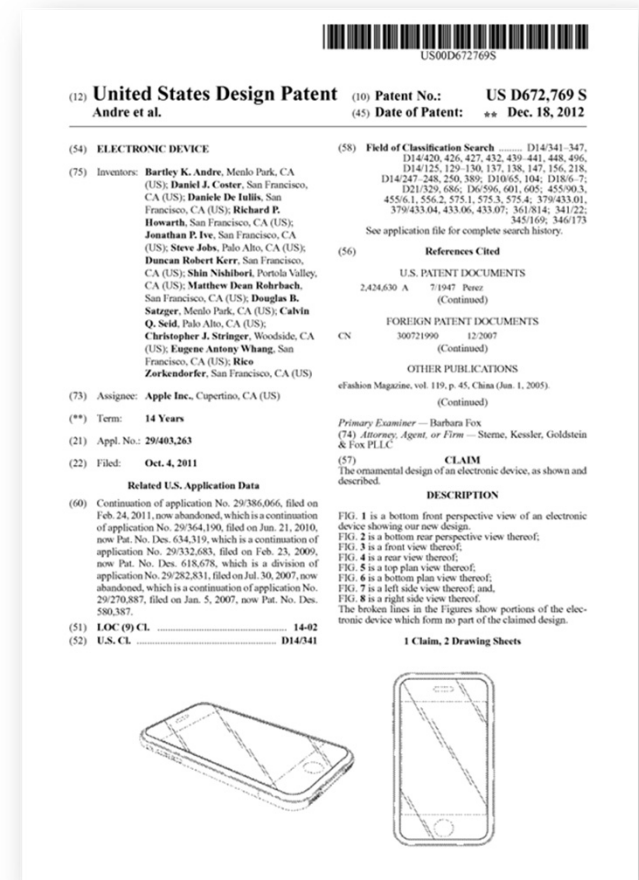


Look What Came in the Mail



What is a Patent?

- A grant from the government of the right to **prevent others** from making, using, offering to sell, selling, or importing the invention(s) claimed in the patent.
- **Property Right**— can be bought, sold, licensed, bequeathed, mortgaged, assigned.
- **Limited Term** – 20 years for utility and plant patents; 14 years for design patents.
- **Territorial** – must obtain patent in every country where protection is desired.
- **United States Patent and Trademark Office (USPTO)** – tasked with examining US patent applications and granting US patents.



Basic Concepts

How to Read a Patent

- Cover page
 - Patent Number
 - Title
 - Inventor(s)
 - Assignee
 - Application Date
 - Priority Documents
 - References Cited
 - Issue Date
 - Abstract

US00628599B1

(12) United States Patent
Page

(10) Patent No.: **US 6,285,999 B1**
(45) Date of Patent: **Sep. 4, 2001**

(54) **METHOD FOR NODE RANKING IN A LINKED DATABASE**

(75) Inventor: **Lawrence Page, Stanford, CA (US)**

(73) Assignee: **The Board of Trustees of the Leland Stanford Junior University, Stanford, CA (US)**

(*) Notice: Subject to any disclaimer, the term of this patent is extended or adjusted under 35 U.S.C. 154(b) by 0 days.

(21) Appl. No.: **09/004,827**

(22) Filed: **Jan. 9, 1998**

(60) Provisional application No. 60/035,205, filed on Jan. 10, 1997.

(51) Int. Cl. **G06F 17/50**

(52) U.S. Cl. **707/5; 707/7; 707/501**

(58) Field of Search **707/100, 8, 7, 707/513, 1-3, 10, 104, 501; 345/440, 382/226, 229, 230, 231**

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(List continued on next page.)

Primary Examiner—Thomas Black
Assistant Examiner—Uyen Le
(74) **Attorney, Agent, or Firm**—Harley & Snyder L.L.P.

(57) **ABSTRACT**

A method assigns importance ranks to nodes in a linked database, such as any database of documents containing citations, the world wide web or any other hypermedia database. The rank assigned to a document is calculated from the ranks of documents citing it. In addition, the rank of a document is calculated from a constant representing the probability that a browser through the database will randomly jump to the document. The method is particularly useful in enhancing the performance of search engine results for hypermedia databases, such as the world wide web, whose documents have a large variation in quality.

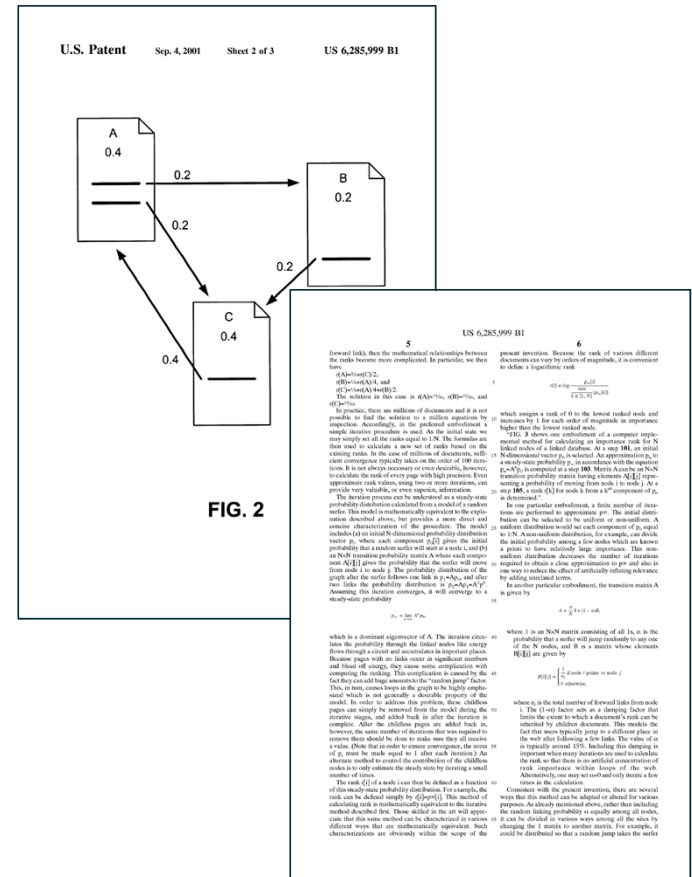
29 Claims, 3 Drawing Sheets

Basic Concepts

How to Read a Patent

• Specification

- Drafted by the inventor (or patent attorney)
- Explains how to make and use the invention – the patent bargain
- Description + Figures
- May include multiple examples (embodiments)



Basic Concepts

How to Read a Patent

- **Claims**

- Legally define scope of protection
- Each claim covers a distinct invention that is defined by its essential features or “limitations”
- Independent and dependent claims
- Infringement of one claim means you infringe the patent

Independent Claim

10. A computer implemented method of ranking a plurality of linked documents, comprising:
automatically performing a random traversal of a plurality of linked documents, the random traversal including selecting a random link to traverse in a current linked document;
for each linked document that is traversed, assigning a rank to the linked document that is dependent on the number of times the linked document has been traversed; and
processing the plurality of linked documents according to their rank.

Dependent Claim

11. The method of claim **10**, wherein there is a predetermined probability that the next linked document to be traversed will be a random one according to a distribution of the plurality of linked documents.

What is Patent Infringement?

- **Basic Concept:** Without the permission of the patent owner, making, using, selling, offering for sale or importing the claimed invention
- **Types of Infringement**
 - Direct
 - Literal
 - Doctrine of Equivalents
 - Indirect
 - Contributory
 - Induced

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Literal Infringement	
Claim Limitation	Present?
A (body)	Yes
B (gasoline engine)	Yes
C (steering wheel)	Yes
D (rubber tires)	Yes

What is Patent Infringement?

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Doctrine of Equivalents Infringement	
Claim Limitation	Present?
A (body)	Yes
B (gasoline engine)	No, diesel engine
C (steering wheel)	Yes
D (rubber tires)	Yes

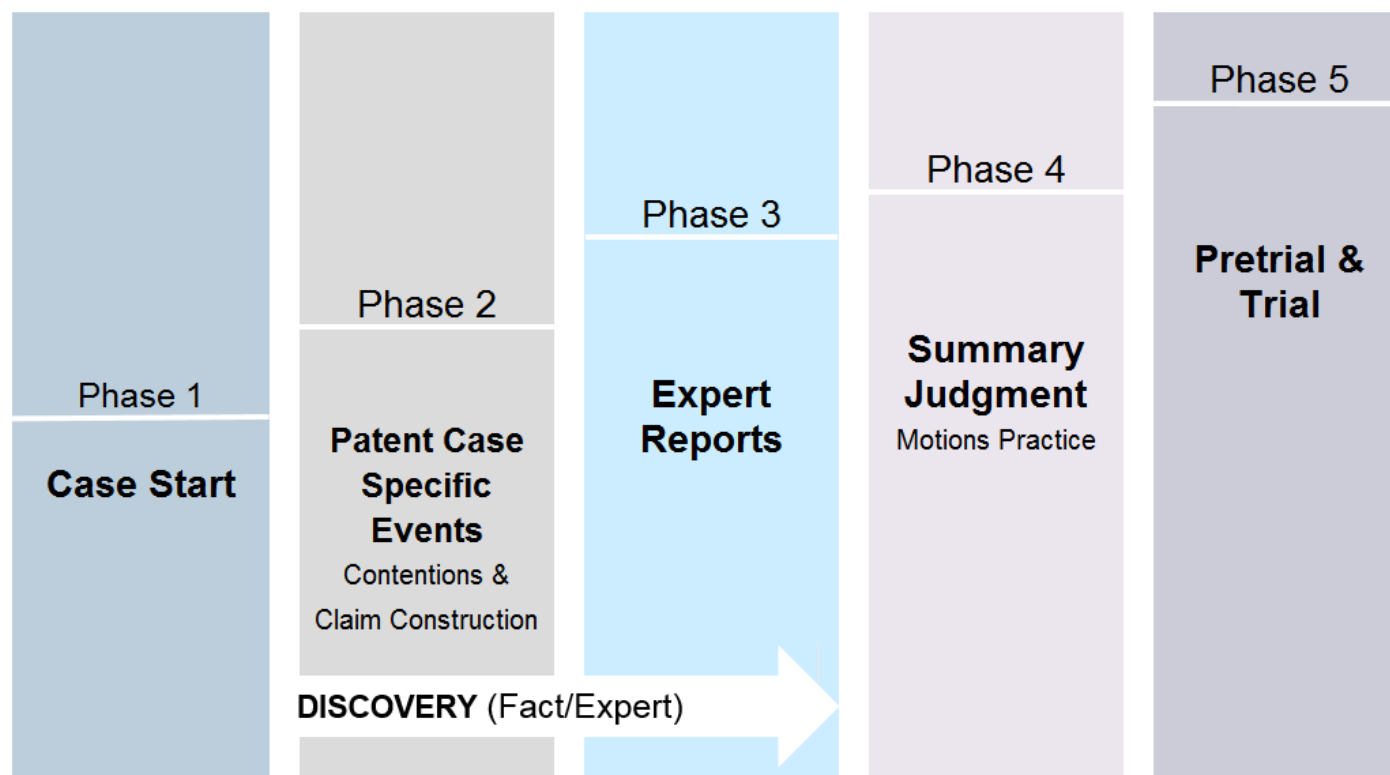
Remedies for Infringement

- **Damages**
 - Reasonable Royalty
 - Lost Profits
- **Injunction**
 - Types
 - Preliminary
 - Permanent
 - Formal requirements
 - Proof of infringement (or likelihood of success)
 - Irreparable harm from infringement
 - Balance of hardships
 - Public Interest
 - Practical requirements
 - Competition
 - Invention drives demand for the product
- **Running royalty**
 - For future infringement
 - Available instead of injunction

What is Patent Invalidity?

- **Basic Concept: Accused infringer can challenge the validity of the patent**
 - In litigation
 - In an administrative proceeding at the PTO
- **No damages for infringement if patent found invalid**
- **Main types of Invalidity**
 - Anticipation
 - Obviousness
 - Non-patentable subject matter
 - Laws of nature
 - Abstract ideas
 - Inadequate Disclosure

Typical US Patent Litigation Timeline







“Stop Using Our Trademark”



What Is A Trademark?

- **Trademark**

- Anything that identifies that goods bearing that mark come from or have quality controlled by a single source (even if the source is unknown)

- **Service Mark**

- Identifies a single source of services
- “Trademark” often used for marks used on *goods* or *services*

- **Registration**

- Unlike Patents, registration not mandatory but provides numerous benefits

- **Term For Registered Trademarks**

- Can be renewed perpetually every 10 years

amazon



kindle



Unusual Marks

- **However, Trademarks are not limited to logos and product names**
 - The word “face”
 - Superhero
 - Orange, Yellow, Blue, Brown, Magenta, and Pink
 - Zippo Click, Mac boot-up sound, Law and Order Sound
 - Darth Vader Breathing:

Description of Mark	The mark consists of the sound of rhythmic mechanical human breathing created by breathing through a scuba tank regulator.
Goods and Services	Halloween and masquerade costumes incorporating masks
Goods and Services	Costume masks; voice altering toys; toy computers; handheld playthings, namely, toy action figures; [and hand held units for playing electronic games; dashboard driver figurines, namely, bobble head dolls and] modeled plastic toy figurines
Pseudo Mark	DARTH VADER; BREATHING; BREATH

Look What Came in the Mail



July 12, 2012

VIA EMAIL ONLY

Mr. Patrick Wensink
Louisville, KY
patrickwensink@gmail.com

Re: Mark: JACK DANIEL'S
Subject: Use of Trademarks

Dear Mr. Wensink:

I am an attorney at Jack Daniel's Properties, Inc. ("JDPI") in California. JDPI is the owner of the JACK DANIEL'S trademarks (the "Marks") which have been used extensively and for many years in connection with our well-known Tennessee whiskey product and a wide variety of consumer merchandise.

It has recently come to our attention that the cover of your book *Broken Piano for President*, bears a design that closely mimics the style and distinctive elements of the JACK DANIEL'S trademarks. An image of the cover is set forth below for ease of reference.

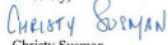
We are certainly flattered by your affection for the brand, but while we can appreciate the pop culture appeal of Jack Daniel's, we also have to be diligent to ensure that the Jack Daniel's trademarks are used correctly. Given the brand's popularity, it will probably come as no surprise that we come across designs like this on a regular basis. What may not be so apparent, however, is that if we allow uses like this one, we run the very real risk that our trademark will be weakened. As a fan of the brand, I'm sure that is not something you intended or would want to see happen.

As an author, you can certainly understand our position and the need to contact you. You may even have run into similar problems with your own intellectual property.

In order to resolve this matter, because you are both a Louisville "neighbor" and a fan of the brand, we simply request that you change the cover design when the book is re-printed. If you would be willing to change the design sooner than that (including on the digital version), we would be willing to contribute a reasonable amount towards the costs of doing so. By taking this step, you will help us to ensure that the Jack Daniel's brand will mean as much to future generations as it does today.

We wish you continued success with your writing and we look forward to hearing from you at your earliest convenience. A response by **July 23, 2012** would be appreciated, if possible. In the meantime, if you have any questions or concerns, please do not hesitate to contact me.

Sincerely,


Christy Susman
Senior Attorney - Trademarks

FISH.
FISH & RICHARDSON

April 8, 2009

Michael Morgan,
3830 NW Royal Oak Drive
Jensen Beach, Florida 34957
United States

By Email: mike@mikemorgan.us
Original by US Mail

Re: Use of the goldmansachs666.com and goldmansachs13.com Name/Logo on the Internet

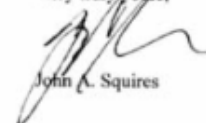
Dear Mr. Morgan:

Goldman, Sachs & Co. is the owner of a family of Goldman Sachs trademarks for use in connection with financial services, including its famous house mark GOLDMAN SACHS, U.S. Registered Trademark No. 1975880. A copy of the federal trademark registration data is attached for your reference as Exhibit A. It has been brought to our attention that you are making unauthorized use of the mark GOLDMAN SACHS in connection with your domain names goldmansachs666.com and goldmansachs13.com.

Your use of the mark GOLDMAN SACHS violates several of Goldman Sachs' intellectual property rights, constitutes an act of trademark infringement, unfair competition and implies a relationship and misrepresents commercial activity and/or an affiliation between you and Goldman Sachs which does not exist and additionally creates confusion in the marketplace.

Accordingly, we demand that you immediately cease and desist from using the mark GOLDMAN SACHS and confirm in writing to me no later than April 18, 2009 that you will cease use of Goldman Sachs' intellectual property rights. We reserve all legal rights here under and absent a written response from you, we may proceed with legal action without any further notice.

Very truly yours,


John A. Squires

cc: W. Hanchuk; GoDaddy, INC.
Enclosures

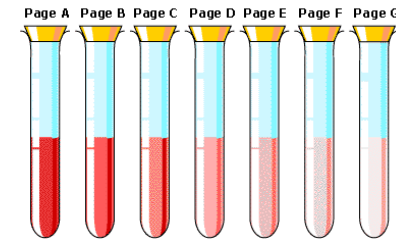
Trademark Infringement

- Is the mark ***likely to cause consumer confusion as to the goods' or services' source/sponsorship/affiliation?***
 - Strength of the plaintiff's mark
 - Similarity of the marks (sight/sound/meaning and doctrine of foreign equivalence)
 - Proximity of the goods (DELTA and DOMINOS)
 - Evidence of actual confusion
 - Marketing channels used
 - Purchaser sophistication/degree of care
 - The second user's intent in selecting the mark

Polaroid Corp. v. Polarad Elecs. Corp., 287 F.2d 492 (2d Cir. 1961).

Trademark Dilution

- The lessening of the capacity of a “famous mark” (widely recognized by the general consuming public) to identify and distinguish goods or services
 - Goldfish-shaped crackers in snack food mix – dilution found. *Nabisco, Inc. v. PF Brands, Inc.*, 50 F. Supp. 2d 188 (S.D.N.Y. 1999)
 - “Charbucks blend” – not “substantially” similar, no dilution. *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.* - 588 F.3d 97 (2d Cir. 2009)
- “Likelihood of dilution” is sufficient
 - Blurring (BUICK aspirin; TIFFANY sneakers)
 - Tarnishment (THIS BUGS FOR YOU; ENJOY COCAINE in Coca-Cola script)



Counterfeiting

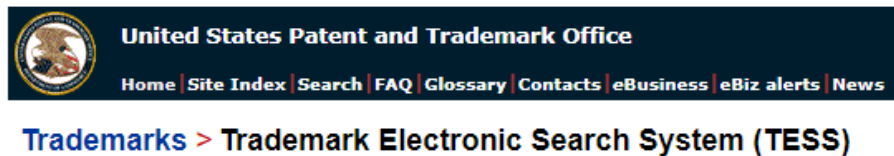
- Counterfeit mark defined as a “spurious mark which is identical with, or substantially indistinguishable from, a registered mark” (i.e. an intentional copying of someone else’s trademark to defraud consumers)
- Courts may issue orders authorizing pre-suit seizure of suspected counterfeits
- Federal criminal penalties and mandatory monetary remedies
- Use of genuine label on fake goods can still be counterfeiting (e.g. refilling Coke bottles with another beverage, or using GE packaging for non-GE parts)

Ways to React

- **Respond**
- **Do Nothing**
- **Negotiate**
- **File a DJ**

Respond

- **If you have a basis, consider responding to the letter**
 - If it is a registered trademark, look up the mark:



- Is your mark the same? How is it different?
- When did your company first use the mark in commerce?
- Is their use limited to a particular geographic region?

Do Nothing

- **You do not have to respond to a Cease and Desist Letter**
- **Some letters are predatory and are meant to mislead or intimidate in getting a payment.**
- **However, ignoring the letter risks a later finding of willful counterfeiting of the mark**
 - Up to 3X damages plus attorney's fees

Negotiate

- **There may be other options besides cease and desist**
- **Negotiate a license**
- **Negotiate a geographic or field or use restriction**
- **Negotiate a phase out**

Fight Back

- **While unusual, you can usually file suit against the letter writer to try and clear your usage.**
- **Only consider if your arguments are very strong and the cloud of the letter is concerning**
- **The letter may not provide personal jurisdiction and venue over the suit, so carefully consider where to file suit.**

“Generification” of a Trademark

- If consumers regard a term as primarily referring to a type of goods or services rather than as a mark, it can become generic and unprotectable
 - “On the other hand, if the plaintiff is allowed a monopoly of the word [Aspirin] as against consumers, it will deprive the defendant, and the trade in general, of the right effectually to dispose of the drug by the only description which will be understood.”
Bayer Co., Inc., v. United Drug Co., 272 F. 505, 514 (S.D.N.Y. 1921).
- **Examples: aspirin, dry ice, cellophane, nylon, kerosene, lanolin, zipper, escalator, thermos, shredded wheat, trampoline**
 - On the edge? XEROX, KLEENEX, JELLO, JEEP, FREON, MACE, ZOOM, etc.



Abandonment

- Non-use for significant period of time with intent not to resume use
- Non-use for three years without reasonable excuse creates presumption of abandonment
- Declaration of use required for federal registrations between the 5th and 6th year of registration and at 10 year renewals
- De minimis use merely to maintain rights in the mark may not be sufficient (use “in the ordinary course of trade” required)



Cybersquatting

- **U.S. law: Bad faith intent to profit resulting from “registering, trafficking in, or using” a domain name confusingly similar to the trademark of another**
 - Allows recovery of up to \$100,000 in statutory damages per domain name, in addition to transfer or cancellation of the domain name
- **International arbitration (“UDRP”): bad faith resulting from “registering and using” a domain name confusingly similar to the trademark of another**
 - No monetary damages, only transfer or cancellation of the domain name

Remedies for Trademark Infringement

- **Injunctions, not monetary awards, are the norm**
 - Courts vary on when to award monetary awards
- **No automatic statutory damages as in copyright law**
- **Typically no “reasonable royalty” damages as in patent law**





Copyright Infringement

What is Copyright?

- **Copyrights** protect original works of authorship (literary, musical, sculptural, etc.) and have a long but limited life
- **Registration:** Unlike patents and similar to trademarks, registration is not mandatory but beneficial
- **Term:** 70 years after the death of the author



To Show Copyright Infringement

Plaintiff must show:

- Ownership
- Infringement
- Territoriality

Proof of Ownership

Registration establishes presumption of validity and ownership

“In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute **prima facie evidence of the validity of the copyright and of the facts stated in the certificate.**”

17 U.S.C. §410(c)

Proof of Infringement

- **Direct Evidence of Copying**
- **Inference of Copying**
 - Defendant had access to copyrighted work
 - Accused work is “substantially similar or “virtually identical” to copyrighted works

Standards of Similarity

- **“Substantially Similar”**
 - Default standard
 - “whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work”
Warner Bros. Inc. v. ABC, Inc., 654 F.2d 204, 208 (2d Cir. 1981)
- **“Virtually Identical”**
 - Applies to compilations or works consisting largely of uncopyrightable elements

Defenses

- **Fair use**

- Not an infringement to make “fair use” of a copyrighted work “for purposes such as criticism, comment, news reporting, teaching. . . , scholarship, or research.” (U.S.C. §107)
- Examples: parodies, copying for compatibility, “time shifting” (okay to record TV shows on video tapes)

- **Copyright Misuse**

- “Use of the [copyright] to secure an exclusive right or limited monopoly not granted by the [Copyright] Office and . . . contrary to public policy.” *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970,972 (4th Cir. 1990)

- **Safe Harbors**

- Provided to telecommunication companies, online service providers to avoid liability when simply hosting infringing content

Remedies

(a) **IN GENERAL.**—Except as otherwise provided by this title, an infringer of copyright is liable for either—**(1)** the copyright owner’s **actual damages** and **any additional profits of the infringer**, as provided by subsection (b); or **(2) statutory damages**, as provided by subsection (c).

17 U.S.C. § 504

- **Actual damages**
 - Typically lost profits.
 - Copyright holder has the initial burden to show lost profits. See *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 567 (1985).
- **Disgorgement (any additional profits of the infringer)**
 - Double dipping not allowed, but copyright owner can recover any additional profits made by the infringer.
 - Initial burden on the copyright holder.

Remedies (continued)

- **Statutory Damages / Attorney Fees**

- \$750 - \$30,000 per infringement.
- If willful infringement, up to \$ 150,000 per infringement.
- Requires registration to claim these remedies.

- **Injunctions**

- Easier to obtain than in patent cases, because irreparable harm is presumed when copyright is infringed. *See e.g., Apple Computer v. Franklin Computer Co.*, 714 F.2d 1240 (3d Cir.1983); Nimmer on Copyright §14.06[A].



Trade Secret Infringement/Misappropriation



"This is highly confidential, so, yes, we built a little fort."

What is a Trade Secret?



- **Secret:** The information at issue is not generally known or readily ascertainable

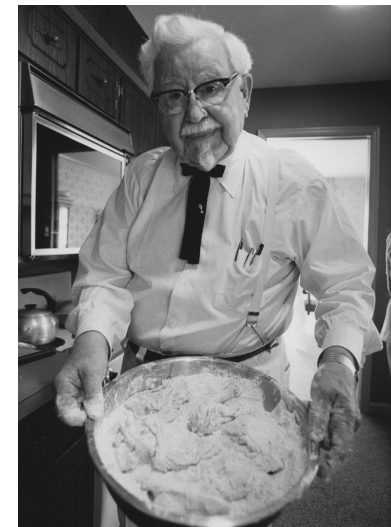
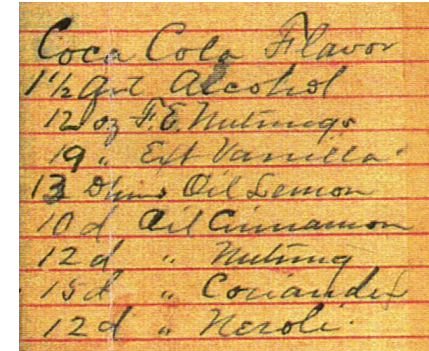


- **Reasonable Measures to Preserve Secrecy:** The owner has taken *reasonable* steps to ensure the information remains secret



- **Value:** The information has actual or potential value arising from the fact that it is not generally known

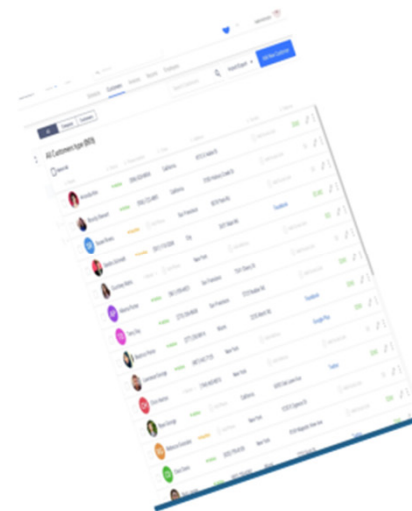
18 U.S.C. § 1839 (DTSA)



Trade Secrets Can Be -

- Anything held as confidential by anyone with whom you were in a confidential relationship
- Future product development plans
- Future strategic and business plans
- Profitability, cost, and revenue information
- Anything that took a long time to develop (even if it is a compilation of public data)
- Term: as long as its secrecy can be maintained

Examples of Trade Secrets



Trade Secrets Cannot Be -

- **Generally known**

- “Information that is generally known or understood within an industry, even if not known to the public at large, does not qualify as a **trade secret**.” *Von Holdt v. A-1 Tool Corp.*, No. 04 C 04123, 2013 US Dist LEXIS 636, at *23 (ND Ill Jan. 3, 2013).

- **Reverse engineered (but not requiring too much work)**

- “The public at large [is] free to discover and exploit the trade secret through reverse engineering of products in the public domain or by independent creation.” *Bonito Boats v. Thunder Craft Boats*, 489 US 141 (1989).
- “Information that is derived from public sources but requires laborious accumulation, culling, and/or analysis of the public information can, however, still qualify as a trade secret.” *Stenstrom Petroleum Servs. Group, Inc. v. Mesch*, 874 N.E.2d 959, 975 (Ill. App. Ct. 2007).

- **Presented Publicly**

- “A trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process, design and operation of which, in unique combination, affords a competitive advantage and is a protectable secret.” *Imperial Chem. Indus. v. Nat'l Distillers & Chem. Corp.*, 342 F2d 737, 742 (2d Cir 1965).

Most Likely Areas of Exposure

- Non-Disclosure Agreements
 - Engineers and business folks tend to want to sign these without reading them.
 - Breaches of NDAs are one of the major sources of trade secret litigation.
- New Hires
 - Former employer may not be excited about them changing companies
 - Human nature to use what you have learned in life
- Joint Development Deals Gone Bad
 - Best intentions can fall apart quickly

What to do after receiving the letter

- **Research the project / employees involved**
 - Keep everyone calm
 - Letters usually mean that they want to talk rather than sue first
 - Hire trade secret counsel, if you do not have TS experience
 - Consider temporary isolation (if possible)
 - Get your employees' side of the story
 - Determine exposure
- **Lock down and hold affected employee systems**
 - Prevent deletion of emails and computer files
 - Collect relevant documents (confirm stories, if possible)
- **Determine the state of the project before any alleged misuse**
 - Often, you can show independent development prior to the incident

What to do after receiving the letter

- **Advise your clients**
 - Redirect efforts elsewhere, if they can
 - Prepare for possible suit / injunction
 - Go through the “what-ifs”
- **Respond to the claims**
 - After your internal investigation
 - Ask for details (as the initial letter likely lacked them)
- **Look into Counterfire**
 - If joint project, what did you share with them?
 - Do you have patents or other IP that they are using

What could you be facing

- **Actual damages:** other party's lost sales
- **Unjust enrichment:** similar to disgorgement
- **Reasonable royalty**
- **Exemplary damages:** willful and malicious misappropriation allows 2 times the amount of the damages



Final Thoughts

An Ounce of Prevention

- Develop a solid IP policy
 - Checklists for hires and departures
 - Commitments from employees to not bring IP with them
 - Confidentiality Agreements
- Educate the client
 - Eliminate IP speculation (esp. by email)
 - Discourage certain types of competitive research
 - Encourage an ask questions first approach

The Best Defense...

- Get Patents in your in your core areas
 - And maybe in places where you think your competitors might go (even if you are not)
- Protect your brand
 - Trademarks and Copyrights
- Keep an eye on your secrets
 - Use confidentiality agreements to protect yourself
 - And watch to make sure they are not abused

Thank You!



Michael Headley
Principal
Fish & Richardson
headley@fr.com



David Hoffman
Principal
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