

Avoiding RISK of Intellectual Property (IP) Infringement

“The Big 3” - Patents, Copyrights and Trademarks

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While MDCSystems® has served Lady Justice for many decades in expert witness and forensics engineering, technology, and construction, we are pleased to announce that MDCSystems® now offers intellectual property forensics and expert witness services. As with many legal matters, MDC® typically works with clients and attorneys in review of a claim or lawsuit to develop an opinion/position of the case. That said, while the addressing of infringement matters is paramount once a claim is filed, addressing infringement risk BEFORE the matter becomes a claim or makes its way into the courtroom is a much-preferred approach!

To kick off MDCSystems® latest offering, I write this intellectual property (IP) risk article to illustrate high level examples of IP lawsuits/cases for “The Big 3” categories of IP – Patents, Copyrights and Trademarks to help readers understand the risk of intellectual property infringement in business matters.

While the details of these cases may appear somewhat comical on the surface, these matters can quickly escalate into large scale, high stakes legal battles. Not only are the financial aspects of the cases at stake for an involved entity, but also the notoriety of losing such a case and the potential development of case law against such activities in the future are also at stake.

Patent & Patent Infringement - “Swipe Gripe”

The sheer volume of patent infringement lawsuits, typically pertaining to big tech and mobile applications seemed excessive in the earlier part of this last decade (~2010 to present). It would appear U.S. Circuit Court Judge Richard Posner may have felt the same.

In a particular claim between Motorola and Apple, Judge Posner terminated a patent claim as the parties could not prove any harm due to the other party’s actions. In addition, Judge Posner deemed the cost of a trial contrary to public interest and that one of Apple’s claims was ridiculous. This claim referred to Apple’s argument that a “swipe to unlock” also meant a “tap” to unlock since a “tap” is a “zero length swipe”. I wonder if anyone in the courtroom had trouble keeping a straight face when these definitions were proposed?

In all seriousness, an intellectual property evaluation/risk assessment, performed by a qualified expert, may have proven very helpful to both plaintiff and defendant alike. An expert could have developed a bona fide definition of a tap versus a swipe, as well as review the relevant patent(s) and patent(s) claim(s) of Motorola and Apple to compare and contrast for infringement.

Copyright Infringement - “Not New, Tattoo”

Imagine pouring your creative sweat into the development of a really cool artistic design for a client. You could sit back and be proud of your work, knowing your work of art was a unique

masterpiece, created by none other than yourself. Imagine then going to the movies to see your artistic mark being used in mainstream media, unbeknownst to you.

S. Victor Whitmill, a tattoo designer and artist, filed a lawsuit against Warner Bros. for copyright infringement in 2011. Mr. Whitmill claimed the tattoo used for actor Ed Helms in the movie “The Hangover Part II” was a custom tattoo designed specifically for Mike Tyson and therefore protected under copyright law.

Mr. Whitmill claimed that Warner Bros. had no legal right to use his work in “The Hangover Part II” or in any promotional materials. At one point it was decided the tattoo would have to be digitally removed from Helm’s face on all home videos. Fortunately, this claim was resolved when Warner Bros. agreed to pay an undisclosed settlement amount to Mr. Whitmill. This appeared good news for all, as movie goers far and wide could enjoy the full comedic effect of the tattoo on Stu’s face (played by Mr. Helms) after his blackout of an evening. Here again, a risk review of the matter prior to this issue would have likely proven beneficial. “The Hangover Part II” developed revenues of over half a billion dollars worldwide. You can view the complaint at: [Complaint for Copyright Infringement, Unfair Competition, etc. \(wired.com\)](#)

Trademark Infringement - Hershey v. Pot Distributors – “Reefer Grief”

There are now many states in the US that have legalized or decriminalized the sale of marijuana. As you might NOT expect, this has created some interesting legal IP issues. The term “confusingly similar” is a key consideration when determining if one brand encroaches on another’s mark (trademark).

The Hershey Company, well known for chocolate and affiliated with Hershey Park located in Hershey PA, began filing claims alleging pot distributors were selling products similar to Hershey’s well established brand names. One product of concern was “Reefers Peanut Butter Cups.” While there are many jokes that may come to mind, we don’t think all considered this a laughing matter. An intellectual property risk assessment may have likely identified “confusingly similar” language and likely to infringe, regarding this matter before introduction into the marketplace. Ultimately, the pot distribution companies involved in this matter halted the sale of their brands and agreed to destroy any remaining inventory and packaging, an effort not without significant expense.

In summary, I hope the cases described herein were at least somewhat educational, entertaining, and illustrative of some recent IP matters and lawsuits. We live in an interesting time for intellectual property.

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