

Innovation and Trade Law Update

Cowles & Thompson | November 2008



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By the Numbers

Behind every successful law firm you will find attorneys who love their profession, and Cowles & Thompson is no exception.

Our numbers speak for themselves. In business since 1978, we have worked with over 48 of the Fortune 100 companies (2006) as well as local middle-market companies. Our experience includes having handled more than 500 appellate matters and 20,000 litigation matters, over 2,000 business matters and more than 500 legal malpractice

International Trade

CBP Has Record Breaking Year for Seized Counterfeit Goods

U.S. Customs and Border Protection officials announced a dramatic increase in seizures of counterfeit goods. This year, CBP at the Los Angeles-Long Beach seaport complex seized 357 shipments of counterfeit and pirated goods with a domestic value of \$71.4 million. This is an increase of 148 percent by value, and a 50 percent increase in seizures, over fiscal year 2007.

Several factors have contributed to the record seizures: The hard work of the men and women of CBP, and the close partnerships formed with Immigration and Customs Enforcement, the Food and Drug Administration and the Consumer Product Safety Commission. New CBP teams designated to target high risk shipments for possible Intellectual Property Rights violations were formed and a joint CBP/ICE working group which includes various local CBP divisions was created. CBP and ICE meet weekly to focus on current trends and patterns to ensure better, more effective targeting. It is expected that the advent of this working group will result in increased IPR seizures for the Los Angeles-Long Beach area over the next year and beyond.

"CBP will continue to strengthen relationships with other law enforcement agencies as well as the trade community to combat the illegal importation of goods which threatens the American economy, U.S workers and businesses as well as the health and safety of consumers. According to the International Anti-Counterfeiting Coalition, counterfeiting cost U.S. businesses \$200 billion to \$250 billion annually and is directly responsible for the loss of more than 750,000 American jobs," said Hoffman.

Some of the products intercepted this year range from falsely labeled "UL" electrical articles, such as Christmas lights, that can catch fire, to food items that may contain harmful ingredients. Other items such as handbags and shoes defraud consumers who believe they are obtaining legitimate items.

Source: CBP

Trademark

Click Forensics Unveils Technology to Protect Search Advertisers from Online Trademark Infringement

Click Forensics™, Inc., the industry leader in scoring, auditing and managing traffic quality for the online advertising community, announced a new feature which allows brands to identify and track organizations and individuals unlawfully using trademarked names for search marketing campaigns. The new feature produces updated reports on potential trademark abusers who use well-known brand names to generate Pay Per Click (PPC) traffic. Companies can use the new solution to more quickly take action to protect intellectual property and their own search marketing investments.

Trademark infringement in Pay Per Click is a growing and highly-visible problem on content networks and major search engines such as Google, Yahoo! and MSN. Perpetrators commonly register domains containing well-known brand names and then display ads on them that generate traffic and PPC ad revenue. Consumers often see the results when mistyping a web site URL only to find themselves on a different web site with lots of ads and pop-ups.

"The impact of trademark infringement in search advertising goes beyond consumer annoyance,"

matters. Experience matters.

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Premises Liability
Product Liability
Professional Liability
Real Estate
Transportation
Toxic Tort/ Environmental
Estate Planning
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said Paul Pellman, CEO of Click Forensics. "It's affecting the advertising budgets of major brands as they're forced to spend more money to get the high-quality search traffic that is rightly theirs. We're helping to change that by giving brands a tool they can use to fight back."

If your intellectual property needs trademark protection or is being infringed upon, [contact Jim Chester](#).

Source: *Click Forensics*

Business

Breach Notices Sent to Joker.com and DNS.com.cn

ICANN recently sent breach notices to two ICANN-accredited registrars, Beijing Innovative Linkage Technology Ltd., doing business as DNS.com.cn and Joker.com. These registrars failed to comply with Section 3.7.8 of the Registrar Accreditation Agreement (RAA) which requires registrars to take "reasonable steps to investigate" Whois inaccuracy claims.

Section 3.7.8 of the RAA requires registrars, "...upon notification by any person of an inaccuracy in the contact information associated with a Registered Name sponsored by Registrar, take reasonable steps to investigate the claimed inaccuracy. In the event Registrar learns of inaccurate contact information associated with a Registered Name it sponsors, it shall take reasonable steps to correct that inaccuracy."

In November 2007, ICANN audited registrar compliance with the investigation of Whois inaccuracy claims filed through ICANN's Whois Data Problem Report System (WDPRS). The audit analyzes the complaints as well as complainant follow-up correspondence indicating "no change" to Whois data 45 days after the claim is filed. Registrars that appear to take no action in response to a significant percentage of WDPRS complaints are sent a Notice of Concern that request they provide ICANN with details regarding the steps taken to investigate the claimed Whois inaccuracies - as required by Section 3.7.8 of the RAA.

On 29 May 2008, ICANN sent Joker.com and DNS.com.cn Notices of Concern. Both subsequently assured ICANN that they were investigating Whois inaccuracy claims and had suitable processes in place to do so. However, ICANN found compelling evidence leading to a conclusion that both DNS.com.cn and Joker.com do not appear to be taking reasonable steps to investigate these claims as required.

Accordingly, on 30 September 2008 ICANN sent DNS.com.cn and Joker.com notices of breach of contract. To avoid the commencement of the termination process, DNS.com.cn and Joker.com must cure the cited breaches within 15 days. ICANN will pursue all remedies available under the terms of the RAA, including possible termination, if DNS.com.cn and Joker.com fail to cure the cited breaches.

DNS.com.cn has over 300,000 domain names under management and Joker.com has over 600,000 domain names under management.

ICANN's efforts to improve Whois accuracy are ongoing and registrars are advised to investigate every claim of Whois inaccuracy received as required by Section 3.7.8 of the RAA to avoid compliance action by ICANN.

Source: *ICANN*

Upcoming Trade & Innovation Seminars

Key Differences Between Domestic and International Contracts

Sponsor: Inst. Of Supply Chain Management- San Antonio
Date: April 23, 2009
Time: 6:00 pm - 8:00 pm
Place: Petroleum Club of San Antonio

Speaker: Jim Chester
Contact: [Bob Wolfe](#)

Trademark

USPTO Plans Greater Trademark Consistency

In an effort to further improve quality, the US Patent and Trademark Office has created a centralized process by which an applicant may bring to the attention of the Office situations where, in applicant's opinion, the Office has acted inconsistently in its treatment of applicant's pending applications/recent registration(s). Specifically, applicants may submit a Request for Consistency Review when a substantive or procedural issue (excluding any issues involving identifications of goods and services) has been addressed in a significantly different manner in different cases, subject to the following provisions: (1) the request is based on co-pending applications or an application and a registration owned by the same legal entity or a successor in interest (e.g., assignee); (2) the registration(s) involved was issued less than one year prior to the date of the request; (3) at least one of the applications in the request is in a pre-publication status at the time of the request; and (4) the allegedly inconsistent treatment has already occurred. Third parties are prohibited from submitting requests in this forum, and the Office will not consider or act on such requests.

Issues concerning identification and classification of goods and services have been excluded from the program at this time, in large part because of the easy mechanism for consistency where an applicant selects an acceptable identification set out in the Office's Manual of Acceptable Identifications of Goods and Services.

In all requests, applicants must briefly describe the allegedly inconsistent action, and list the application(s) and/or registration(s) involved. Requests must be limited to situations where inconsistent treatment allegedly has already occurred. All requests will be scanned into the USPTO's database and will be viewable by the public through Trademark Document Retrieval (TDR). Applicants may not submit additional evidence. If evidence is submitted, it will not be considered during this process.

Source: USPTO

Business- International Trade

SBA Offers New Online Training for Exporters

A new online course will help small businesses explore exporting opportunities in international markets. Global Enterprise: A Primer on Exporting is a free, self-paced course that provides practical guidance on exploring international markets.

The course is a comprehensive training module using script and audio to provide fundamental information about selling in global markets. It illustrates how to identify international markets, develop an export strategy, make and receive international payments, and finance trade operations, plus guidance on determining a firm's readiness and suitability for exporting.

Exporting can be an avenue to tap into the increasing global marketplace. There are some 236,000 small business exporters, representing 97% of all U.S. exporters, and they generate some 30% of export sales. In 2007, U.S. exports of goods and services amounted to \$1.6 trillion, with small businesses accounting for nearly \$500 billion of those exports.

The new course is available from the Small Business Administration training Web site at www.sba.gov/training. To access the course, click on "Free Online Courses," and then select the first course listed under International Trade.

Source: SBA

Business

Unlawful Marketing of Drugs Ends in \$60 Million Payment to 34 States

Texas Attorney General Greg Abbott and 33 other state attorneys general recently reached a \$60 million settlement with Pfizer Inc. The agreement resolves an enforcement action involving Pfizer of New York and subsidiary, Pharmacia, Inc., which unlawfully marketed two prescription pain medicines - Bextra and Celebrex. Under the settlement, the state of Texas will receive \$3.8 million.

The states' enforcement action charged Pfizer with unlawfully marketing the "Cox-2 inhibitors" Bextra and Celebrex for the treatment of acute and surgical pain. The U.S. Food and Drug Administration (FDA) had only approved Bextra and Celebrex for reducing common pain and inflammation. The Texas Department of State Health Services referred the case to the Office of the Attorney General for enforcement.

According to court documents, Pfizer and Pharmacia launched a marketing campaign that encouraged physicians, hospitals and health plans to prescribe Bextra in higher doses for "off-label" uses. The marketing effort occurred after the FDA rejected the applications seeking authorization to use Bextra at higher doses. While a physician may prescribe drugs for off-label uses, the law prohibits a drug manufacturer from marketing drugs to physicians for off-label purposes.

The states also charged the defendant with exaggerating Celebrex's properties in promotional materials. For example, marketing materials suggested Celebrex could prevent the progression of arthritis. In fact, the drug only relieves arthritic pain. The exaggerated marketing effort catapulted Celebrex to "blockbuster" status among drugs in this class.

Included in the judgment are terms that will help prevent:

- deceptive use of scientific data when marketing to doctors;
- "ghost writing" of articles and studies;
- conflicts of interest for Pfizer promotional speakers;
- dissemination of information about an off-label use rejected by the FDA;
- distribution of samples with the intent to encourage off-label prescribing;
- incentives from being offered to sales staff to increase off-label prescribing; and
- grants from being provided to encourage use of Pfizer products.

In addition, the judgment requires Pfizer to submit all "direct-to-consumer" television drug advertisements to the FDA for approval and comply with any FDA comment before launching the advertisement.

If you have questions about state laws that may affect how your business operates in that state, [contact Jim Chester](#).

Source: Texas Attorney General's Office

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