

Ipls P STATE BAR OF MICHIGAN PROCEEDINGS

Martin v. Alliance Machine: A Broken Application of the Bundle of Secondary Considerations¹

By Stacie N. Farina

Volume 23 • Issue 1 • 2012

IN THIS ISSUE

<i>Martin v. Alliance Machine: A Broken Application of the Bundle of Secondary Considerations</i>	1
View from the Chair	2
Announcements.....	10
First Amendment Defense Prevails in Artist's and University's Trademark Dispute	11
Intellectual Property Caseload in the Michigan Districts December 1, 2011 through November 1, 2012.....	14

I. Introduction

Geo. M. Martin Co. v. Alliance Machine Systems International, Inc., a patent invalidity decision handed down by the Court of Appeals for the Federal Circuit (“CAFC”) in 2010, was based on an improvement in bundle breaker design deemed obvious in view of the relevant prior art.² The court applied the current method for determining invalidity of a patent based on obviousness by applying four *Graham* “factors,” including secondary considerations of non-obviousness.³ In *Martin*, the CAFC applied the first three *Graham* factors, the primary considerations of obviousness, to find the invention obvious. After this finding, the CAFC decided that no evidence related to the fourth *Graham* factor, secondary considerations of non-obviousness, could supplant the finding of obviousness under the first three *Graham* factors.

As evidenced in *Martin*, secondary considerations of non-obviousness can be applied subjectively and without concrete direction as to weight of the considerations. The application of secondary considerations occurs only after a patent is found obvious under primary considerations and is greatly influenced by this initial determination. Combining the review of primary and secondary considerations would allow courts to better balance aspects of obviousness and non-obviousness, instead of negating considerations of non-obviousness based on the preliminary obviousness of the invention. Thus, considerations supporting obviousness and non-obviousness should be applied at the same time to allow the considerations with the strongest support to be favored in a true balancing test.⁴

II. Legal History of Obviousness & *Martin v. Alliance Machine* Overview

Following over one-hundred years of court decisions applying some form of non-obviousness as a legal requirement for patentability, Congress codified the concept of non-obviousness in the Patent Act of 1952.⁵ The Act required that a patentable invention be non-obvious “to a person having ordinary skill in the art to which the said subject matter pertains.”⁶ The Supreme Court clarified the meaning of non-obvious in *Graham v. John Deere* in 1966.⁷ In *Graham*, the Court confirmed that the Congressional intent of the 1952 Patent Act was indeed to codify the idea of non-obviousness.⁸ The Court interpreted §103 of the 1952 Patent Act to require

Chair:

Anna M. Budde, Troy
E-mail: ambudde@hdp.com
Phone: (248) 641-1600

Chairperson-Elect:

Adam Strauss, Kalamazoo
E-mail: adam.strauss@stryker.com
Phone: (269) 389-7545

Secretary-Treasurer:

Karl T. Ondersma, Grand Rapids
E-mail: ondersma@glbf.com
Phone: (616) 975-5500

Term Expires 2013:

Amanda Conti-Duhaime, Auburn Hills
E-mail: alc63@chrysler.com
Phone: (248) 512-4068

James J. Dottavio, Dearborn
E-mail: jdottavi@ford.com
Phone: (313) 845-5537

Kristen Isaacson Spano, Detroit
E-mail: kis5@chrysler.com
Phone: (248) 512-6475

Term Expires 2014:

David C. Berry, Auburn Hills
E-mail: berryd@cooley.edu
Phone: (248) 751-7800 x7750

Kendra S. Mattison, Auburn Hills
E-mail: kmattison@gmail.com
Phone: (248) 340-2170

Kristin L. Murphy, Bloomfield Hills
E-mail: klm@raderfishman.com
Phone: (248) 594-0647

Term Expires 9/30/2015:

Tamara Ann Clark, Bloomfield Hills
E-mail: tclark.esquire@gmail.com
Phone: (248) 207-9202

Steven Richard Hansen, Waterford
E-mail: srh@hanseniplaw.com
Phone: (248) 504-4849

Chad E. Kleinheksel, Grand Rapids
E-mail: ckleinheksel@wnj.com
Phone: (616) 752-2313

Immediate Past Chair:

David L. Wisz, Birmingham

View from the Chair

The opening of the Elijah J. McCoy USPTO Detroit Office on July 13, 2012 was a proud moment for our intellectual property law community and for Michigan. It is a testament to the vitality of research and innovation in our state and to the strength of our IP bar that the Patent and Trademark Office committed to locate its first regional office here. Through this inaugural year we will be seeking ways to support the new USPTO Detroit Office and to foster interaction between the Detroit Office and our members.

Many of you attended the Grand Opening Gala for the Elijah J. McCoy USPTO Detroit Office at The Henry Ford. The USPTO requested that any excess funds from the evening be used to establish an intellectual property law pro bono program in Michigan. There are funds remaining, and we are getting information and working with the State Bar of Michigan and the USPTO to set up a pro bono program. Minnesota, with the help of the USPTO, started a pilot IP pro bono program last year, with a non-profit legal services provider engaged to screen applicants. (There is a short article about the Minnesota program at <http://www.uspto.gov/inventors/independent/eye/201108/probono.jsp>; more information is at <http://legalcorps.org>.) Other state programs are already planned for Colorado, California, Texas, and for the DC area. Perhaps not coincidentally, the USPTO announced plans for other regional USPTO offices in Denver, Colorado, Silicon Valley, California, and Dallas, Texas. I hope you will embrace this opportunity to help high-tech businesses get started right here in Michigan.

In October, the Intellectual Property Law Section again sponsored a fall seminar on the basics for new attorneys and paralegals. This all-day seminar, patents in the morning and trademarks in the afternoon, was taught by leading experts from our section. We hope this program format will be helpful for newer people at your company or firm.

I am honored to serve as Chair of the Section for the 2012-2013 term. I welcome new Council members Tamara Clark of Miller IP Group, James Dottavio of Ford Motor Company, Steven Hansen of Hansen IP Law, and Chad Kleinheksel of Warner Norcross & Judd. You will find all the Council members listed in a side bar at left. We welcome your comments and suggestions on these projects or other business of the Intellectual Property Law Section.

—Anna Budde

three factual inquiries to arrive at a primary determination of obviousness. These steps became the first of the three *Graham* factors:

1. review “the scope and content of the prior art,”
2. determine the “differences between the prior art and the claims at issue,” and
3. resolve “the level of ordinary skill in the pertinent art.”⁹

The Court also defined the fourth *Graham* factor as secondary considerations that may be used to overcome a determination of obviousness under the three primary considerations.¹⁰ The Court gave a few examples of secondary considerations of non-obviousness: “commercial success, long felt but unsolved needs, failure of others, etc.”¹¹ Although the Court introduced secondary considerations of non-obviousness in *Graham*, they were not applied in resolving the case because the patent was invalidated using only primary considerations of obviousness.¹²

A. The TSM Test, KSR, and More Recent Developments in Obviousness

Despite developing the *Graham* factors to guide patent review, the *Graham* Court recognized that there would be “difficulties in applying the non-obviousness test.”¹³ A test used to clarify the first *Graham* factor, the Teaching, Suggestion, or Motivation (TSM) test, became prevalent during the decades after *Graham* and is described in the case *Freeman v. Gerber Products Co.*:

[I]n order to prevent a hindsight-based obviousness analysis, the Federal Circuit has clearly established that the relevant inquiry for determining the scope and content of the prior art is whether there is a reason, suggestion, or motivation in the prior art or elsewhere that would have led one of ordinary skill in the art to combine the references.¹⁴

In *Freeman*, the court found that defendant could not point to specific prior art that “would have driven one of ordinary skill in the art to combine the references.”¹⁵ Because the motivation to combine “f[ell] far short of the clear and particular,” the court held that the defendant could not be granted a judgment of patent invalidity based on obviousness.¹⁶ Adding to the original list in *Graham*, the court referenced unexpected results and copying as additional secondary considerations that indicate an invention was non-obvious.¹⁷

Use of the TSM test to determine obviousness under the first *Graham* factor – scope and content of the prior art – continued until the recent Supreme Court decision in *KSR v.*

Teleflex.¹⁸ Teleflex sued KSR International for patent infringement.¹⁹ The patent at issue covered an adjustable pedal that allowed movement of the pedal along a guide rod while fixing the pivot point for the pedal on a vehicle mount.²⁰ The design was new because it used an electronic throttle sensor fixed at the pedal pivot point to determine pedal position instead of allowing the sensor to move with the pedal as in prior adjustable pedal designs.²¹ The Supreme Court overruled the holding of patent validity made by the CAFC because the CAFC applied the TSM test too narrowly.²² Instead, the Court held that an “obviousness analysis cannot be confined by a formalistic conception of the words teaching, suggestion, and motivation ... and that the inquiry set forth in *Graham* was sufficient to determine obviousness.”²³

After the decision in *KSR*, the USPTO published several examination guideline updates in order to aid patent examiners in reviewing obviousness.²⁴ Recognizing the TSM test as potentially restrictive, the USPTO highlighted six other rationales for determining obviousness than can be used as alternatives to the TSM test:

- i. “Combining prior art elements according to known methods to yield predictable results;
- ii. Simple substitution of one known element for another to obtain predictable results;
- iii. Use of a known technique to improve similar devices, methods, or products in the same way;
- iv. Applying a known technique to a known device, method, or product ready for improvement to yield predictable results;
- v. Obvious to try – choosing from a finite number of identified, predictable solutions, with a reasonable expectation of success; and
- vi. Known work in one field of endeavor may prompt variations of it for use in either the same field or a different one based on design incentives or other market forces if the variations are predictable to one of ordinary skill in the art.”²⁵

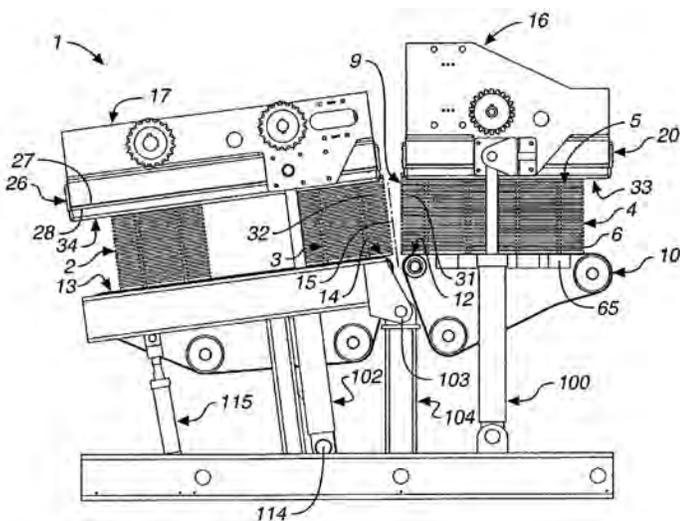
None of the seven obviousness rationales allude to the secondary considerations identified in *Graham*.²⁶ In addition, the guidelines only provide examples of patent invalidity decisions made by the CAFC after *KSR*.²⁷ None of the decisions de-

Continued on next page

scribed in the guidelines discussed secondary factors of non-obviousness to validate patentability; instead, they focused on the first three *Graham* factors.²⁸

B. Geo M. Martin Co. v. Alliance Machine Systems Int'l

The patent at issue in *Martin*, U.S. Pat. No. 6,655,566 (the '566 patent), disclosed an improvement to a bundle breaker.²⁹ Bundle breakers are machines that separate stacked sheets, or bundles, of materials such as cardboard. A preferred embodiment of the bundle breaker machine (1) is shown below that depicts the separation and downstream conveyance of bundles (2, 3) broken from a log (4) of cardboard sheets (6).³⁰



The inventors described the improvement made to the bundle breaker of the '566 patent in the summary section: “[t]he essence of the invention is the provision of a fluid pressure compliance structure to provide reliable breaking of multiple side-by-side bundles from multiple side by side logs by applying equal pressure to all of the logs and severed bundles.”³¹ Using fluid pressure in the compliance structure addressed one common problem with prior-art bundle breakers. Some logs were taller than others, and rigid clamping of logs of different heights at the same time could lead to damage of taller logs and shifting of shorter logs during and after breaking. This common problem is called a “lack of compliance” in the cardboard industry.³² The compliance structures in the '566 patent are best described as clamping mechanisms using flexible members pressurized by fluid and rigid members that engage the flat tops of cardboard bundles.

Following the district court’s claim construction, a jury trial was held to determine if Alliance Machine infringed the '566 patent or, alternately, if the patent was invalid as obvi-

ous. The only independent claim in the '566 patent is claim 1, in which the improvement to the basic design of the bundle breaker is described as comprising:

“(a) a first compliance structure mounted on said first clamp means including,

- (1) a first fluid pressurized structure having a first flexible member presenting a first engagement area for operative engagement with an upstream portion of said generally planar top surface of said log and on the upstream side of said weakened plane in said log; and

(b) a second compliance structure mounted on said second clamp means including,

- (1) a second fluid pressurized structure having a second flexible member presenting a second engagement area for operative engagement with a downstream portion of said generally planar top surface of said log and on the downstream side of said weakened plane in said log.”³³

As the district court noted, the claims do not specify production speed or consistency requirements. After a two week trial and four days of deliberation, the jury was unable to reach a verdict on the issue of invalidity.³⁴ After the non-verdict, Alliance Machine moved to have the district court decide the issue of invalidity as a matter of law.³⁵ The district court relied on three prior-art devices to conclude that the '566 patent was invalid as obvious.³⁶

An Australian company, Visy, had eight bundle breaking machines (Visy breakers) installed in an Australian production line seven years before the similar Martin bundle breaker was conceived.³⁷ The Visy breakers included upstream and downstream upper clamping mechanisms with the ability to deform to grip different heights of logs based on the use of air pressure in the clamping mechanism.

The second machine referenced as prior-art, the “Pallmac Omni-Separator” (Pallmac breaker), used the compliance method of an air bladder and rigid members interspersed between rope conveyors below the logs.³⁸ Martin argued the major difference between his breaker and the Pallmac breaker was the use of compliance structures above the logs instead of below the logs. The '566 patent explained the disadvantage of the Pallmac breaker as allowing shifting of the logs on the conveyor when the compliance structure lowered. This shifting caused a failure to cleanly break bundles from the log. The

district court applied a *KSR* approach in clarification of obviousness: “when there is a design need or market pressure to solve a problem and there are a finite number of identified, predictable solutions, a person of ordinary skill has good reason to pursue the known options within his or her technical grasp.”³⁹ The district court reasoned that since there were only two options for clamping the logs – from the bottom or from the top – choosing one over the other was obvious.⁴⁰

A third bundle breaker meeting all claim limitations in the ‘566 patent, the Tecasa breaker, was developed by a competitor overseas and first used in the United States in June of 2002.⁴¹ Martin was able to swear behind the Tecasa breaker because it established during trial that the machine was reduced to practice before the Tecasa breaker. Though the Tecasa breaker could not be considered as prior art, the district court allowed evidence of its near simultaneous development to be used as a secondary consideration of non-obviousness.

The district court defined even more secondary considerations than those detailed in *Graham* and *Freeman*. This more complete list of secondary considerations is now commonly considered by the CAFC in determining potential non-obviousness of an invention: commercial success, long-felt but unsolved needs, failure of others, copying, praise of the invention, unexpected results, disbelief of experts, general skepticism of those in the art, commercial acquiescence, and simultaneous development.⁴²

In applying secondary considerations of non-obviousness, the district court discounted evidence that the Martin bundle breaker was commercially successful.⁴³ The district court also discounted Martin’s allegations that there was a long felt need for a new breaker design in the cardboard industry because other inventors had the same basic design idea either before or shortly after Martin.⁴⁴ Because the designs of the bundle breakers were similar, the district court found no unexpected results, disbelief by experts, or general skepticism about the design and ruled the ‘566 patent invalid.⁴⁵ Martin appealed the ruling to the Federal Circuit.⁴⁶

On appeal, the CAFC reviewed the three prior-art bundle breakers in detail, concluding that the Visy and Pallmac art created a prima facie basis for concluding that the ‘566 patent claims were obvious.⁴⁷ The CAFC also accepted that Martin conceived his invention prior to the Tecasa breaker being reduced to practice, making the Tecasa breaker irrelevant as prior-art.

The CAFC also reviewed each of Martin’s arguments for validity of the ‘566 patent based on secondary considerations of non-obviousness. First, Martin’s evidence of commercial success was rejected by the CAFC as being due to his pre-existing market share in the stacker market. “The commercial success of a product is relevant to the non-obviousness of a claim only insofar as the success of the product is due to the claimed invention.”⁴⁸ Second, the CAFC negated Martin’s evidence

that his bundle breaker was filling a long-felt but unsolved need. The court reasoned that the need for breaking multiple bundles was already met by prior machines such as the Pallmac and Visy breakers.⁴⁹ Though the jury may have credited Martin with the argument that other machines did not work as well as his breaker, the CAFC reasoned that evidence indicated Martin’s success was “due to enhanced throughput over and above the claimed ability to handle a ‘plurality of logs.’”⁵⁰

Martin also referenced the secondary consideration of industry praise. This praise was in the form of an Alliance Machine customer stating that the Martin breaker “[was] the cat’s meow” and that they chose the breaker because of the single source interface between the breaker and the stacker. Again, the CAFC discounted this praise as a secondary consideration of non-obviousness because of Martin’s existing share of the stacker market.⁵¹ Martin next argued that Alliance Machine planned to copy his bundle breaker. He gave evidence that Alliance Machine analyzed the Martin concept, noted that it was patented, and proposed “adding its own ‘floating platens capability’ to its bundle breaker.”⁵² The CAFC discounted this evidence as “hardly compelling” by reasoning that the same Alliance Machine memo “suggested that Alliance’s proposed design was the ‘same [as the] Pallmac platen concept’ but ‘flipped.’”⁵³

The CAFC held that Martin’s arguments purporting secondary considerations of non-obviousness did not overcome “the fact that nearly every single person or entity who encountered the lack of compliance problems in the industry came up with the same general hydraulic design to manage it.”⁵⁴ In holding secondary considerations inadequate, the CAFC applied the rule that “[i]ndependently made, simultaneous inventions, made ‘within a comparatively short space of time,’ are persuasive evidence that the claimed apparatus ‘was the product only of ordinary mechanical or engineering skill.’”⁵⁵ Alternately, the CAFC acknowledged that “near simultaneous invention by two or more equally talented inventors working independently ... may not be an indication of obviousness when considered in light of all the circumstances.”⁵⁶ The CAFC determined that the existence of the Pallmac and Visy breakers and the near simultaneous invention of the Tecasa breaker were circumstances that supported obviousness. The CAFC affirmed the district court decision to hold the claims of the ‘566 patent invalid.

III. Combining Primary and Secondary Considerations of Obviousness

The Martin ‘566 patent would have been invalid as obvious using a straight-forward review of primary considerations of obviousness in the fashion of *Graham*. However, both the district court and CAFC reviewed secondary considerations

Continued on next page

of non-obviousness and discounted secondary considerations using rather confusing arguments matched only to primary considerations. Two better approaches to reviewing obviousness are discussed below: a European bright-line test and a modified USPTO model combining the review of primary considerations of obviousness and secondary considerations of non-obviousness.

A. Secondary Considerations Muddy the Martin Obviousness Analysis

A court must first determine if an invention is obvious under primary considerations of obviousness, *Graham* factors one through three. Then, the court will decide if a secondary consideration of non-obviousness, *Graham* factor four, overcomes that obviousness. The focus of primary considerations of obviousness is on the patent itself and the prior art that preceded that patent.⁵⁷ Alternately, secondary considerations are intended to provide objective, non-technical economic measurements and motivational factors that indicate non-obviousness.⁵⁸ Secondary considerations are also meant to move the focus from the patent and prior art to external conditions that can be measured at the time of the invention.⁵⁹ Secondary considerations should provide stability to an obviousness analysis when primary considerations based on common sense become prone to inconsistent application by the courts.⁶⁰

Did secondary considerations play an important, objective role in determining the invalidity of the '566 patent? Five secondary considerations were reviewed by the courts in the appeal of this case: commercial success, long felt but unsolved need, industry praise, copying, and simultaneous invention. In reviewing commercial success, both the district court and the CAFC discounted evidence of commercial success because Alliance Machine argued that Martin's existing stacker market could account for that success.⁶¹ However, it was just as likely that the increased throughput and efficiency of the Martin breaker would have made it commercially successful. Had the throughput and efficiency improvements been specifically included in the patent, the secondary consideration of commercial success could have supported non-obviousness of a valid invention. Hence, there are two alternate views of commercial success: the invention was obvious based on existing market share or non-obvious based on improved throughput and efficiency.

Second, both the district court and CAFC rejected Martin's argument that his breaker filled a long felt but unsolved need because other breakers were designed with the same hydraulic clamp solution in the same general time period.⁶² The district

court acknowledged that their reasoning for discounting the secondary consideration of unsolved need was the same as that used for finding the invention obvious under the primary obviousness factor of finite number of solutions for a given design problem.⁶³ This argument discounted a secondary consideration of non-obviousness because of a primary consideration of obviousness. No additional clarity on the question of obviousness was obtained by the district court's review of the secondary consideration of unsolved need.

Additionally, Martin correctly argued that neither the Visy nor Pallmac breaker worked reliably and hence did not fulfill the long felt need of reliable multiple-bundle breaking.⁶⁴ Unfortunately, Martin did not claim reliability as part of his improvement. The secondary consideration of fulfilling a long felt but unsolved need could have supported Martin had he included reliability as an element of his invention. Even then, the courts might still have argued that prior machines fulfilled that need. Whether evidence of a long felt but unsolved need has merit depends on how the need is defined.

Third, the CAFC reviewed Martin's reference to industry praise as a secondary consideration of non-obviousness.⁶⁵ Like commercial success, industry praise must be linked to the patented invention.⁶⁶ The Alliance Machine customer likely called the Martin breaker the "cat's meow" both because of the single vendor interface and the improved reliability and throughput of the bundle breaker. Again, Martin did not include the reliability and improved throughput of the breaker in the claims of his patent. Had he done so, the customer's statement about the breaker could have been used as support for the improved reliability and throughput, the single vendor interface, or both. One valid interpretation of the praise is a secondary consideration supporting non-obviousness, the other, a discountable factor unable to overcome a primary consideration of obviousness.

Fourth, the CAFC reviewed evidence that Alliance Machine copied Martin's bundle breaker.⁶⁷ The court ruled that "copying is only equivocal evidence of non-obviousness in the absence of more compelling objective indicia of other secondary considerations."⁶⁸ The CAFC disposed of copying as a secondary consideration because the Alliance Machine action plan that proposed adding features from the Martin breaker to the Alliance Machine breaker also noted that the Martin breaker appeared to be an inverted version of the Pallmac breaker. Despite Alliance Machine's documents confirming that they were incorporating designs from Martin, the court discounted the copying because the changes Martin made were obvious based on the design of the Pallmac breaker. This is an

illogical argument. How can evidence of copying support the non-obviousness of an invention found obvious under primary considerations if said evidence is thrown out because the invention is deemed obvious under primary considerations?

The final secondary consideration referenced, simultaneous invention, was discussed by both the district court and the CAFC.⁶⁹ The CAFC gave two conflicting rules on the subject: simultaneous inventions can either be “persuasive evidence that the claimed apparatus was the product only of ordinary mechanical or engineering skill,” or they may not indicate obviousness at all “when considered in light of all the circumstances.”⁷⁰ The CAFC decided that the circumstances of near simultaneous invention dictated that the Martin breaker was obvious given the Pallmac and Visy breaker designs. Similarly, they reasoned that the Tecasa breaker being built around the same time as the Martin breaker was only the product of ordinary skill in the art. Again, the argument seems illogical. Given an invention found obvious under a primary consideration, the secondary consideration of simultaneous invention is discounted because of the primary consideration instead of used as a tool to refute obviousness.

B. A European View of Obviousness Applied to Martin

How do other patent authorities treat obviousness? In the European Patent Office (EPO), the EPO Appeals Board follows a bright-line test for determining if an invention can be deemed patentable:

- i. “What is the technical field, or the purpose and effect, of the invention?”
- ii. What was the most promising starting point prior art (‘closest prior art’)?
- iii. What is the technical problem that is solved by the differences vis`a vis the closest prior art?
- iv. Does the claimed subject matter indeed provide a solution for the technical problem?
- v. Was the technical problem known or obvious? If not;
- vi. Does the claimed subject matter provide no more than an obvious solution?⁷¹

Steps one and two are clearly analogous to the first of the *Graham* factors: determining the scope and content of the prior art. Steps three and four analyze the differences between the claims and the prior art (the second *Graham* factor) in a two-step, problem-solution format. Steps five and six look at the third *Graham* factor of ordinary skill in the given art and apply the question of obviousness to the problem-solution format of steps three and four.

A review of the *Martin* bundle breaker improvement applying the EPO guidelines leads to a straightforward finding

of invalidity of the ‘566 patent. Step one defines the technical field of the patent: bundle-breaking machines that separate bundles of cardboard.⁷² Step two determines the closest prior art: the Visy, Pallmac, and Tecasa breakers.⁷³ Step three defines the technical problem that is solved by the patent: prior bundle breakers were unreliable and allowed damage to occur to the bundles and logs.⁷⁴ Step four determines if the *claimed* subject matter provides a solution to the defined problem: nothing in the claims of the ‘566 patent describes the reliability improvement of the Martin breaker or its ability to avoid damage to the bundles and logs. Since no solution to the technical problem is claimed, steps five and six regarding obviousness of the solution need not be considered to determine that the ‘566 patent is obvious under the EPO guidelines.

Despite the EPO and USPTO guidelines both applying the first three *Graham* factors, there remains a significant difference between the approaches. The EPO guidelines first identify the “positive merits of the invention before considering whether the differences might be objected to as obvious.”⁷⁵ Paul Cole, a prominent European patent attorney, argued that defining the problem and reviewing its inventive solution before looking at obviousness aids in avoiding hindsight analysis.⁷⁶ If the patent examiner had rejected Martin’s claims for lacking the disclosure of a solution to the technical problem of unreliable bundle breaking, it is likely that no litigation would have been necessary. This EPO approach is a more objective method of applying the first three *Graham* factors of obviousness. However, it does not include secondary considerations of non-obviousness as part of a balancing test.

C. A Better Use of Secondary Considerations in Obviousness Analyses

In *Martin*, the district court and CAFC gave secondary considerations of non-obviousness very little weight when balancing them against primary considerations of obviousness.⁷⁷ Proponents of secondary considerations of obviousness argue that the fourth *Graham* factor should be given additional weight.⁷⁸ If relevance of secondary considerations is first determined, then objective data supporting this relevance provided, a balancing by the court between primary and secondary considerations should lead to more objective obvious analyses.

Though a more objective approach to obviousness would be desirable, proponents for secondary considerations recognize that *Graham* did not include any direction regarding the weight of secondary considerations.⁷⁹ Without specific direction as to weight of secondary considerations, it is simple for courts to discount secondary considerations after finding an invention obvious under primary considerations. Adding weight to secondary considerations in *Martin* would not have changed the outcome of invalidity of the ‘566 patent because the secondary considerations were largely discounted under the same reasoning used for primary considerations.

Continued on next page

Courts do not reach objective obviousness decisions by using the same reasoning to apply both primary considerations of obviousness and secondary considerations of non-obviousness. Further, each of the secondary considerations discounted in *Martin* could have reasonably been interpreted in a different way, a sign of subjectivity, not objectivity. The application of secondary considerations of non-obviousness to obviousness analyses does not add value for two reasons. First, courts have no direction in accurately weighing secondary considerations of non-obviousness. Second, application of primary considerations of obviousness before secondary considerations of non-obviousness limits the ability to use a true balancing test between the considerations. Applying rationales for obviousness and non-obviousness at the same time should lead to a better balance.

Obviousness Rationales:

- i. "A reason, suggestion, or motivation in the prior art or elsewhere would have led one of ordinary skill in the art to combine the references;
- ii. Combination of prior art elements according to known methods yields predictable results;
- iii. Simple substitution of one known element for another obtains predictable results;
- iv. Use of a known technique improves similar devices, methods, or products in the same way;
- v. Application of a known technique to a known device, method, or product ready for improvement yields predictable results;
- vi. Obvious to try – choosing from a finite number of identified, predictable solutions, with a reasonable expectation of success; and
- vii. Known work in one field of endeavor prompts variations for use in either the same field or a different one based on design incentives or other market forces if the variations are predictable to one of ordinary skill in the art."⁸⁰

Non-Obviousness Rationales:

- i. Commercial success of the product based on the claimed invention;
- ii. Long-felt but unsolved need answered by the claimed invention;
- iii. Failure of others to come forward with the claimed invention;
- iv. Copying of the claimed invention by others;

- v. Praise of the claimed invention by others;
- vi. Unexpected results obtained by the claimed invention;
- vii. Disbelief by experts that the claimed invention could exist;
- viii. General skepticism of the invention by those familiar the art; and
- ix. Simultaneous development of the invention by multiple persons.⁸¹

IV. Conclusion

Though *Martin* should have been able to patent his bundle breaker design based on improved reliability, efficiency, speed, or throughput achievable over prior art, he did not claim improvements based on these values. *Martin* claimed only the inverted design of a prior-art bundle breaker. Hence, the district court and CAFC rightly concluded that this design change would be obvious to a person skilled in the art due to a finite number of solutions available to clamp logs during breaking: from above or from below. After this conclusion, both courts discounted secondary considerations of non-obviousness based on either their subjective interpretation of the secondary consideration (commercial success and industry praise) or a repeat of their reasoning for primary considerations of obviousness (long felt but unsolved need, copying, and simultaneous invention). Secondary considerations of non-obviousness are either subjectively interpreted by the courts or unable to overcome the weight given to primary considerations of obviousness.

Secondary considerations of non-obviousness are also irrelevant in the preliminary review of a patent by the USPTO and EPO. Both offices instead direct examiners to determine obviousness under the first three *Graham* factors. Secondary considerations of non-obviousness should not be a distinct *Graham* factor in the obviousness analysis. First, there is currently no focus on secondary considerations in the preliminary review of patentability. Second, when courts apply secondary considerations, they do so subjectively and without direction as to weighing them against primary factors of obviousness. Instead, both patent offices and courts should advocate the use of secondary considerations of non-obviousness as a balance to obviousness considerations under the third *Graham* factor: resolving the level of ordinary skill in the art.

Decisions like *Martin* that have a muddy, subjective argument for secondary considerations could be avoided if

primary and secondary considerations are reviewed at the same time. The assumption of invalidity that currently plagues the review of secondary considerations would be negated by simultaneous review with primary considerations. Instead of overcoming presumptions, all considerations with strong support could more easily come forward to be balanced, be they for obviousness or non-obviousness. ¶

Endnotes

- 1 Stacie N. Farina, J.D., Thomas M. Cooley Law School (2012). This submission was awarded first prize in the 2011 Michigan Innovation and IP Legal Writing Competition. Ms. Farina is an associate at Young Basile Hanlon & MacFarlane P.C. in Troy, Michigan.
- 2 *Geo. M. Martin Co. v. Alliance Machine Sys. Int'l, Inc.*, 618 F.3d 1294 (Fed. Cir. 2010).
- 3 *See infra* Part II.B.
- 4 *See infra* Part III.C.
- 5 35 U.S.C.A. § 103 (West 2010).
- 6 *Id.* § 103(a).
- 7 *See Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966).
- 8 *See id.*
- 9 *Graham*, 383 U.S. at 17.
- 10 *Id.* at 17-18.
- 11 *Id.*
- 12 *See Id.* at 25-26.
- 13 *Id.* at 18.
- 14 *Freeman v. Gerber Prod. Co.*, 450 F. Supp.2d 1248, 1258 (D. Kan. 2006) (quoting *Ruiz v. A.B. Chance Co.*, 234 F.3d 654, 664 (Fed. Cir. 2000)).
- 15 *Freeman*, 450 F. Supp.2d at 1259.
- 16 *Id.*
- 17 *Id.*
- 18 *See KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007).
- 19 *Id.* at 398, 405.
- 20 *See* U.S. Patent No. 6,237,565 (filed Aug. 22, 2000).
- 21 *See Id.*
- 22 *See KSR*, 550 U.S. at 419-22.
- 23 *Id.* at 415, 419.
- 24 *See* Examination Guidelines for Determining Obviousness Under 35 U.S.C. 103 in View of the Supreme Court Decision in *KSR International Co. v. Teleflex Inc.*, 72 Fed. Reg. 57,526 (Oct. 10, 2008) [hereinafter Examination Guidelines Under KSR]; see also Examination Guidelines Update: Developments in the Obviousness Inquiry After KSR v. Teleflex, 75 Fed. Reg. 53,643 (Sept. 1, 2010) [hereinafter *Examination Guidelines After KSR*].
- 25 *Examination Guidelines After KSR*, *supra* note 24, at 53,644.
- 26 *See id.* (indicating that the TSM test is still considered valid so long as only narrowly applied).
- 27 *See id.* at 53,646-56.
- 28 *Id.*
- 29 *See* U.S. Patent No. 6,655,566 (filed Aug. 28, 2002).
- 30 *See Id.* at fig. 14, items 1-6.
- 31 *Id.* at col.2 l.66-67, col.3 l.1-3.
- 32 *Id.*
- 33 *Id.* at col.17 l.4-19.
- 34 *Geo. M. Martin Co. v. Alliance Mach. Sys. Int'l*, 634 F. Supp. 2d at 1024, 1028 (N.D. Cal 2008).
- 35 *Id.*
- 36 *Id.* at 1029.
- 37 *Id.* at 1029-30.
- 38 *Id.* at 1033-34.
- 39 *Martin*, 634 F. Supp. 2d at 1038 (quoting *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 421 (2007)).
- 40 *See id.* at 1038.
- 41 *Id.* at 1036.
- 42 *Id.*
- 43 *Id.* at 1039-40.
- 44 *Id.*
- 45 *Id.* at 1040.
- 46 *See Geo M. Martin Co. v. Alliance Mach. Sys. Int'l*, 618 F.3d 1294 (Fed. Cir. 2010).
- 47 *Id.* at 1303-04.
- 48 *Id.* at 1304 (quoting *Ormco Corp. v. Align Tech., Inc.*, 463 F.3d 1299, 1312 (Fed. Cir. 2006)).
- 49 *Id.* at 1304-05.
- 50 *Id.* at 1305.
- 51 *Id.*
- 52 *Id.*
- 53 *Id.*
- 54 *Id.* at 1305-06.
- 55 *Id.* at 1305 (quoting *Concrete Appliances Co. v. Gomery*, 269 U.S. 177, 184 (1925)).
- 56 *Id.* (quoting *Lindemann Maschinenfabrik GHBH v. Am. Hoist & Derrick Co.*, 730 F.2d 1452, 1460 (Fed. Cir. 1984)).
- 57 *See Graham*, 383 U.S. at 17.
- 58 *See* Jay Jongjitirat, Leapfrog Enterprises v. Fisher-Price: *Secondary Considerations in Nonobviousness Determinations*, 42 U.C. Davis L. Rev. 599, 611 (2008).
- 59 *See Id.* at 614-15.

Continued on next page

- 60 See Amanda Wieker, *Secondary Considerations Should Be Given Increased Weight in Obviousness Inquiries Under 35 U.S.C. §103 In The Post-KSR v. Teleflex World*, 17 Fed. Circuit B.J. 665, 674 (2008).
- 61 See *Martin*, 634 F. Supp. 2d at 1039; see also *Martin*, 618 F.3d at 1304.
- 62 See *Martin*, 634 F. Supp.2d at 1039-40.
- 63 *Martin*, 634 F. Supp.2d at 1040 n.14.
- 64 See *Id.* at 1031; see also U.S. Patent No. 6,655,566 col.2 l.50-54 (filed Aug. 28, 2002).
- 65 See *Martin*, 618 F.3d at 1305.
- 66 *Id.* (citing *Power-One, Inc. v. Artesyn Techs., Inc.*, 599 F.3d 1343, 1352 (Fed. Cir. 2010).
- 67 See *Martin*, 618 F.3d at 1305.
- 68 *Id.* (quoting *Ecolochem, Inc. v. S. Cal. Edison Co.*, 227 F.3d 1361, 1380 (Fed. Cir. 2000)).
- 69 *Martin*, 634 F. Supp. 2d at 1039-40; see also *Martin* 618 F.3d at 1305.
- 70 *Id.*
- 71 See Paul Cole, *KSR and Standards of Inventive Step: A European View*, 8 J. Marshall Rev. Intell. Prop. L. 14, 42 (2008) (discussing patentability, including novelty, inventive step, technical problems, etc.).
- 72 See U.S. Patent No. 6,655,566 (filed Aug. 28, 2002).
- 73 See *Martin*, 634 F. Supp. 2d at 1029.
- 74 '566 Patent at col.2 l.22-31.
- 75 Cole, *supra note* 71, at 42.
- 76 See *Id.* at 42-43.
- 77 See 634 F. Supp. 2d at 1040, 618 F.3d at 1304-05.
- 78 See Wieker, *supra note* 60, at 681; see also Jongjitirat, *supra note* 58, at 626-27.
- 79 See Jongjitirat, *supra note* 58, at 624; see also Wieker, *supra note* 60, at 674.
- 80 *Examination Guidelines After KSR*, *supra note* 59, at 53,644.
- 81 *Martin*, 634 F. Supp. 2d at 1039.

Announcements

Save the Dates

Plan to Attend Upcoming IP Section Programs

- **2012 Intellectual Property Law Spring Seminar**
March 26, 2013
MSU Kellogg Hotel and Conference Center
East Lansing
- **38th Annual Intellectual Property Law Summer Institute**
July 18-23, 2013
Grand Hotel, Mackinac Island

Publish Your Paper In *IPLS Proceedings*

The *IPLS Proceedings* is seeking short contributed articles on intellectual property topics. Contributors receive an opportunity to place one-quarter page ad in the *IPLS Proceedings* issue, which is distributed to 1,000 IP Section members. If you have an idea for an article, please contact the IPLS Editors: David C. Berry (berryd@cooley.edu), Tamara Clark (tclarkesquire@gmail.com), or Chad Kleinheksel (ckleinheksel@wnj.com)

Congratulations to 2012 Writing Competition Winners

The IP Section is please to announce the winners of the 2012 Innovation and IP Legal Writing Competition, co-sponsored by the Intellectual Property Law Section and Thomas M. Cooley Law School Graduate Program in Intellectual Property Law. First Place: Kameron Bonner, a student at Wayne State University Law School, for his paper "Bridging the Gap Between Invention and Innovation: The Bayh-Dole Act and Human Embryonic Stem Cell Research." Second Place: Brian Zomberg, Michigan State University School of Law, for his paper "Substantive Utility: Who's To Say What's Useful?" The papers will be published in upcoming issues of *IPLS Proceedings*. Congratulations to both winners.

First Amendment Defense Prevails in Artist's and University's Trademark Dispute

By Gerald Tschura

On June 11, the U.S. Court of Appeals for the Eleventh Circuit ruled that artist, Daniel Moore could not be found liable for trademark infringement by selling and reproducing paintings in which he portrays University of Alabama football scenes. Moore's realistic style paintings depict the University's uniforms, helmets, crimson and white school colors and team insignia.¹ Judge Lanier Anderson, writing for a unanimous panel, concluded Moore's depictions of the university's colors and logo were artistically relevant and necessary for the portrayal of the scenes and that, as such, his "...paintings, prints and calendars very clearly are embodiments of artistic expression, and are entitled to full First Amendment protection."²

Moore had been painting photorealistic scenes of Alabama football games since at least as early as 1979 and throughout the 1990s. His originals have sold for upwards of several thousand dollars. His works can also be found in prints, calendars, t-shirts, coffee mugs and the like. The university asserted that Moore's depictions of the university's trademarks on any of his works would require a license. Moore, having continued to paint his scenes and reproduce the works, was sued by the university in 2005. After a fairly lengthy meander through the district court, having been assigned, at various times, to no less than seven different district court judges, both parties moved for summary judgment in 2009. The district court split the baby, so to speak, finding Moore was protected by the First Amendment as well as fair use with respect to his paintings and prints but found in favor of the University on the calendars, mugs and other "mundane products."³

Notably, with respect to the paintings and prints, the district court sharply, and in my opinion appropriately, criticized the University's likelihood of confusion survey as both suggestive and misleading. The district judge was of the opinion that people who buy Moore's paintings do so because of their loyalty to the University and their appreciation of his art and simply using the school colors and logos in the art and because of any perception of sponsorship or endorsement by the University. The court went on to note that *even if* there was some likelihood of confusion with respect to the prints, the *Rogers v. Grimaldi*⁴ test limits liability for trademark infringement to instances where the public interest in avoiding consumer confusion outweighs the public interest in free expression. The district court, however, distinguished Moore's use of the University's colors and indicia on "non-artistic products such as calendars, smaller prints, t-shirts, mugs, etc."

as, somehow, less deserving of First Amendment protection and granted summary judgment in favor of the University with respect to those items. It seems the district court believed it is art when it is on a canvas or more expensive print, but somehow ceased to be art when printed on a calendar or coffee mug. The district court opinion leads to the inevitable conclusion that somehow First Amendment protection only applies to expensive "fine artistic creations". In any event, with the baby split, both parties appealed the decision.

With what appeared to be so much at risk to the more than \$4.3 billion collegiate merchandise licensing industry, more than two dozen colleges and universities weighed in as *amici* to support the University of Alabama's claim. On the other side, groups such as the American Society of Media Photographers as well as a group of trademark law professors, including this author, submitted amicus briefs in support of Moore. By the time it was all over, it had been reported the University had expended in excess of \$1.5 million suing Daniel Moore. It had also been reported that attorney and financial assistance had also been provided by the Collegiate Licensing Company, the licensing agency that represents the NCAA and more than 100 colleges and universities. It seemed clear this case was about more than just Moore and the Crimson Tide.

On appeal, the Eleventh Circuit sided with Moore and affirmed the district court's summary judgment as to the "fine art" and fine prints. Moreover, the court reversed the judgment in favor of the University finding in favor of Moore as to other prints and calendars concluding those items, every bit as much as the original and/or fine prints, are shielded from the Lanham Act by the First Amendment. As to the remaining items the court advised that it had no choice but leave the district court ruling in place as Moore did not raise the issue with respect to those items on appeal.

In its analysis, the court addressed paintings, prints and calendars together as one single category or works. In addressing the First Amendment question the court first considered Alabama's argument that Moore's paintings, prints and calendars "are more commercial than expressive speech and, therefore, entitled to a lower degree" of First Amendment protection. The court resolved by clarifying that the commercial speech is speech that "propose[s] a commercial transaction" not speech that derives a commercial benefit.⁵ Recognizing

Continued on next page

that Moore sells his art for money, the court notes it is of no moment that speech takes place under commercial auspices; like other expressive speech, Moore's artwork is still entitled to full protection under the First Amendment.⁶

The court then followed the oft cited Second Circuit's landmark *Rogers v. Grimaldi*⁷ in balancing trademark and First Amendment rights. Essentially, the *Rogers* test establishes that trademark liability cannot be imposed as against artistic works *unless* the trademark(s) used "has no artistic relevance to the underlying work whatsoever."⁸ Noting that the depiction of the Alabama uniforms, helmets, and etc. are necessary inclusions to the expressive works of portraying Alabama football scenes, the court easily concluded Moore's paintings, prints and calendars are protected under the *Rogers* test. In continuing to follow the *Rogers* test, the court noted there was no evidence Moore ever marketed his works as endorsed or sponsored by the University. Most importantly, the court concluded that even if some members of the public drew the incorrect inference that Moore's work was or, for that matter, had to be, sponsored by or somehow involved with the University, that risk is so outweighed by the interest in expression as to preclude any violation of the Lanham Act.

Addressing the second category of works, which the court calls "mundane products" such as mini-prints, mugs, t-shirts and the like, the court noted little attention was paid to such items during the course of the litigation the parties focusing almost exclusively on paintings, prints and calendars. Since the district court ruled against Moore on the mugs and t-shirts and since Moore did not raise the issue as to these items on appeal, the court concluded Moore has waived any challenge to the district court's conclusion. He did, however, preserve in the district court the claim of acquiescence on the part of the University as to use of the indicia in his art, including the mundane products. Whether or not the University acquiesced to Moore's sales of his work during the preceding decade had not yet been adequately developed in the trial court and the case was remanded for further proceedings on the issue. It seems the facts suggest Moore had been selling these items for several years without the University's objection, even in the University's own bookstore.

It is, I believe, unfortunate the First Amendment issue as to such things as Moore's mini-prints, coffee mugs and the like was not squarely resolved by this court. The suggestion might be that as "mundane products" they should somehow be treated differently and/or accorded less of a First Amendment

protection under the *Rogers* test. Reading such a conclusion into the court's opinion is illogical and would be a mistake. While it may be Moore waived any challenge to the district court's ruling as to these products, it does not at all follow that First Amendment protection does not exist for such products. All of the same reasoning applies to less expensive prints, coffee mugs or any other medium which portrays the art as its essential expressive or artistic feature. The depiction of an Alabama football scene is artistic expression. The inclusion of the Alabama indicia is a necessary inclusion and, therefore, artistically relevant. Just like its placement on prints or calendars, expressive art does not cease to be art simply because it is placed on a mug. A Van Gough work of art does not cease to be art when one views it on his cup with his morning coffee. It is likely the appreciation of the Van Gough was the very reason for the purchase of the cup. Just as the sales of paintings, prints and calendars do not amount to commercial speech, neither should the sales of mugs amount to commercial, less

One thing is clear, however, the First Amendment is not limited to the spoken or written word, but encompasses all forms of expressions including pictures and paintings.

protected speech because they are sold more cheaply. Indeed, reading between the lines, one might see the reluctance and disappointed by the court in having to conclude that Moore waived this important issue.

The result in this case is entirely consistent with the conclusion of our own Sixth Circuit which had addressed a somewhat similar claim under the Lanham Act where an artist had painted a collage of Tiger Woods images.⁹ The court, in applying the *Rogers* balancing test, found that Woods's image on the paintings and prints had artistic relevance to the underlying work. The work was protected by the First Amendment against Tiger's claim of false endorsement. Beyond the Lanham Act, the result in both the Alabama and Tiger Woods case fits nicely with the right of publicity trading card dispute in *Aldrin v. Topps*.¹⁰ In that case, in November of last year, the district court in Los Angeles struck down astronaut Buzz Aldrin's right of publicity claim against Topps, the chewing gum trading card company, finding that, as a historically significant figure, his image on trading cards was

protected speech even though the cards were a commercial product. Aldrin appealed to the Ninth Circuit where the case is now pending.

Are athletes historically significant figures? I suppose that depends upon who you ask. We will have to wait and see how the Ninth Circuit feels about the incredibly murky interface between the right of publicity and the First Amendment. One thing is clear, however, the First Amendment is not limited to the spoken or written word, but encompasses all forms of expressions including pictures and paintings. The fact that a particular form of expression is sold for profit does alter the protection afforded the artist.

Moore's victory in this long fought battle can be seen as big victory for artists and photographers who wish to portray marks or brands in their works. It can, perhaps also be seen as an example of the result of overreaching by trademark owners/licensors.

While this case presents a prime example of the First Amendment as a potential shield for artist using another's trademark, other grounds remain available to the artist. Recall for example, in *Mattel, Inc. v. Walking Mountain Productions*¹¹ wherein the artist created photographs of a nude Barbie® doll posed with various kitchen appliances and entitled "Food Chain Barbie."¹² Rather than resolve the case on a First Amendment basis, the Ninth Circuit concluded the artists use of Mattel's purported marks was a nominative fair use and considered "necessary" to identify a component of the artist's work. While trademark law ultimately protects mark owners from third party uses likely to cause confusion as to source or origin, an artist's use of the mark that can be seen as "necessary" or "relevant" to the artwork remains likely to be a privilege of the artist. ?

About the Author

Gerald Tschura is a Professor of Law and a Director of the Graduate Program in Intellectual Property Law at the Thomas M. Cooley Law School in Auburn Hills where he teaches Intellectual Property Law, Trademark and Unfair Competition Law, and Copyright Law and Practice. He can be reached at (248) 751-7800 or by email at tschurag@cooley.edu.

Endnotes

- 1 *University of Alabama Board of Trustees v. New Life Art, Inc.* No. 09-16412 (11th Cir. June 11, 2012)
- 2 *Id.*
- 3 *Univ. of Alabama Board of Trustees v. New Life Art Inc.*, CV 05-UNAS-PT-585-W (N.D. Ala. Nov. 2, 2009)
- 4 875 F.2d 994 (2nd Cir. 1989)
- 5 The court cites *Central Hudson Gas & Elec. Corp v. Public Service Commission of New York.*, 447 U.S. 557, 562-563, 100 S.Ct. 2343, 2350 (1980)
- 6 See *Smith v. California* 361 U.S. 147, 150, 80 S.Ct. 215,217 (1959) accord *ETW Corp. v. Jireh Pub. Inc.*, 332 F.3d 915, 925 (6th Cir. 2003) [the Tiger Woods print case]
- 7 875 F.2d 994 (2nd Cir 1989)
- 8 *Id.* at 999
- 9 *ETW Corp. v. Jireh Pub. Inc.*, 332 F.3d 915, 925 (6th Cir. 2003)
- 10 CV 10-09939 DDP (C.D. Cal.)
- 11 353 F.3d 792 (9th Cir. 2003)
- 12 Notable examples included works such as "Barbie in a Blender", "Enchilada Barbie," and "Barbie a la Fondue."



Moving? Let Us Know!

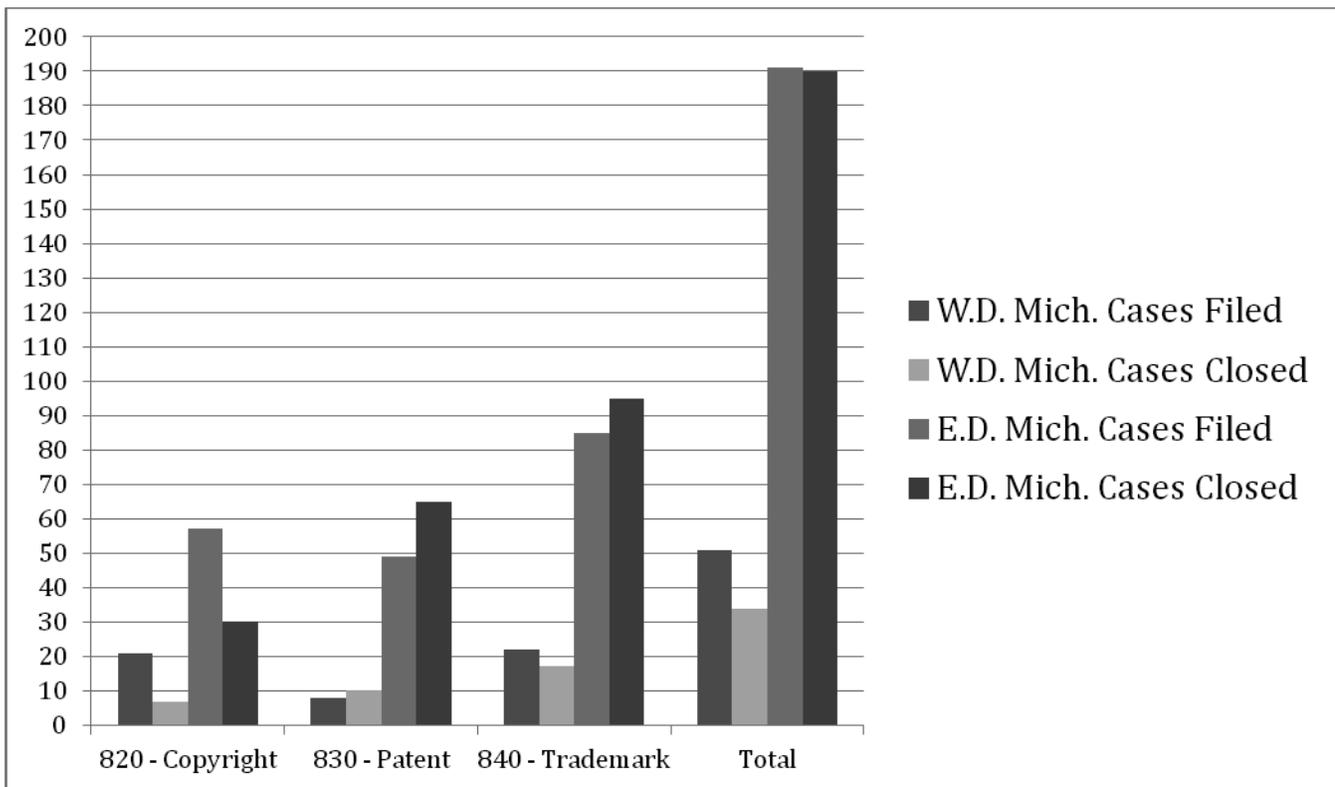
Don't forget to tell the State Bar of Michigan your new address. In order to safeguard your member information, changes to your member record must be provided in one of the following ways:

- Login to SBM Member Area (<http://e.michbar.org/>) with your login name and password and make the changes online.
- Complete contact information change form (<http://www.michbar.org/programs/pdfs/AddressChange.pdf>) and return by e-mail, fax, or mail. Be sure to include your full name and P-number when submitting correspondence.
 - Fax form to Member Records at (517) 372-1139.
 - Mail form to State Bar of Michigan, Member Records, 306 Townsend St., Lansing, MI 48933-2012.
 - e-Mail completed form to sbmadressfix@mail.michbar.org

Intellectual Property Caseload in the Michigan Districts December 1, 2011 through November 1, 2012

The United States District Courts for the Eastern and Western Districts of Michigan kindly provided the Section with information regarding Intellectual Property cases handled by the Courts between December 1, 2011 and November 1, 2012. This data was compiled by Mark Streck, a Cooley Law School student and research assistant.

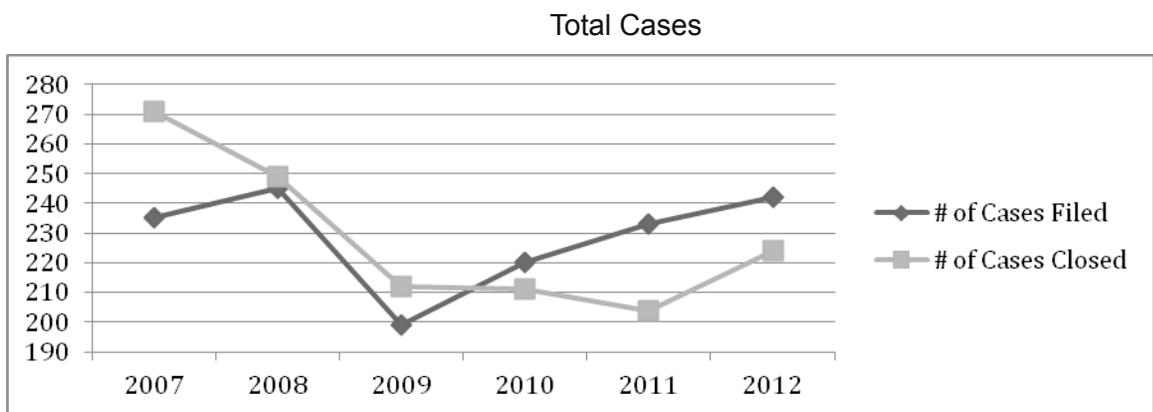
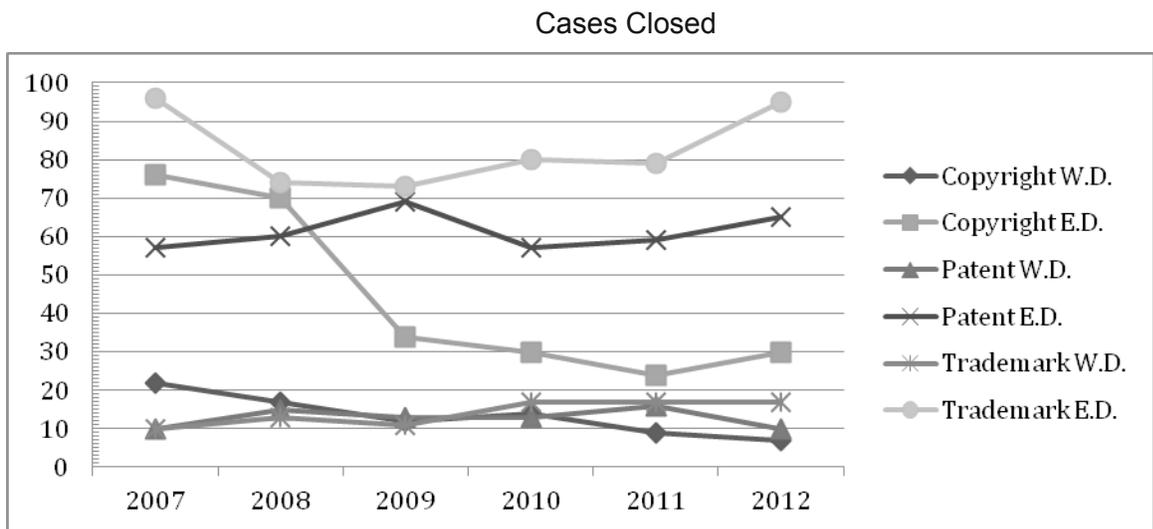
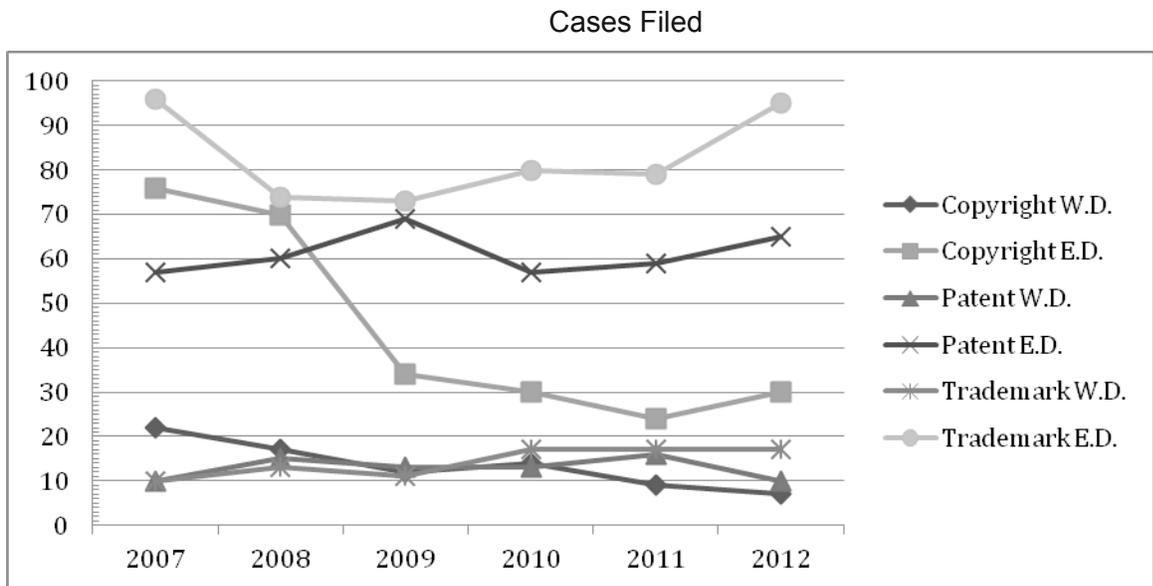
The Section would like to thank Gabriel Orzame Jr., Management Analyst for E.D. of Mich., who provided data from which this article was drawn. We also thank Yvonne Carpenter, Judicial Assistant to Honorable Robert J. Jonker, who provided the W.D. of Mich. data.



Cases Filed: 12/1/11–11/1/12		
District	W.D.	E.D.
820 - Copyright	21	57
830 - Patent	8	49
840 - Trademark	22	85
Total	51	191

Cases Closed: 12/1/11–11/1/12		
District	W.D.	E.D.
820 - Copyright	7	30
830 - Patent	10	65
840 - Trademark	17	95
Total	34	190

E.D. & W.D. OF MICHIGAN CASE TRENDS 9/30/2006 through 11/1/2012



The above graphs show the case trends of Michigan District Courts for the past six years. Data for 2007 to 2011 retrieved from <http://www.uscourts.gov/JStatistics/JudicialBusiness.aspx>.

Data for 2012 (NOTE: 2012 data based on 11 month period) from Gabriel Orzame Jr., Management Analyst for E.D. Mich., and Yvonne Carpenter, Judicial Assistant to Honorable Robert J. Jonker, who provided the W.D. Mich. data. ?

SBM

STATE BAR OF MICHIGAN

MICHAEL FRANCK BUILDING
306 TOWNSEND STREET
LANSING, MI 48933-2012

PRESORTED
FIRST CLASS MAIL
U.S. POSTAGE PAID
Lansing, MI
PERMIT NO. 191