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A Competitor's Right To Copy

BY ROBERT C. KAIN, JR. OF FLEIT, KAIN, GIBBONS,
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A competitor's right to copy is the antithesis of intellectual property (I.P.) laws which generally grant individuals and businesses the right to exclude others from making and selling an accused article under patent, copyright, trademark, trade secret and unfair competition laws. Although lower court decisions rarely mention a common law "right to copy,"¹ the U.S. Supreme Court has annunciated a "right to copy" on several occasions. "The right to copy, and to copy without attribution, once a copyright has expired, like 'the right to make [an article who's patent has expired] — including the right to make it in precisely the shape it carried when patented — passes to the public'" Dastar Corp. v. Twentieth Century Fox Film Corp., 123 S. Ct. 2041, 2048, 156 L.Ed.2d 18, 29 (2003), (quoting Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 230, 84 S.Ct. 784, 11 L.Ed.2d 661 (1964)). Any item is subject to abject, unadulterated copying unless another's intellectual property right, such as a patent, copyright, trade secret or trade dress right² protects the item. Traffix Devices, Inc. v. Marketing Displays, Inc., 532 U.S. 23, 29, 121 S.Ct. 1255, 149 L.Ed.2d 164 (2001). ("unless an intellectual property right such as a patent or copyright protects an item, it will be subject to copying"). "The rights of a patentee or copyright holder are part of a 'carefully crafted bargain' under which, once the

patent or copyright monopoly has expired, the public may use the invention or work at will and without attribution." Dastar Corp., 123 S. Ct. at 2048 (quoting Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 150-151, 109 S.Ct. 971, 103 L.Ed.2d 118 (1989)).

In 2003, the Supreme Court in the Dastar case reversed a 9th Circuit Court of Appeals decision and ruled that the unauthorized, wholesale copying of a video tape, without identifying the original producer of the video, was not a violation of the federal trademark law (false designation of origin). Twentieth Century Fox alleged that Dastar had falsely designated a film of General Dwight D. Eisenhower's World War II campaign as being its own production when, in fact, Twentieth Century Fox had earlier produced the film and owned the expired copyright to the film. False designation of origin is a violation of federal trademark law, commonly known as the Lanham Act, 15 U.S.C. § 1125(a)(Section 43(a) of the Lanham Act). The Court stated that "[a]llowing a cause of action under Section 43(a) [of the Lanham Act], for that representation [identifying the copier but not the original producer] would create a species of mutant copyright law that limits the public's 'federal right to copy and to use,' expired copyrights." Dastar 123 S.Ct. a 2048 (quoting Bonito Boats, 494 U.S. at 165).

COPYRIGHT

"That there can be no valid copyright in facts [which are publicly available] is universally understood. The most fundamental axiom of copyright law is that 'no author may copyright his ideas or the facts he narrates.'" Feist Publications Inc. v. Rural Telephone Serv. Co., Inc., 499 U.S. 340, 344, 111 S.Ct. 1282, 1287, 113 L.Ed.2d 358 (1991), (quoting Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 556, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985)).³ "Others may copy the underlying facts from the publication, but not the precise words used to represent them. In Harper & Row, for example, we explained that President Ford could not prevent others from copying bare historical facts from his autobiography, but that he could prevent others from copying his subjective descriptions and portraits of public figures." Feist, 499 U.S. at 348 (citing Harper & Row, 471 U.S. at 556-557). Although the copyright assures authors the right to copy their original expression, it "encourages others to

build freely upon the ideas and information conveyed by a work." Id. at 350. Raw facts may be copied at will. Id. "No author may copyright facts or ideas. The copyright is limited to those aspects of the work — termed 'expression' — that display the stamp of the author's originality. ... [C]opyright does not prevent subsequent users from copying from a prior author's work whose constituent elements that are not original — for example ... facts, or materials in the public domain — as long as such use does not unfairly appropriate the author's original contributions." Harper & Row, 471 U.S. at 547-548. "[T]he facts contained in existing works may be freely copied because copyright protects only the elements that owe their origin to the compiler — the selection, coordination, and arrangement of facts." Feist, 499 U.S. at 378. In Feist, the Supreme Court ruled that the alphabetic presentation of names, addresses and telephone numbers in the white pages of the telephone book "does not satisfy the minimum constitutional standards for copyright protection" by the selection, coordination and arrangement of that data. Feist, 499 U.S. at 362.

PATENTS

In Kellog Co. v. Nat'l Biscuit Co., 305 U.S. 111, 59 S.Ct. 109, 83 L.Ed. 73 (1938), the Supreme Court dissolved an injunction imposed upon a competitor which prohibited (i) the production and sale of a pillow shaped form under the common law principle of unfair competition and (ii) prohibited the use of the term SHREDDED WHEAT. The Supreme Court held that the term SHREDDED WHEAT, a trade name used by the plaintiff-intellectual property (I.P.) rights owner, had become generic and "is the term by which the biscuit in pillow shaped form is generally known by the public." Kellog, 305 U.S. at 116. "Since the term is generic, the original maker of the product acquired no exclusive right to use it." Id. Since the basic patent⁴ for making the pillow shaped biscuit⁵ had expired, "there passed to the public upon the expiration of the patent, not only the right to make the article as it was made during the patent period, but the also the right to apply thereto the name by which it had become known." Kellog, 305 U.S. at 118.⁶ "It is self evident that on the expiration of a patent the monopoly granted by it ceases to exist, and the right to make the thing for-

merly covered by patent becomes public property. It is upon this condition that the patent is granted. It follows, as a matter of course, that on the termination of the patent there passes to the public the right to make the machine in the form in which it was constructed during the patent. We may, therefore, dismiss without further comment their complaint, as to the form in which the defendant made his machines.” Kellog_, 305 U.S. at 120 (quoting Singer Mfg. Co. v. June Mfg. Co., 163 U.S. 169, 185 16 S.Ct. 1002, 41 L.Ed. 118 (1894).

“Thus the patent system is one in which uniform federal standards are carefully used to promote invention while at the same time preserving free competition. Obviously a State could not, consistently with the Supremacy Clause of the Constitution, extend the life of a patent beyond its expiration date or give a patent on an article which lacked the level of invention required for federal patents. To do either would run counter to the policy of Congress of granting patents only to true inventions, and then only for a limited time. Just as a State cannot encroach upon the federal patent laws directly, it cannot, with some other law, such as that prohibiting unfair competition, give protection of a kind that clashes with the objectives of the federal patent laws.” Sears, 376 U.S. at 230-231, 84 S. Ct. at 788-789. See U.S. Const., Art VI. “An unpatentable article, like an article on which the patent has expired, is in the public domain and may be made and sold by whoever chooses to do so. What Sears did was to copy Stiffel’s design and to sell lamps almost identical to those sold by Stiffel. This it had every right to do under federal patent laws.” Id.

TRADE DRESS

Trade dress rights may provide exclusive rights to a product design⁷ or product packaging.⁸ Trade dress rights for a product design requires that the I.P. rights owner establish secondary meaning (consumer recognition) before a court will enforce the owner’s rights. “The design or packaging of a product may acquire a distinctiveness which serves to identify the product with its manufacturer or source; and a design or package which acquires this secondary meaning, assuming other requisites are met, is a trade dress which may not be used in a manner [by competitors] likely to cause confusion as to the origin, sponsorship, or approval of the goods.” Traffix, 532 U.S. at

28. Secondary meaning is established when “in the minds of the public, the primary significance of a product feature or term is to identify the source of the product rather than the product itself.” Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 851, n. 11, 102 S. Ct. 2182, 72 L.Ed.2d. 606 (1982). Product packaging trade dress, as distinguished from product design trade dress, can be inherently distinctive and does not necessarily require the I.P. rights owner to establish secondary meaning. Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 773, 112 S. Ct. 2753, 120 L. Ed. 2d. 615 (1992); see also Wal-Mart Stores, Inc. v. Samara Brothers, Inc., 529 U.S. 205, 215, 120 S.Ct. 1339, 146 L.Ed.2d 182 (2000). I.P. rights owners must prove that product design trade dress has secondary meaning or distinctiveness in order to establish an exclusive right to the design with respect to competitor: Wal-Mart, 529 U.S. at 216.

“Trade dress protection must subsist with the recognition that in many instances there is no prohibition against copying goods and products. In general, unless an intellectual property right such as a patent or copyright protects an item, it will be subject to copying. As the Court has explained, copying is not always discouraged or disfavored by the laws which preserve our competitive economy. Allowing competitors to copy will have salutary effects in many instances. ‘Reverse engineering of chemical and mechanical articles in the public domain often leads to significant advances in technology’” Traffix, 532 U.S. at 173 (quoting Bonito Boats, 494 U.S. at 160).

Copying a functional product design feature⁹ is legally permitted by all competitors. Traffix, 532 U.S. at 176; Two Pesos, 505 U.S. at 774; Qualitex Co. v. Jacobson Prod. Co., Inc., 514 U.S. 159, 165, 115 S.Ct. 1300, 131 L.Ed.2d 248 (1995); Inwood Labs, 456 U.S. at 850. A product design feature is functional and cannot serve as a trademark if it is essential to the use or purpose of the article or if it affects the cost or quality of the article. Traffix, 532 U.S. at 175; Qualitex, 514 U.S. at 165; Inwood Labs, 456 U.S. at 850. “Whether a utility patent has expired or there has been no utility patent at all, a product design which has a particular appearance may be functional because it is ‘essential to the use or purpose of the article’ or ‘affects the cost or quality of the article.’” Traffix at 117 (quoting Inwood Labs, 456 U.S. at 850). [ck cite].

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Preemption of State Laws - Boat Mold Statutes and Unfair Competition

The Supreme Court in Bonito Boats held that Florida’s boat mold statute, granting rights for boat hull designs to manufacturers, was unconstitutional as being preempted by federal law. Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 109 S.Ct 971, 103 L.Ed.2d 118 (1989). “From their inception, the federal patent laws have embodied a careful balance between the need to promote innovation and the recognition that imitation and refinement through imitation are both necessary to invention itself and the very lifeblood of a competitive economy.” Id. at 146. “Once an inventor has decided to lift the veil of secrecy from his work, he must choose the protection of a federal patent or the dedication of his idea to the public at large.” Id. at 149. Upon expiration of the patent, “the knowledge of the invention inures to the people, who are thus enabled without restriction to practice it and profit by its use.” Id. at 151 (quoting United States v. Dubilier Condenser Corp., 289 U.S. 178, 186-187, 53 S.Ct. 554, 77 L.Ed. 1114 (1933)). “To a limited extent, the federal patent laws must determine not only what is protected, but what is free for all to use.” Bonito Boats, 494 U.S. at 151. “[A]fter expiration of a federal patent, the subject matter of a patent passes to the free use of the public as a matter of federal law.” Id. at 152.

Common law principles of unfair competition, as construed by the courts, must be balanced with other intellectual property rights, including the right to copy. “The question in this case is whether a State’s unfair competition law can, consistently with the federal patent laws, impose liability for or prohibit the copying of an article which is protected by neither a federal

patent nor a copyright.” Sears, 376 U.S. at 225. In Sears, the mass market retailer, Sears, Roebuck & Co., sold a pole lamp, originally designed by plaintiff Stiffel Company, at a retail price which was about the same as Stiffel’s wholesale price. Stiffel had a design and a utility patent on the accused pole lamp. Stiffel sued Sears alleging that Sears had copied Stiffel’s patents and, in a second count, that Sears had caused confusion in the trade as to source of the lamp and therefore was engaged in unfair competition under Illinois law. Sears, 376 U.S. at 226-227. The trial court invalidated Stiffel’s design and utility patents, but found that since the lamps were so much alike that consumer confusion seemed likely, Sears was guilty of violating Illinois’ law of unfair competition. Although an appellate court approved the lower court’s decision, the Supreme Court did not.

The Supreme Court stated “[w]hat Sears did was to copy Stiffel’s design and sell lamps almost identical to those sold by Stiffel. This it had every right to do under the federal patent laws.” Sears, 376 U.S. at 231. “But mere inability of the public to tell two identical articles apart is not enough to support an injunction against copying or an award of damages for copying that which the federal patent laws permit to be copied. ... But because of the federal patent laws a State may not, when the article is unpatented and uncopyrighted, prohibit the copying of the article itself or award damages for such copying.” Id. at 232-233. See also Compco Corp. v. Day-Brite Lighting, Inc., 378 U.S. 234, 84 S.Ct. 779, 11 L.Ed.2d 669 (1964). “The injunction against copying of an unpatented article, freely available to the public, impermissibly ‘interfere[d] with the federal policy, found in Art. I, § 8, cl. 8, of the Constitution and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain’.” Bonito Boats, 494 U.S. at 153 (quoting Compco, 376 U.S. at 237).

“[A] State cannot encroach upon the federal patent laws directly, [and] it cannot, under some other law, such as that forbidding unfair competition, give protection of a kind that clashes with the objectives of the federal patent laws.” Sears, 376 U.S. at 231. Therefore, courts cannot extend unfair competition principles to provide rights similar to patent or copyrights because

such extensions of the law are preempted by the Constitution. U.S. Const. Art. VI.

TRADE SECRETS

An I.P. rights owner may protect his or her intellectual property by maintaining the property as a trade secret. The property is protectable as a trade secret if it has commercial value and is subject to reasonable efforts to maintain its secrecy.¹⁰ Trade secret law does not operate to frustrate the achievement of congressional objectives served by the patent laws. Bonito Boats, 494 U.S. at 155; Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 483, 94 S.Ct. 1879, 40 L.Ed.2d 315 (1974). With respect to trade secrets, the public’s awareness of a trade secret is, by definition, limited and the “trade secret” is protectable only as long as it is maintained as a secret. “[T]he policy that matter once in the public domain must remain in the public domain is not incompatible with the existence of trade secret protection.” Kewanee Oil, 416 U.S. at 484 (emphasis added). Further, trade secret law protection is far weaker in many respects than patent law. Id. at 489-490. “This point was central to the Court’s conclusion that trade secret protection did not conflict with either the encouragement or disclosure policies of the federal patent law. The public at large remained free to discover and exploit the trade secret through reverse engineering of products in the public domain or by independent creation. Thus, the possibility that trade secret protection would divert inventors from the creative effort necessary to satisfy the rigorous demands of patent protection was remote indeed. Finally, certain aspects of trade secret law operated to protect non-economic interests outside the sphere of congressional concern in the patent laws.” Bonito Boats, 494 U.S. at 155.

“At the heart of Sears and Compco is the conclusion that the efficient operation of the federal patent system depends upon substantially free trade in publicly known, unpatented design and utilitarian conceptions ... Both the novelty and the nonobviousness requirements of federal patent law are grounded in the notion that concepts within the public grasp, or those so obvious that they readily could be, are the tools of creation available to all. They provide the baseline of free competition upon which the patent system’s incentive to creative effort depends.” Bonito Boats, 494 U.S. at 156. The Supreme Court also noted that the

“competitive reality of reverse engineering may act as a spur to the inventor, creating an incentive to develop inventions that meet the rigorous requirements of patentability.” Id. at 160. Judge Hand, in Crescent Tool Co. v. Kilborn & Bishop Co., 247 F.299, 301 (2d Cir. 1917), explained “[t]he plaintiff has the right not to lose his customers through false representations that those are his wares which in fact are not, but he may not monopolize any design or pattern, however trifling. The defendant, on the other hand, may copy plaintiff’s goods slavishly down the minutest detail: but he may not represent himself as the plaintiff in their sale.” See also Bonito Boats, 494 U.S. at 157.

“Sears and Compco protect more than the right of the public to contemplate the abstract beauty of an otherwise unprotected intellectual creation — they assure its efficient reduction to practice and sale in the marketplace... Where an item in general circulation is unprotected by patent, ‘[r]eproduction of a functional attribute is legitimate competitive activity.’” Bonito Boats, 494 U.S. at 164 (quoting Inwood Labs, 456 U.S. at 863), see also Bailey v. Logan Square Typographers, Inc., 441 F.2d 47, 51 (7th Cir. 1971)(Stevens, J.) (“that which is published may be freely copied as a matter of federal right”). “For almost 100 years it has been well established that in the case of an expired patent, the federal patent laws do create a federal right to ‘copy and to use.’” Sears and Compco extended that rule to potentially patentable ideas which are fully exposed to the public.” Bonito Boats, 494 U.S. at 143 (emphasis included). There is a strong federal policy favoring free competition and ideas which do not merit patent protection. Id. at p. 168, (citing Lear, Inc. v. Adkins, 395 U.S. 653, 656, 89 S.Ct. 1902, 23 L.Ed.2d 610 (1969)). A state cannot, under the guise of trade secret law or “some other law, such as that prohibiting unfair competition, give protection of a kind that clashes with the objectives of the patent laws.” Sears, 376 U.S. at p. 231. Articles “in the public domain ... may be made and sold by whoever chooses to do so. What Sears did was to copy Stiffel’s design and to sell lamps almost identical to those sold by Stiffel. This it had every right to do under federal patent laws.” Id. Articles in the public domain cannot be considered a trade secret if those articles can be reverse engineered. There is no secret after such reverse engi-

neering. Hence, trade secret law cannot extend to technology in the public domain.

CONCLUSION

The "right to copy" is a common law right. The Supreme Court has recognized this right as it relates to patent rights, copyrights, trade dress rights, unfair competition and trade secret rights. However, the right to copy is rarely cited by lower courts.¹¹ In view of the aforementioned pronouncements by the Supreme Court, the common law "right to copy" is a viable defense in many intellectual property lawsuits. **(IPT)**

ENDNOTES

1. *Letterman Tool Group v. Cooper Industries*, 131 F.3d 1011, 1015 (Fed. Cir. 1997) (there is a common law right to copy what is in the public domain); *Summit Mach. Tool Mfg. Corp. v. Victor CNC Sys.*, 7 F.3d 1434, 1437 (9th Cir. 1993) ("It cannot be disputed that Victor has the right to copy Summit's lathe. The common law has long recognized that an unpatented article is in the public domain and may be made and sold by whoever chooses. Although copyist undoubtedly incur the enmity of the product's creator, they serve the public interest by promoting competition and price reductions"); *Roho, Inc. v. Marquis*, 902 F.2d 356, 359 (5th Cir. 1990) ("Marquis' right to copy Roho's unpatented product, the Roho mattress, also cannot be disputed. The common law has long recognized that an unpatented article is

in the public domain and may be made and sold by whoever chooses").

2. This article does not discuss the right to copy another's trademark. A trademark is a word, logo, styled letter(s), sound and, to a limited extent, color and smell, used on or in connection with specific goods or services, which distinguishes the I.P. rights owner's goods and services from others.
3. Compilations of facts can be subject to copyright protection. 17 U.S.C. §101. To establish a copyrightable compilation of facts, the copyright statute "identifies three distinct elements and requires each to be met for a work to qualify as a copyrightable compilation: (1) the collection and assembly of preexisting material, facts, or data; (2) the selection, coordination or arrangement of those materials; and (3) the creation, by virtue of the particular selection, coordination, or arrangement of an original work of authorship." *Feist*, 499 U.S. at 357. However, underlying facts are not protectable. 17 U.S.C. §102(b).
4. See the Patent Statutes at 35 U.S.C. § 101 et seq.
5. U.S. Patent No. 548,086
6. The I.P. rights owner had also obtained a design patent on the pillow shaped biscuit but the design patent earlier had been declared invalid by another court.
7. Product design is the physical embodiment of the product itself.
8. Product packaging is the box, package or container carrying the product. An analysis of trademarks, brand names, logos or labels is not within the scope of this article. Generally, there is no right to copy another's trademark if the I.P. rights owner or its licensees continue to use the trademark, provided the mark is not generic to the goods or services. However, a competitor may use



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another's trademark in truthful comparative advertisements. There is also a limited right to permit the fair use of another's trademark but the fair use defense is rarely established by a competitor. *Playboy Enterprises, Inc. v. Welles*, 279 F.3d 796 (9th Cir. 2002) (a former Playmate of the Year was permitted to use the PLAYBOY mark on her website since it was fair use to use the mark to show her previous achievements).

9. This assumes there is no utility patent on the feature.

10. Uniform Trade Secrets Act, see, for example, Fla. Stat. 688.001 et seq. (1988).

11. *Letterman Tool Group v. Cooper Industries*, 131 F.3d 1011, 1015 (Fed. Cir. 1997); *Summit Mach. Tool Mfg. Corp. v. Victor CNC Sys.*, 7 F.3d 1434, 1437 (9th Cir. 1993); *Roho, Inc. v. Marquis*, 902 F.2d 356, 359 (5th Cir. 1990).

CHUNGHWA PICTURE TUBES ASKS COURT TO DISMISS LG PHILIPS CHARGES

New CPT Lawsuit Alleges Fraud, Breach of Contract, Conversion and Violation of US Antitrust Laws

Attorneys for Taiwan based Chunghwa Picture Tubes, Ltd. (CPT) announced today that they have filed a Motion for Summary Judgment and other motions in its ongoing legal action against Korean based LG Philips LCD Co., Ltd. (LPL). CPT has also initiated legal action against LPL and its predecessor LG Electronics, Inc. (LGE) for fraud, breach of contract, conversion and violation of the U.S. antitrust laws. The action, filed today in U.S. Federal District Court in Los Angeles, stems from a patent infringement suit filed by LPL against CPT in Los Angeles in August 2002. LPL's suit alleges that certain TFT flat panel display products manufactured by CPT infringe patents allegedly owned by LPL. CPT's lawsuit contends that LPL does not own most of the patents it is asserting against CPT. In papers filed with the Court today, CPT has asked the District Court judge to grant a motion for summary judgment stating that LPL lacks standing to sue on 4 out of 6 of the patents in suit.

According to CPT's lawsuit and motion papers, the true inventors of these LPL patents worked for Digital Equipment Corporation (DEC). CPT's papers contend that both LPL and LGE intentionally misled the U.S. Patent Office by failing to reveal the names of these true DEC inventors, fraudulently concealing material prior art from the U.S. Patent Office examiner during the prosecution of these patents, and suppressing LPL's lack of ownership in the patents.

CPT's papers also contend that the patents were rightfully the intellectual property of DEC pursuant to the terms of a 1996 joint development agreement entered into between LGE and DEC. CPT acquired the worldwide ownership rights in these DEC technologies earlier this year from Hewlett-Packard, DEC's successor in interest.

CPT will vigorously pursue its claims against LPL and believes that the ownership and inventorship of the disputed patents will be resolved in its favor. CPT intends to seek the maximum damages for LPL's conversion of CPT's intellectual property, and for LPL's and LGE's violation of the antitrust laws. If CPT prevails, CPT will seek additional damages for patent infringement, as well as enhanced damages based on LPL's and LGE's fraud, and will seek injunctive relief against LPL and LGE to stop the sale of infringing LPL-produced flat panel displays in the United States and elsewhere. CPT estimates that LPL's overall exposure based on CPT's new claims is in excess of US \$1 billion.

CPT is being represented in the case by the Washington, D.C.-based litigation firm Howrey Simon Arnold & White, LLP. The team is led by Glenn Rhodes and Teresa Corbin of the firm's San Francisco office, and Christopher Mathews and Brian Kim of the firm's Los Angeles office.