

Intellectual Property

2014 SPRING BULLETIN

Right of Publicity? First, Let Me Take a Selfie

BY KATHRYN J. FRITZ AND CIARA N. MITTAN

“Oh, he wants to do a selfie,” President Barack Obama observed with amusement before gamely posing with Boston Red Sox designated hitter David Ortiz. Ortiz snapped the shot using his Samsung smartphone during a visit to the White House in April, later tweeting it along with “What an honor! Thanks for the #selfie, @BarackObama.” But when the photo went viral and Samsung — which, unbeknownst to the president, recently signed Ortiz to an endorsement deal to be its “MLB social media insider” — retweeted it, the White House was far from amused. Senior White House advisor Dan Pfeiffer even mused that it might “be the end of all selfies.”

Such incidents have become increasingly common during the age of the selfie. Ellen DeGeneres’ celebrity-filled selfie taken during her hosting of the Oscars stirred up similar attention and criticism when it was later revealed to be a Samsung marketing stunt. The Obama-Ortiz selfie raises a unique set of legal questions, placing a spotlight on how the president’s individual right of publicity conflicts with free speech considerations, colliding against a backdrop of increasingly interwoven contexts: news, entertainment, social media, and advertising.

It is hard to imagine that the president of the United States would bring a lawsuit for violation of his right of publicity. But could he?

The Right of Publicity

Broadly defined, the right of publicity is an individual’s inherent right to control the commercial use of his/her identity, including name, image, and likeness. Unlike trademark, copyright, and patent rights, there is no federal right of publicity. Instead, the scope and application of the right is defined by state law, and varies considerably from state to state, with some states codifying the right in statute only (e.g., New York), others recognizing only a common law right, and still others recognizing the right in both statute and common law (e.g., California).

Consequently, success in a right of publicity suit could hinge on where the aggrieved plaintiff resides (the place that usually governs which right applies) or where he/she files suit.

This kaleidoscope of right of publicity laws has significant ramifications for how one assesses whether use of a selfie violates any individual’s right. Despite state variations in the right, at least two common issues arise when attempting to answer this question. First, the right of publicity typically protects against unauthorized commercial use of a person’s identity. In the case of a selfie, did the person somehow give his/her consent? Second, does the First Amendment interest in free speech outweigh any potential encroachment on his/her right of publicity, particularly when the subject is a figurehead, such as the president?

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Context is crucial. Use that is consented to in one context may be entirely unauthorized when shifted to another. Similarly, use of the same photo, name, or likeness in one setting may be considered speech related to public affairs, while a slight shift in context could render that same speech commercial, and thus deserving reduced First Amendment protection. These issues come into play when considering the implications of Ortiz's tweet versus Samsung's retweet, as each act was a separate use of the selfie in a distinct context.

Consent

States assess the sufficiency of "consent" to use differently. The statutes of some states require written consent. In other jurisdictions, consent can be implied from the circumstances, but states assess the adequacy of implied consent differently. Additionally, while a person may consent to one type of use of his/her identity, such consent does not necessarily extend to use for other purposes or in other contexts.

Obama seemed to consent to the actual taking of the selfie; he acquiesced to Ortiz's suggestion with a smile and a laugh. Similarly, it would be hard to imagine that Obama, posing with the famous ballplayer, did not expect and therefore consent to the athlete's public use of that photo on Twitter or other social media. He might even have expected Ortiz's myriad fans and followers to retweet or otherwise share the selfie.

Samsung's use of the selfie, however, is something altogether different. First, there is little doubt that Samsung's retweet and proclamation that the photo was taken with a Samsung Galaxy Note 3 were clearly efforts to associate its product with the president for marketing and promotional purposes. Second, while one could imagine Obama implicitly consenting to Ortiz tweeting the selfie, it is a step further to presume that Obama was also implicitly signing off on Samsung's retweet to advertise its smartphone. Indeed, the White House's response to Samsung's retweet seems aimed at making it clear — both for this instance and any that might arise in the future — that the White House "certainly objects" to the president's image being used for commercial purposes.

Newsworthiness and Free Speech Concerns

Even if the president did not authorize Ortiz's or Samsung's respective tweets, use of the selfie might still fall under a statutory exception or qualify as protected speech under the First Amendment. Some states (e.g., California, Illinois, and New York) exempt from liability noncommercial uses such as newsworthiness, sports, public affairs, and political campaigns. Additionally, a use could be protected under the First Amendment. A use relating to public issues or politics would garner stronger First Amendment protection than a commercial use, including advertising.

The commercial versus newsworthy/political distinction is critical here. Because Obama is such a renowned public and political figure, nearly any use of his identity in the media is arguably newsworthy. Similarly, much expression relating to the president would likely be considered political speech at the core of First Amendment protection. On the other hand, there is also likely a point at which use of the president's image or likeness could be seen as a pure attempt to promote a product by associating it with the president.

In the Obama-Ortiz selfie arena, context is key. One could certainly argue that Ortiz's tweet falls under a "newsworthy" exception; he was visiting the White House to celebrate winning the World Series and snapped a shot of himself with the president. The event was publicized, and Ortiz has stated that the selfie was not for promotional purposes, but was instead a spontaneous moment of fun with Obama. However, the Samsung retweet again presents a different use within a different context. Samsung retweeted Ortiz's photo of a newsworthy event in order to promote the Samsung Galaxy Note 3, not to comment on a newsworthy or public issue. This type of use garners reduced First Amendment protection, and Samsung would likely have a harder time asserting a First Amendment argument in the context of a right of publicity claim. However, the news coverage of the whole incident, which included copies of the selfie, falls back within the newsworthy exception.

Parting Selfie Assessment

Though the president possesses a right of publicity like any other individual, he is significantly impacted by free speech considerations and the impracticalities of a seated president bringing a lawsuit to fruition. Instead, the White House will likely continue to make clear that use of the president's image for commercial purposes is unauthorized. Already, Olympians visiting the White House after the Obama-Ortiz selfie scandal have been told that they will not be allowed to take selfies with the president and must keep their cellphones in their pockets while meeting him.

Even if the selfie were merely a spontaneous moment between Big Papi and the commander in chief. The frequency of such moments will likely decrease after this ordeal. Indeed, for Obama, selfies may be more trouble than they are worth: Late last year, the president faced a storm of criticism after posing for a selfie with the Danish prime minister at Nelson Mandela's memorial service, a scandal later coined "Selfie-Gate." But this will hardly be the final word on selfie-related legal issues. Would a blanket "no selfie" policy trigger further First Amendment concerns? Would "the end of all selfies" constitute a prior restraint? As technology continues to develop and complicate interactions among public figures in the media, these questions, while entertaining, will also become increasingly tricky to answer.

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Joint Inventorship in Patents Can Present Problems

BY JANE N. KIM

Once an invention has been developed and a corresponding patent application is written, determining an inventorship list for the application might seem like a formality. Particularly in cases where a company, rather than the inventors, applies for or owns the application, inventorship may appear especially unimportant. However, an incorrect list of inventors could have a major effect on the ownership or validity of a patent.

An inventor is someone who contributes to the conception of at least one claim in a patent.

Conception occurs when an inventor has consciously and completely developed the idea for the invention in his/her mind, so that no further inventive steps are needed to reduce the invention to practice. If conception sounds like it would be hard to prove, that is because it can be. This is why it is important to keep documentary evidence of conception, such as lab notebooks or invention disclosure forms. Such documentary evidence is particularly important now that the Leahy-Smith America Invents Act (AIA) is in place. It states that if two applicants dispute inventorship, one applicant can triumph if he/she can prove that the other applicant derived the invention from the first applicant's own work.

The inventorship rule is relatively clear when a solo inventor conceived an invention, but the rule can become complex when more than one person is considered an inventor. In such cases, multiple inventors should be listed jointly on a patent. A joint inventor is an individual who has not only made a significant contribution to the conception of the invention but also participated in a "collaboration or concerted effort" toward the invention. *Eli Lilly & Co. v. Aradigm Corp.*, 376 F.3d 1352, 1359 (Fed. Cir. 2004). This collaboration or concerted effort does not require that the joint inventors physically or concurrently worked together, but does dictate that the inventors "have some open line of communication during or in temporal proximity to their inventive efforts."

The rules surrounding joint inventorship of a patent are not exactly intuitive. For example, if a patent contains 200 claims, and person X contributed to the conception of one claim while person Y contributed to the conception of the other 199 claims, both X and Y potentially have equal ownership rights in the patent. This means that both X and Y may be able to independently grant a license to the entire patent, even though X only conceived of one of the 200 claims. This concept played out in *Ethicon Inc. v. United States Surgical Corp.*, 135 F.3d 1456 (Fed. Cir. 1998). Inventor InBae Yoon granted a license to Ethicon for a patent covering a surgical device, and

Ethicon sued U.S. Surgical for infringing two of the 55 claims of the patent. However, U.S. Surgical learned that Young Jae Choi should have been listed as a joint inventor on the patent. Even though Choi had only contributed to two claims (neither of which was a claim that Ethicon was asserting), the court granted a motion to correct the inventorship to include Choi. Choi then had the power to grant a license to U.S. Surgical, and the lawsuit was dismissed once the license was granted.

A recent case, *Bard Peripheral Vascular, Inc. v. W.L. Gore & Associates*, 670 F.3d 1171 (Fed. Cir. 2012), *aff'd in relevant part*, 682 F.3d 1003 (Fed. Cir. 2012), further clarifies what it means to be a joint inventor. The case involved prosthetic vascular grafts made from highly expanded polytetrafluoroethylene (ePTFE). Peter Cooper was an employee at Gore's facility, and made several ePTFE tubes. He sent these tubes to multiple researchers, telling them that the tubes could be potentially used as vascular grafts. Cooper then experimented on the tubes and discovered that ePTFE tubes with fibril lengths of 5 - 100 microns were very effective for vascular grafts. David Goldfarb, a researcher who received ePTFE tubes from Cooper, independently determined that these fibril lengths should be used for vascular grafts.

Goldfarb and Cooper filed separate patent applications on the ePTFE tubes, both with claims focusing on the fibril lengths of the tubes. Cooper's application was filed in April 1974, while Goldfarb's application was filed six months later in October 1974. The U.S. Patent and Trademark Office decided in an interference proceeding that Goldfarb was the first inventor to reduce the invention to practice, so the patent rights were awarded to Goldfarb (note that in today's AIA-mandated first-to-file world, Cooper would likely have won instead, since he was the first to file his patent application). Goldfarb's patent had been assigned to the company Bard Peripheral Vascular, which then sued Gore for patent infringement.

Gore's defense was that Cooper should be a joint inventor. Cooper did, after all, send the tubes to Goldfarb and tell him they could be used as vascular grafts. However, a person is not a joint inventor just because he/she explains to an actual inventor

a concept that is well-known—using ePTFE tubes as vascular grafts was not new at the time. Furthermore, Goldfarb discovered the importance of the tube fibril length on his own. Cooper had sent Goldfarb tubes of varying fibril lengths, but there is no evidence that he thought the lengths were important. The Federal Circuit held that a joint inventor must appreciate what has been invented and must have collaborated with other inventors to contribute significantly to conception and reduction to practice of the invention. Bard won the lawsuit, and Gore was left facing over \$1 billion in damages for patent infringement.

Clearly, a goal of any company should be to avoid inventorship disputes that could end up costing over \$1 billion. In addition to requiring that inventor employees assign patent rights to their employer, any business interested in protecting its intellectual property should also be diligent about determining true inventorship, as well as entering into written agreements regarding ownership rights for intellectual property that results from any collaboration with outside inventors or companies. Companies should also put agreements in place requiring all collaborators to disclose to each other any discovery that occurs during the collaboration. Preemptively requiring such agreements can prevent miscommunications and misunderstandings that turn into expensive and high-profile lawsuits down the road.

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Quick Updates

IPR Petition Denials Cannot be Challenged in District Courts

The America Invents Act (AIA) created a new procedure to litigate the validity of patents: the *inter partes* review (IPR). A party can file a petition for an IPR with the U.S. Patent and Trademark Office (PTO). Once the petition is filed, the Patent Trial and Appeal Board (PTAB), which is a part of the PTO, decides whether to institute an IPR. When the PTAB decides not to institute an IPR, the petitioner has few avenues for recourse. Recently, *Dominion Dealer Solutions, LLC v. Lee*, no. 3:13-cv-00699 (E.D. Va. Apr. 18, 2014), made

clear that such recourse will not come from district courts.

Dominion was sued for patent infringement in district court. In response, Dominion filed IPRs challenging the validity of the five patents-in-suit. Included with its petitions were expert declarations opining that the asserted patents were obvious. The PTAB denied the IPRs, in part, because the expert's testimony was "nebulous" and "unpersuasive." Dominion's petitions for reconsideration were also denied.

In response, Dominion filed a collateral suit against the PTO in district court for violation of the Administrative Procedure Act (APA). Dominion argued that the PTAB's decisions were arbitrary, capricious, an abuse of discretion, contrary to law, and in excess of statutory authority. The PTO moved to dismiss and the question before the court was whether district courts are the proper recourse for challenging the PTAB's decisions.

In general, the APA confers a general cause of action to obtain judicial review of an administrative agency's (like the PTO's) action, but only to the extent that the agency's authorizing statute does not preclude judicial review. 5 U.S.C. § 701(a)(1). The AIA delineates the procedure for instituting an IPR. 35 U.S.C. § 314, subsection (a) states that an *inter partes* review may not be instituted unless the PTO's director determines that the information presented in a petition shows that "there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition." Subsection (d) states that "[t]he determination by the Director whether to institute an *inter partes* review under this section shall be final and nonappealable." The court relied on subsection (d) to hold that Dominion's collateral litigation in district court was, in effect, an appeal of the PTAB's decisions.

The court also relied on Congress's intent in creating the IPR process. The AIA was passed, in part, to decrease the amount of patent litigation. If every denial of a petition for IPR could potentially result in a collateral lawsuit in district court, the courts could be flooded with new patent cases. As this would frustrate the purpose of the IPR process, the court determined

that Congress could not have intended for denials of IPR petitions to be disputed in district courts.

The *Dominion* decision makes clear that the recourse for a denial of an IPR petition is a request for reconsideration, not collateral litigation in district court.

Developing Best Practices for Brand Owners in the New Generic Top-Level Domain Space

A massive expansion of the Internet domain space is underway: The familiar .com is being joined by an army of new "gTLDs" (generic top-level domains), likely over 900, spanning every industry (e.g., .technology, .plumbing), profession (e.g., .lawyer, .florist), and more (e.g., .sucks, .wtf). As this new system lurches into being, best practices are anyone's guess. Evolving checks and balances, including rights protection mechanisms, do little to protect brand owners in this uncharted territory.

Take the Trademark Clearinghouse (TMCH), the first stop for brand owners looking to curb third-party exploitation of their marks in the new gTLD space. Depositing marks in the TMCH confers two benefits: (1) the chance to register those marks as second-level domains (SLDs) in the new gTLDs (e.g., yourmark.business) before the general public in "sunrise periods"; and (2) notice when someone tries to register a SLD that is identical to a mark (the "claims service").

At least post-sunrise, the TMCH has serious disadvantages. Most significantly, the claims service does not prevent others from registering a mark as their SLD. Rather, brand owners and domain applicants merely receive notice that an attempted registration may infringe a mark. But nothing short of litigation stops the applicant from completing that registration and using the domain. Additionally, brand owners only receive notice for identical marks, not misspellings, typos, or words containing the entire identical mark (e.g., yourmark.business but not yorumark.business). Some enterprising registries offer a blocking service — for a fee — that prevents brand owners' marks from being registered as SLDs across all gTLDs that the entity owns. Donuts Inc.

offers that service, known as its Domains Protected Marks List, across the 200-plus gTLDs it is likely to operate for \$2,500 to \$3,000 for five years. While this may be more cost effective than counting on hundreds of individual registrations, downsides remain. Terms containing the identical mark will be blocked, but not misspellings or typos. Also, another brand owner with rights in the same mark can trump a block (e.g., Delta Air Lines can override Delta Faucets' block if the former has a valid registration in the TMCH). And, of course, there will be hundreds of gTLDs to which blocking does not apply.

Another form of protection is the Uniform Rapid Suspension (URS) System, touted as a cheaper and faster Uniform Dispute Resolution Policy (UDRP) — \$300 to \$500 for a URS versus \$1,500 to \$2,000 for a UDRP. But, like the previous rights protection mechanisms mentioned, the URS may be a hollow remedy: Even if the trademark owner wins, the domain is not transferred to the owner as it would be in a UDRP. Instead, the domain is rereleased into the general pool of available domains, for the owner or someone else to pick up.

The safest approach may be to record core marks in the TMCH, participate in the relevant sunrise periods, and police actual infringements. Just as registering marks in various countries is like buying insurance that a business will be able to enforce rights, participating in the sunrise periods is another kind of insurance — insurance that a business controls the use of its exact mark as an SLD. As mentioned, this is a form of limited control, however — registering yourmark.app will not cover yourmarks.app, yorumark.app, or any other permutations. As has always been true in the domain space, it is not realistic to be able to control every conceivably related domain across all new gTLDs.

California Appellate Court Clarifies that General Design Concepts Are Entitled to Trade Secret Protection Under California's Implementation of UTSA

In a recent opinion comparing and contrasting trade secret law and patent law, *Altavion v. Konica Minolta Systems Laboratory, Inc.*, 226 Cal. App. 4th 26 (2014), a California appellate court confirmed

that ideas — in this case, an inventor's general and specific design concepts relating to digital stamping technology — may qualify as protectable trade secrets under California law in cases where the inventor has kept such ideas secret rather than filing for a patent.

The plaintiff, Altavion, had developed a digital stamping technology (DST) for creating self-authenticating documents using bar codes encoded with the contents of the original document. Altavion entered into business negotiations in 2003 with Konica Minolta Systems Laboratory (KMSL), a research subsidiary of a company that manufactures multifunction printers. After signing a non-disclosure agreement (NDA) with KMSL, Altavion disclosed its DST ideas to KMSL in furtherance of a potential business partnership. Although Altavion never disclosed algorithms or source code for executing the technology, it did provide KMSL with a product demonstration and disclosed high-level DST design concepts, which it had kept secret from other companies.

Several months later, after the business negotiations had broken down, Altavion learned that KMSL had filed patent applications encompassing Altavion's DST technology. Altavion sued KMSL for trade secret misappropriation and breach of the NDA. The trial court concluded that KMSL was liable for trade secret misappropriation and awarded Altavion over \$1 million in compensatory damages and more than \$3 million in attorneys' fees.

On appeal, KMSL argued that "generalized ideas and inventions are protectable by patents and thus cannot be trade secrets." The appellate court squarely rejected this argument, explaining that there are various reasons why an inventor may elect to keep his/her invention secret rather than filing for a patent, such as the risk that the patent could be invalidated by the courts, resulting in "disclosure of an invention to competitors with no benefit." The law of trade secret misappropriation affords protections to such inventors who disclose their secret unpatented ideas — and not necessarily the formulas, algorithms, or source code executing those ideas — in a confidential setting.

The *Altavion* decision resolves any uncertainty under California precedent as to whether ideas, such as

high-level design concepts, can qualify as protectable trade secrets. If such ideas are sufficiently specific and meet the other requirements of trade secret protection — i.e., they derive independent economic value from not being generally known, and the inventor made reasonable efforts to maintain their secrecy — the commercial exploitation of these ideas by a competitor may give rise to a lawsuit under California law.

Registration for Collective Works Can Operate to Register Component Works

The U.S. Court of Appeals for the Ninth Circuit recently ruled that registration of a collective work can operate to register both the collective work and, independently, the individual component works within the collective work. *Alaska Stock LLC v. Houghton Mifflin Harcourt Publ'g Co.*, 747 F.3d 673 (9th Cir. 2014). The underlying dispute was a copyright infringement claim by stock photography company Alaska Stock against a licensee, Houghton Mifflin Harcourt Publishing Co., alleging that Houghton had exceeded the scope of its license to Alaska Stock's images.

The district court dismissed Alaska Stock's infringement claim on the basis that Alaska Stock's registrations for the individual photographs asserted in the infringement claim were deficient. A party must register a work with the Copyright Office before suing for infringement of such work, so the district court concluded that there could be no infringement claim regarding the unregistered individual photographs.

The Copyright Act requires, in part, that copyright registration applications include the name of the author and title of the work. Alaska Stock's applications were for collective works (i.e., the image databases) comprising several individual photographs. Each application included the title for the image database, the names of three authors of the individual photographs, and the number of the remaining non-named authors of the individual photographs.

The issue to be decided was whether Alaska Stock's applications were sufficient to register the individual

photographs. The Ninth Circuit disagreed with the district court and found that the manner by which Alaska Stock identified the title of the collective work and authors of the collective and component works was effective to register both the collective work (i.e., the image database) and the component works (i.e., the individual photographs). Provided that the registrant owns both the collective work and the component works, the registration of a collective work can operate to register both the collective work and, independently, the individual component works. In this case, Alaska Stock was the owner of both the image databases and the individual photographs therein.

An important factor in this decision was that Alaska Stock had submitted its applications in accordance with guidelines that the Copyright Office had provided for the registration of image libraries. The Copyright Office had previously stated that, so long as the registrant owned both the catalog and the individual photos, identifying (i) three distinct authors of the individual photographs and (ii) the number of other authors responsible for the remaining works in the catalog, this would satisfy the author identification requirements, and that it would register the image catalog and the underlying photographs themselves. The Ninth Circuit cited precedent specifying that it would defer to the Copyright Office's interpretations of the Copyright Act if such interpretations are appropriate and have the power to persuade.

In this case, the Ninth Circuit gave due regard to the guidelines from the Copyright Office, stating that redefining such guidelines would be unfair to copyright owners who rely on the administrative practices at the Copyright Office.



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