Intellectual Property

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California's Eraser Law: What IP Attorneys and Owners Need to Know

BY ERIC BALL

Hector recently graduated from UC Berkeley and is anxious about his upcoming job interview. He is about to enter the adult world. But he has also got a bigger problem: When he was 17, he was not as wise as he is now at the ripe ol' age of 22. Back then, he posted unfortunate photos of himself drinking at high school parties and made comments on the message boards of news websites that he would like to take back. These pictures and comments will be the top results when his future employers look for his name on Google search. What can he do about his teenage indiscretions?

Earlier this year, California seemingly came to Hector's rescue with its Eraser Law (officially the Privacy Rights for California Minors in the Digital World, Business and Professions Code Sections 22580-22582). The law requires website and mobile app operators to provide anyone under 18 with (i) the ability to remove or request removal of content that the minor posted on the website or mobile app; (ii) notice and clear instruction on how to do so; and (iii) notice that such removal may not remove all traces of such posting.

For the removal requirement, operators can comply by making the original content invisible to other users or the public, even if it remains on the operator's servers or if a third party has copied the content and made it available elsewhere on the operator's site. Operators may not have to comply with the removal requirement if: (i) federal or state law requires maintenance of the content or information; (ii) the content was stored or posted (or reposted) by a third party other than the minor; (iii) the operator anonymizes the content or information so that the minor cannot be identified; (iv) the minor received compensation or other consideration for providing the content; or (v) the minor does not follow the instructions provided by the operator to request removal of content.

While the law has understandable goals, it raises a number of uncertainties for both Hector and operators. The Eraser Law has a number of parallels with existing intellectual property laws that can guide interpretation and application of the law, and that may also be of interest to intellectual property lawyers and owners.

Where should an operator post the notice of its takedown procedures? The most common place to add the required notice and clear instruction on how to take down a minor's posting is either on an operator's privacy page or its terms of service page. If the operator already has a Digital Millennium Copyright Act (DMCA) notice procedure in place, the operator can either add the Eraser Law notice under the DMCA notice, or the operator can fold the Eraser Law notice into the existing DMCA notice procedures.

Who can request removal? Only "registered users" can take advantage of the law, but the law does not define what a "registered user" means. Could "registered users" include someone who posts a comment on a news article and provides his real name (and

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email address)? Or is a more formal sign-up process required? Operators should be cautious not to read the "registered users" provision too narrowly. But because of this "registered users" definition, the applicability of the law is narrower than the DMCA, which any copyright owner could utilize. (Under the DMCA, even non-users of an operator's website can demand the takedown of allegedly infringing material.)

When can a minor request removal? The law fails to define when a user can request removal of postings he made as a minor. Can Hector, at 22, request removal? Or has he waived any right since he's no longer a minor? The most natural reading of the law is that a user may only request removal while he is a minor. But that requires minors to make adult decisions and to know what they should and should not be posting. This reading is contrary to the law's intent to protect minors from the mistakes of their youth.

Is the law a DMCA side door? Ordinarily, if a minor voluntarily posts a picture, in which the minor owns a copyright, the operator is allowed to host and publish that picture. This use is normally covered by the terms of service of the operator's website and the license granted by the minor to the operator. In this situation, the operator may not be required to take down the picture in response to a DMCA notice. But under California's Eraser Law, even if the minor previously agreed that the operator could host and publish the picture, the operator may still be required to remove the minor's picture from its service.

Additionally, if an operator receives a DMCA takedown notice from a minor (or one regarding a minor's copyrighted content), it should assess whether the notice also complies with its takedown instructions under California's Eraser Law (and *vice-versa*). There are enough similarities in the takedown procedures that a request under one law may also be sufficient under the other.

Does the law apply to parties outside of California? If non-California operators have to comply with the law because California minors are using their websites, the law is potentially unconstitutional. This reading of the law would violate the Dormant Commerce Clause doctrine, which says that only Congress can regulate interstate commerce. But even if the law applies only to California operators, it would still have national implications, since many of the major Internet companies are in California.

The more ambiguous situation arises if an operator has only a small California office not related to its website operations, or if only some of its servers — which do not contain Hector's posts — are in California. Would the law still apply in this context? Without jurisdictional guidance from the law, an operator with some California connection should evaluate the cost of compliance versus the risk and cost of a future lawsuit.

Some of these Commerce Clause issues may be resolved by an amendment of the Children's Online Privacy Protection Act (COPPA). Earlier this year, Senator Robert Menendez introduced Senate Bill 547, which would amend COPPA to include notice and takedown provisions similar to those in California's Eraser Law. The proposed amendment also extends some COPPA protections to minors under 16. Given Menendez's recent indictment, it will be interesting to see if another senator pushes the amendment forward or if it stalls in committee. But even if these extensions become law they would not address the Commerce Clause issues for 16- and 17-year-olds.

Is the law effective? The Eraser Law is likely to give minors a false sense of security and the belief that they can later remove anything they post. But the Internet never forgets. Posted comments and pictures are often reposted by others. This is especially true of the most unfortunate and viral mistakes made by a minor. None of this reposted material needs to be removed by an operator. Additionally, many websites allow their materials to be archived by services like the Internet Archive. Merely removing the user's original post on one operator's site will not always remove the post from the Internet. Similar then to the disclosure of a party's trade secrets, once the information has been publicly disclosed, it is hard to pull it back. Even more, even if an operator failed to comply with California's Eraser Law there may be limited damages to the minor due to this failure to comply. If the post is otherwise readily available through other Internet sources, the operator's continued publishing of the minor's posting does not add that much more damage. But taking down the minor's post may still help Hector where the post was initially seen by his friends, yet it did not ricochet around the Internet. In this common context, removing the original post could be enough to fix a problem with Google search results.

Is the law necessary? Major social media providers, like Twitter and Facebook, already allow users — both young and old — to remove their content. They did not need a new law to require this existing business practice. Unfortunately, the law may have collateral and *in terrorem* effects beyond existing practices, similar to what we see with DMCA takedown requests. Operators may play it safe and remove content that is not required to be removed, (e.g., posts about one minor by another minor, or a full comment thread). This type of response stifles the variety and openness of voices that is a beneficial hallmark of the Internet.

These issues with California's Eraser Law are only a sampling of the questions the law raises. We need a willing defendant to test the limits of the statute and to answer these questions. It will, however, often be easier for operators to voluntarily comply by updating their privacy policies and removing content as needed, than to litigate.

Federal Circuit Creates New (non-*Alice*) Hurdle for Software Patents

BY STUART P. MEYER

In the wake of last year's Supreme Court decision in *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014), dozens of courts have declared scores of patents to be invalid as not satisfying the requirements of §101 of the patent statute. The Federal Circuit recently issued a decision that provides the same result but does not rely on the *Alice* standard and may have a significant and lasting impact on patents for software-related inventions. *Allvoice Devs. US, LLC v. Microsoft Corp.*, No. 2014-1258, 2015 U.S. App. LEXIS 8476 (Fed. Cir. May 22, 2015). In *Allvoice*, the Federal Circuit declared a patent's claims to be invalid because it simply found them not to be directed to one of the four statutory categories of inventions identified in §101.

The *Alice* case and its progeny have all relied on certain judicially created exceptions to §101, stating that inventions are not of a patentable type if, for instance, they encompass an abstract idea. Various tests evolved over the past few years, culminating in *Alice*, to determine whether the claims of a patent fall into one of these judicially created exceptions. In *Allvoice*, the Federal Circuit took a very different approach.

Judge O'Malley, writing an opinion for a unanimous panel including Judges Prost and Dyk, took a strictly literal reading of §101 and said that if a patent claim does not recite an invention that matches one of the four categories recited therein (i.e., a "process, machine, manufacture, or composition of matter"), it is invalid.

For context, the patent at issue is U.S. Patent No. 5,799,273, which carries the somewhat awkward title, "Automated proofreading using interface linking recognized words to their audio data while text is being changed." The patent has 78 claims. Independent claims 1, 52, 69, and 75 are directed to "data processing apparatus." Independent claims 15 and 54 are directed to "a data processing arrangement." Independent claims 28, 56, 71, and 77 are styled as "a data processing method," while independent claims 40 and 58 begin, "a method of processing data." Independent claims 51 and 73 are directed to "a computer usable medium having computer readable instructions." Independent claims 60 and 64 recite "a universal speech-recognition interface."

It is the last of these that the Federal Circuit considered to be outside the ambit of §101. The court began its analysis by stating that, "except for process claims, the eligible subject matter must exist in some physical or tangible form." (quoting *Digitech Image Techs., LLC v. Elecs. for Imaging, Inc.*, 758 F.3d 1344, 1348 (Fed. Cir. 2014)). Diving deeper, the court quoted other passages from *Digitech*, with citations back to the mid-1800s, for the notion that manufactures and compositions of matter must be tangible.

In contrast, the *Allvoice* court held that claims 60 and 64 (and their dependents) "do not recite a process or tangible or physical object and, thus, do not fall within any of the categories of eligible subject matter." The court noted that Allvoice had, at the district court level, argued that the claims were limited to software, but before the Federal Circuit, argued that the claimed interfaces are software instructions. The Federal Circuit held that unless a process is claimed, "the subject matter must exist in tangible form. Here, the disputed claims merely claim software instructions without any hardware limitations."

Closer review of the claims calls this conclusion into question. The claims recite interfaces that comprise three elements: "input means for receiving speech-recognition data," "output means for outputting the recognized words," and "means... for determining positions of the recognised words." The Federal Circuit relegated to a footnote any recognition that this claim form might benefit from the functional claim provisions of §112(6) of the patent statute and essentially ignored that issue based on an assertion that, "the means-plus-function limitations, as construed by Allvoice, do not correspond to tangible structure."

Thus, the court appears to have simply looked to what it saw as a flawed argument by Allvoice, rather than independently reviewing the specification to determine proper means-plus-function determination of these claim elements. Such an approach seems particularly harsh, placing undue emphasis on lawyering skills as opposed to the court's independent review of the patent. In this instance, figure 2 of the patent "illustrates a schematic overview of the internal architecture of the computer" and shows the speech recognition interface as being part of a processor of that computer. *See* '273 patent at column 5, lines 37 – 44. More generally, the patent includes several system block diagrams and corresponding flow charts describing at several levels the tangible structures that correspond to the elements of the claimed interface. For reasons that are not explained in the opinion, though one might surmise conservation of judicial resources, the Federal Circuit chose not to independently undertake analysis of the patent but instead to allow these claims to fail due to the way that the patent owner's counsel characterized them in litigation.

Notably, the *Allvoice* opinion is marked "NOTE: This disposition is nonprecedential." Under old Federal Circuit rules, nonprecedential opinions could not be cited by parties to later cases in briefs and the like, but this has not been the case since 2007. Current Federal Circuit Rule 32.1 says that a panel of the court can designate an opinion as nonprecedential, but that no longer prevents parties from citing to it or prevents the court from looking to it "for guidance or persuasive reasoning." In addition, not just parties but "any person" is afforded 60 days after issuance of a nonprecedential opinion or order to request that it be reissued as precedential.

What is particularly concerning in this instance is that other courts may adopt the approach in *Allvoice* as a convenient proxy for invalidating patents — one that may be even easier to apply than the *Alice* test. It would be incorrect to look at a claim that begins "an interface comprising" and invalidate such a claim merely because an interface is not necessarily a process, machine, manufacture, or composition of matter.

Practitioners would be wise to take note of this decision in framing claims as well. Constructs that have been commonplace for years may now be suspect if the *Allvoice* approach begins to be used by courts in other cases. Particularly in the case of software-implemented inventions, but also in other circumstances, patent lawyers may want to clarify both the nature of the interfaces, engines, systems and the like in their claims both to clearly show the tangible aspect of these and to tie them as directly as possible to the specific statutory categories.

One important aspect of §101 that the *Allvoice* court did not appear to consider is that §101 is not, by its own terms, limited to the four categories recited above. The actual text of the statute reads, "process, machine, manufacture or composition of matter, *or any new and useful improvement thereof*." It does not follow that an improvement to a machine must itself be a machine, for instance. For example, a machine can be improved by adjusting it in a particular way. More specifically, a computing machine may be improved by programming it in a particular way. That Congress intended §101 to be broadly rather than narrowly interpreted is settled law, so ignoring or strictly limiting the "improvement" language in §101 would be difficult to square with dozens of Federal Circuit and Supreme Court decisions.

It may be that courts and the Patent and Trademark Office itself are enjoying the convenience of invalidating patents and rejecting patent applications based on simplistic analysis of what qualifies as patentable subject matter. It may be that such approaches provide a quick and inexpensive way to dispose of poorly written claims and overly aggressive patent plaintiffs. However, there is great danger in such an approach as well, since such shortcuts can lead to invalidation of patent claims that do not deserve such a fate. Patent law is not easy, and we must be careful not to jump to anything that seems like too simple a solution. As always, we will see how the situation develops and report further.

Quick Updates

California Appellate Court Affirms "Bad Faith" Attorney Fees Award in Competitor Suit Aimed at Chilling Employee Mobility

Trade secret litigation aimed at chilling the free mobility of employees is an all too common occurrence, particularly in hot markets like the technology sector. Even the most frivolous of cases can cost defendants tens, if not hundreds, of thousands of dollars or more in defense costs. A recent California appellate decision should help deter the filing of such improper and harassing litigation. California's Sixth Appellate Court of Appeal recently upheld the Santa Clara County Superior Court's award of attorney's fees plus costs against plaintiff, Cypress Semiconductor Corporation, for filing a trade secret misappropriation claim against its competitor, Maxim Integrated Products. *Cypress Semiconductor Corp. v. Maxim Integrated Prods., Inc.*, 236 Cal. App. 4th 243 (2015). Specifically, the appellate court affirmed the attorney fee award under the California Uniform Trade Secrets Act (CUTSA) after the plaintiff voluntarily dismissed the suit without prejudice prior to a pleadings challenge. Under CUTSA, the prevailing party may recover defense costs when a plaintiff brings a trade secret misappropriation claim in bad faith. Cal. Civ. Code § 3426.4.

While the California Legislature has not defined "bad faith," California courts routinely apply a two-prong test that requires (1) objective speciousness of the claim, and (2) subjective bad faith in filing the claim. In this case, plaintiff, Cypress, alleged that its competitor was targeting its employees for the purpose of misappropriating proprietary information. The appellate court found Cypress's trade secret claim easily met the test for bad faith. It determined that Cypress filed the claim solely to intimidate and "cow" its competition into refraining from engaging in entirely lawful conduct. It further held Cypress's complaint was meritless, relying on mere "naked assertions" rather than well-plead facts and asserting "nonsensical" trade secret theories that included claiming publicly available information was confidential. The manner in which the litigation was pursued also appears to have influenced the decision. Cypress delayed identifying its trade secrets for months and ultimately dismissed the case in the face of a pleadings challenge rather than face an adverse determination on the merits.

It was clear to the appellate court that Cypress filed the trade secret claim in an attempt to shut down or interfere with its competitor's entirely lawful recruiting activities based on an inevitable disclosure doctrine, which has been roundly rejected by California courts. The lessons taught in *Cypress Semiconductor* remind would-be trade secret plaintiffs to carefully consider filing trade secret claims in light of the CUTSA's bad faith standard.

Supreme Court Rebukes Federal Circuit on Patent Inducement

Every year in late May or June, you can count on flowers blooming and the Supreme Court reversing the Federal Circuit on some patent issue. This year is no exception. The Supreme Court was asked to follow up on an issue regarding induced infringement of patents. Just a few years ago, the Court explained that to establish induced infringement, a plaintiff needed to show that the alleged inducer not only knew of the patent in question but also knew that the induced acts were infringing. *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011). The issue this year was whether an alleged inducer could avoid infringement if it had a good faith belief that the patent was invalid. The Court reversed the Federal Circuit and said that the defendant's belief about invalidity is irrelevant. *Commil USA, LLC v. Cisco Sys., Inc.*, 191 L. Ed. 2d 883 (2015).

The Federal Circuit had reasoned (as did Justices Scalia and Roberts in dissent) that one cannot infringe an invalid patent. Justice Scalia sounded like a philosophy professor in his dissent: "Only valid patents confer… exclusivity — invalid patents do not. It follows, as night the day, that only valid patents can be infringed. To talk of infringing an invalid patent is to talk nonsense." (citation omitted)

The majority felt otherwise. Justice Kennedy, who wrote a dissenting opinion in *Global-Tech*, wrote for the majority and provided several different reasons for the Court's decision. Before doing so, though, he thoroughly rejected an argument raised by Commil and the U.S. Government that a defendant can be found to induce absent proof that the defendant knew the induced acts to be infringing. In other words, he strictly applied the decision from which he dissented and therefore eliminated any doubt of how strong the *Global-Tech* rule is.

Moving to the primary issue at hand, the majority began by detailing how the patent law distinguishes infringement and validity as separate matters. They appear in separate parts of the patent act; non-infringement and invalidity are described as separate defenses; and defendants can choose to raise either or both of them. The majority then explained that "a common core of thought and truth" regarding patents is that they are presumed valid, and if mere belief in invalidity were a defense to induced infringement, "the force of that presumption would be lessened to a drastic degree."

The majority readily admitted that, "if, at the end of the day, an act that would have been an infringement… pertains to a patent that is shown to be invalid, there is no patent to be infringed." But the majority found both the allocation of burden and the timing of the presentations of relevant arguments to be "concerns of central relevance to the orderly administration of the patent system." Justice Kennedy explained that this conclusion follows "because invalidity is not a defense to infringement, it is a defense to liability."

The Court then moved to practical matters. It explained that there are numerous ways to obtain a ruling backing up a defendant's belief about invalidity, such as a declaratory judgment action or affirmative defense in court, or an *inter partes* review or *ex parte* reexamination by the Patent and Trademark Office. Justice Kennedy concluded this analysis by observing that in many areas of the law, belief is not relevant; "In the usual case, 'I thought it was legal' is no defense."

Before concluding, the Court briefly addressed the issue of patent trolls and frivolous claims. It said that this issue was not raised in this case, but nonetheless it issued a reminder to district courts that they "have the authority and responsibility to ensure frivolous cases are dissuaded," and that "it is within the power of the court to sanction attorneys for bringing such suits." The Court viewed this as one of the important safeguards that, combined with defendants' other options for establishing invalidity, allows the separation between infringement and validity to be maintained.

Unlike some of its prior rebukes of the Federal Circuit, this one had very little disparagement of the specific reasoning of the court below. The Supreme Court here simply presented its own reasoning and then vacated and remanded for further proceedings.

The Sixth Triennial 1201 Rulemaking Hearings — What They Are and Why They Matter

In this day and age, there's an app for everything. Sort of.

Would it be nice to be able to install Google Maps or, even better, Waze onto your car? How about a weather app so you can see whether it's sunny at your destination or a warning that heavy rain might slow your trip? As more and more "smart" devices come onto the market, from watches to home appliances to flying selfie-cams (aka drones), more and more everyday products, and the ways consumers can use them, run headlong into copyright — and anti-circumvention — law.

Section 1201(a) of the Digital Millennium Copyright Act (DMCA) prohibits circumvention of technology that controls access to a copyright-protected work. The classic example would be getting around digital rights management software on a DVD in order to copy a movie. But because copyright law also covers software, product manufacturers have argued that Section 1201 prohibits circumvention of essentially any software. Back in 2003, a printer manufacturer sued to prevent the sale of refilled and aftermarket (and thus cheaper) printer cartridges that used a line of authentication code to "trick" the printers into accepting these cartridges. The printer manufacturer eventually lost in the Sixth Circuit, but now 3D printer manufacturers are making nearly identical arguments. Tractor and car manufacturers are arguing that car owners cannot access the computers on their cars for diagnostic (or any other) reason.

All of this is happening in the context of the Copyright Office's hearings on *exemptions* to Section 1201(a). The DMCA itself requires that every three years the Copyright Office publish a list of classes of works exempted from the prohibition of the anti-circumvention subsection. On May 19-21 in Los Angeles and May 26-29 in D.C., the Copyright Office held the latest round of hearings.

Up for debate are classes covering consumer devices, vehicle software, smart TVs, mobile devices, medical devices, and of course, 3D printers, among others. Many of the exemptions up for consideration (and the Copyright Office is unlikely to grant all of them) concern educational, research, or non-commercial uses. But only a handful — primarily mobile devices, smart TVs, and gaming consoles — cover compatibility issues or "jail-breaking." Section 1201 and the lack of a specific exemption closes off many potential markets that have nothing to do with copyright infringement, such as better navigation software on cars, better monitoring programs for homes or medical devices, and more device-compatible apps. Because the Copyright Office only engages in rulemaking every three years, companies must anticipate the market in considering whether to seek (or oppose) an exemption. With each hearing cycle, the Copyright Office also considers whether to renew previously-granted exemptions. The hearing agenda and a list of testifying participants is available through the Copyright Office's website here: http://copyright.gov/1201/2015/Proposed_1201_hearing_agenda_20150501.pdf. Companies should keep an eye on the rulemaking process and the arguments (good or bad) others are making. Otherwise they risk being left behind or boxed out as new technologies emerge.

Recent Cases Reinforce the Importance of Laches in Trademark Cases

Two recent summary judgment decisions from district courts in the Ninth Circuit, *Fitbug v. Fitbit,* No. 13-1418, 2015 U.S. Dist. LEXIS 8775 (N.D. Cal. Jan. 26, 2015) and *Eat Right Foods, Ltd v. Whole Foods Mkt., Inc.,* No. C13-2174, 2015 U.S. Dist. LEXIS 63578 (W.D. Wash. May 14, 2015), serve as stark reminders that brand owners who sleep on their rights can lose them. Under the equitable defense of laches, a trademark claim is barred if a defendant can show (1) unreasonable delay by plaintiff in bringing suit and (2) prejudice. In analyzing whether a delay was unreasonable, courts in the Ninth Circuit look to the limitations period for analogous state law claims. If the delay was longer than the statutory period, laches presumptively bars the claim.

In *Eat Right*, the U.S. District Court for the Western District of Washington found that laches barred plaintiff's claim over Whole Foods' use of the EATRIGHT mark. The *Eat Right* court looked to Washington's three year statute of limitations for common law trade name infringement. The *Eat Right* court found that plaintiff knew or should have known of the alleged infringement by early 2010, over three years before filing suit. Despite plaintiff's cease and desist letters, the court found that the period of delay nonetheless continued until plaintiff filed suit.

In *Fitbug*, the U.S. District Court for the Northern District of California found that laches barred plaintiff Fitbug's claims. In granting summary judgment, the court found that Fitbug knew or should have known of Fitbit after its launch in 2008, and that (despite sending a demand letter in late 2011) plaintiff's delay until 2013 to file suit was unreasonable. The parties in *Fitbug* disputed whether a four-year or two-year limitations period applied. Although the court did not decide the issue because the delay was longer than four years, the court found that the two year period likely governed.

The *Fitbug* court also squarely rejected plaintiff's argument that its delay was reasonable because defendant, a startup, might have gone out of business:

> Fitbug's argument is that it should be permitted to wait and watch, with full knowledge of Fitbit's allegedly infringing use, as Fitbit invested substantial sums of money in advertising and building up goodwill in its allegedly infringing brand, only to intervene once those investments panned out. That result is not just inequitable, it is also inefficient, and renders this argument untenable.

Fitbug and *Eat Right* highlight important lessons for brand owners.

- First, brand owners should bear in mind that delay can kill their case entirely, particularly when the alleged infringer is making significant investments in the disputed mark.

- Second, in considering how much time is available to take action, parties should carefully consider which statute of limitations a court will apply.

- Third, parties should not assume that cease and desist letters will stop the laches clock. If in need of more time for pre-litigation negotiations, the brand owner should consider negotiating a tolling agreement.

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Fenwick & West's Intellectual Property Group offers comprehensive, integrated advice regarding all aspects of the protection and exploitation of intellectual property. From providing legal defense in precedent-setting user interface copyright lawsuits and prosecuting software patents to crafting user distribution arrangements on behalf of high-technology companies and implementing penetrating intellectual property audits, our attorneys' technical skills enable the Firm to render sophisticated legal advice.

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