Intellectual Property

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In This Bulletin

FENWICK & WEST LLP

Criminal Trade Secret Prosecution Emerges as IP Protection Tool

BY STUART P. MEYER

On May 23, 2007, Coca-Cola employee Joya Williams was sentenced to eight years in prison for trying to sell Coke's trade secrets to rival Pepsi. Newspapers, TV news programs and weblogs all discussed her story. One commentator labeled her a traitor and reported details of how she and her two accomplices hatched the plot in part in an Atlanta strip club and were caught on tape by the FBI discussing how they would split the $1.5 million they expected to receive for the secrets. Historically, trade secret cases have not been pablum for tabloid-style news.

For years, companies dealt with trade secrecy issues primarily through private civil actions for injunctions and damages. In a famous 1995 case, PepsiCo itself obtained an injunction to prevent a high-level manager from assuming similar duties for a competitor under the theory that it was inevitable he would disclose PepsiCo's trade secrets to the new employer. *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262 (7th Cir. 1995).

Fast forward a decade. Pepsi receives a letter, in a Coca-Cola envelope, from a purported Coca-Cola employee offering to sell "very confidential" information. Pepsi sends the letter to Coca-Cola, and Coca-Cola immediately calls in the FBI. Less than a year later, in Feb. 2007, Ms. Williams is found guilty of conspiring to steal Coca-Cola's trade secrets, with a potential sentence of ten years in prison. U.S. Attorney David Nahmias credited aggressive work by the FBI and PepsiCo's "good corporate citizenship" for the result. The judge at sentencing gave little weight to what was described in the press as Ms. Williams's "mercy pleas" and handed down an even greater sentence than the Government had requested.

Just a week before Ms. Williams was sentenced, a Duracell employee from Connecticut named Edward Grande was sentenced based on his plea of guilty to a charge that he stole information about Duracell's product and provided it to two competitors. He, too, faced the prospect of ten years in prison, as well as a $250,000 fine. Mr. Grande, however, fared somewhat better than Ms. Williams. Pleading extraordinary family circumstances, including the need to care for ailing parents "and the progressive deterioration, and ultimate death of a beloved family dog," Mr. Grande escaped with a mere five years probation, $7,500 fine and 200 hours of community service. Likely more of a factor than the dog's death was that, in contrast to Ms. Williams, Mr. Grande immediately admitted to his misdeeds when confronted by the authorities. The evidence in the Grande case showed that he commited the illegal acts not for pecuniary gain, but instead to "punish" senior Duracell executives whom he thought were getting exhorbitant bonuses, while the lower-level employees were either getting minimal raises or were being laid off.

In any event, these cases highlight an interesting trend: criminal trade secrecy cases are on the rise. Criminal trade secrecy prosecution is more than theoretical, and it is important for lawyers and their clients to be aware of how criminal enforcement can help protect trade secret portfolios.

Many think of intellectual property infringement as a civil, rather than criminal, offense. However, some federal and state IP laws include criminal provisions. Copyright law provides criminal liability, for instance, for willful infringement of copyright for commercial advantage or financial gain.

Likewise, trade secret misappropriation can result in both civil and criminal liability. California's version of the Uniform Trade Secrets Act provides a range of civil remedies for misappropriation. The criminal trade secret provisions are found in another statute: the Crimes Against Property title of the California Penal Code. Section 499c of that title phrases the prohibited acts in terms of theft. In this context, "theft" extends far beyond the normal sense of the word and includes not only actual stealing or carrying away of the secrets but also making copies or using trade secrets without authorization. If the information is stored in a computer, such acts may also trigger a separate Computer-Related Crimes section of the same title.

On the federal side, the Economic Espionage Act, 18 U.S.C. Section 1831, *et seq*. (EEA), is the primary vehicle for protecting trade secrets. As its name suggests, a primary focus of the EEA is economic espionage involving foreign governments or the entities they control. However, a second branch of the EEA, Section 1832, addresses commercial trade secret theft generally. The elements of a Section 1832 violation sound much like trade secret misappropriation under the Uniform Trade Secrets Act, with the additional requirement that the secret be related to a product placed in interstate commerce.

It has been more than a decade since the passage of the EEA, yet for years it was used sparingly to protect trade secrets. Based on a listing of publicly filed EEA cases from the Justice Department Web site, approximately six EEA cases per year were brought during the period 2001 – 2005, with Section 1832 being the more commonly used branch of the Act.

Notably, the first convictions on charges of economic espionage came only in December 2006. The case leading to these convictions commenced back in 2001. Two defendants were apprehended at the airport in San Francisco with material stolen from Sun Microsystems and Transmeta in their luggage. The charges of economic espionage were accompanied by charges of conspiracy, trade secret theft and transportation of stolen property. The defendants were reportedly en route to China to use the information in the design of a microprocessor for their company, which was to have provided a share of any profits to the city of Hangzhou.

Also in the Northern District of California in December 2006, a former Chinese national was charged with economic espionage based on allegations that he stole software trade secrets with military applications from his former employer, Quantum3D, purportedly for sale to the governments of China, Thailand and Malaysia. The case also involved related counts of trade secret theft in addition to the economic espionage claims

Attorneys should be mindful of significant differences between the criminal and civil trade secrecy routes. Companies have historically been reluctant to involve the authorities on trade secret matters. Calling the police or the FBI means that the company loses some control over the process. Many companies choose not to even bring civil trade secrecy actions for fear that publicity of any type will suggest that the company cannot protect its own information.

Another potential concern is that the company might have some skeleton of its own in the closet, potentially unrelated to the trade secrets issue, that the authorities might learn of in an investigation. Often, such a concern is speculative. Nonetheless, human nature can make one hesitant to invite the authorities to investigate so close to home.

When a company has available to it all of the evidence needed to successfully obtain an injunction or other relief, the advantages that a private action affords can be significant. However, many trade secret thefts involve at least some unknown facts, and private investigation into those facts may not be possible. For instance, in the Coca-Cola case, the letter to PepsiCo was sent pseudonymously. The federal investigation included an undercover agent exchanging money for documents with a defendant at the Atlanta airport. Without the benefit of such an investigation, there may not have been sufficient evidence available for a private civil action.

Sometimes, a mix of criminal and civil actions can be used advantageously. In one recent case, a model train manufacturer, Mike's Train House, claimed that its Korean manufacturer used its trade secrets in work for a competitor, Lionel. Employees of the Korean manufacturer were convicted on criminal charges in Korea. Mike's Train House then brought a civil action in the U.S. against both Lionel and the Korean entities. Despite the criminal convictions in Korea, Mike's Train House ran into trouble in the civil suit; in December, 2006, the Sixth Circuit Court of Appeals ruled that plaintiff's expert gave testimony that should not have been admitted because it was hearsay based on the report of the special master in the Korean criminal actions. *Mike's Train House, Inc. v. Lionel, L.L.C.*, 472 F.3d 398 (6th Cir. 2006). Thus, a new trial was ordered, and the prior jury award of $26 million in damages in favor of Mike's Train House, and an additional $15 million for unjust enrichment, has been thrown out.

While it may not make sense to go to the FBI with every client that has concerns about trade secret misappropriation, it is important to remember that criminal actions may, in some circumstances, provide relatively prompt relief that might otherwise be difficult to get.

Intellectual Property Strategy and Best Practices for R&D Services in China

BY FRED GREGURAS

China's Ministry of Commerce issued guidelines in March on attracting foreign investment in 2007. According to the guidelines, China intends to continue to encourage foreign investment in R&D centers. Many companies have already established R&D centers in China as wholly foreign-owned enterprises (WFOEs) to reduce the time and costs associated with R&D efforts. China also has a well-established base of third party service providers for companies looking to outsource core processes such as software development, integrated circuit design and drug discovery research. WFOEs provide companies with more practical control over R&D results and offer better IP protection. However, since the parent company must pay for the infrastructure costs of the WFOE, using third party service providers may be an attractive option. This paper examines IP strategy and best business practices for conducting R&D in China using WFOEs or third party service providers.

China is a member of all of the major international IP conventions. Thus, entities from member states of these conventions are entitled to the same IP protections for their works as a Chinese national under Chinese law. Trademarks and patents must be issued in China in order to have any protection under the international conventions. Although copyright protection does not require registration in China, there is a presumption of ownership and validity if the copyright is registered with the National Copyright Administration.

While China has established IP laws that generally meet international standards, weak enforcement continues to frustrate efforts to protect IP in the country. Piracy and counterfeiting levels in China continue at a high level and impact products, brands and technologies across industries. In April 2007, the U.S. filed a complaint with the World Trade Organization (WTO), citing the low number of criminal prosecutions for piracy and counterfeiting in China and alleging that China's ineffective enforcement of copyright and trademark laws violates the WTO's rules. The WTO will determine whether China has taken sufficient actions to combat piracy and counterfeiting.

In China, injunctive relief is the most realistic legal remedy for stopping patent, trademark and copyright infringement. However, since injunctive relief for a breach of contractual obligations (*e.g.*, confidentiality) is not clearly available in China, contracts at all levels should include provisions providing for injunctive relief to increase the likelihood that a court will order such relief. Preliminary injunctions require an IP owner to post a bond and provide strong proof of irreparable harm and a likelihood of prevailing on the merits. As in the U.S., preliminary injunctions are considered extraordinary relief and are not easily obtained. There is no equivalent of a "contempt" order in China to enforce a preliminary injunction that is being disobeyed. Permanent injunctions can be enforced, but they take much longer to obtain. Meanwhile, IP "leakage" may continue.

An IP owner should not expect any significant monetary recovery in a court case in China. It takes four to seven years for a lawsuit to be heard in China and monetary damages are typically very small. Administrative remedies are also available in China, but only for obvious and literal copying or counterfeiting of goods. In addition, the administrative fines in such cases are not large enough to be an effective deterrent. Thus, while judicial and administrative enforcement mechanisms are available to IP owners, IP owners should also use contractual measures and "best business practices" to reduce IP risk.

There must be an R&D services contract regardless of whether the WFOE or third party model is being used. Use of a contract with a WFOE is important to the parent for tax and liability purposes as well as for ownership of IP. The obligations in the R&D services contract must also flow down into contracts with the service provider's employees and subcontractors.

The key provisions of a typical R&D services contract are as follows, with an emphasis on IP related provisions.

- **Statement of Work** The statement of work defines what work is to be done and may include milestones and payment schedules. Contracts with WFOEs tend to have fewer specifics and may simply state that services will be provided as directed by the parent.
- **Payment** WFOE agreements usually take a cost-plus-profit approach, while third party payment schedules may be based on achieving R&D milestones.
- **Acceptance/Warranties** Third party service provider contracts usually have acceptance provisions, performance warranties and maintenance service levels to assure a specified level of quality in the results of the services. WFOE contracts generally have softer or no such requirements.
- **Infringement** The third party service provider is typically required to offer IP infringement protection in the form of warranty and indemnification provisions. These provisions are intended to encourage service providers to manage the R&D process and reduce the risk of IP infringement while providing a remedy in the event the service provider's deliverables infringe the IP rights of another. Although it may be difficult, if not impossible, to fully collect damages in the event of an infringement, these provisions may have a deterrent effect and create a more disciplined R&D process.
- **Confidentiality** Confidential information, including any IP, business information, and the results of the R&D services, should not be disclosed or used except for the purpose of providing the R&D services.
- **IP Ownership** Unless written assignments are obtained, the party paying for the work performed by the third party service provider will not own the resulting IP. Third party service providers typically assign ownership of all IP developed under the contract to the party paying for the development. To avoid IP ownership chain of title issues, the service provider should agree not to subcontract or otherwise use any non-employee service providers. IP developed by a WFOE is usually assigned to the parent in the R&D services contract when the parent is the primary liquidity vehicle and customer relationships are directly with the parent.
- **Moral Rights** Unlike U.S. copyright law, moral rights are expressly provided for under Chinese copyright law and the scope of an author's moral rights is broader. Moral rights include the right of publication, to maintain the integrity of the work and to claim authorship of the work. The integrity of a work is infringed if the work is distorted, altered or otherwise modified to the prejudice of the reputation of the author. Moral rights may not be assigned by an author but may be waived. Contracts with WFOEs and third party service providers must contain an express, irrevocable waiver of moral rights and an obligation not to assert them.
- **Audit Rights** This provision defines the frequency, the circumstances, and the extent to which the party paying for the work can inspect the physical and electronic work environment of the service provider to evaluate contract performance and determine if best practices have been implemented.
- **Governing Law** The contract should specify which law will be applied to govern the interpretation and enforcement of the R&D services contract, typically the law of the country of the party paying for the work. Chinese IP law, however, will apply as a matter of public policy.
- **Arbitration** The contract should provide for binding arbitration to resolve commercial disputes. The right to obtain injunctive relief for IP leakage should be expressly excluded from the obligation to arbitrate. China is a member of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), but China's enforcement under the convention has been spotty at best.

Best Business Practices for IP Protection:
Selecting a trustworthy business partner in China for R&D services is a practical way to reduce IP risk. This applies to selecting a third party service provider as well as the management team of a WFOE. A company that desires to conduct R&D in China should also establish a corporate IP protection strategy and best business practices that include the actions below.

- Make IP protection a primary responsibility of the entire China management team, not just legal counsel. Everyone needs to buy into the importance of such protection.

- Register IP rights in China. No patent or trademark protection is available until the patent or trademark is issued in China.
- Separate components of key R&D work so that no one group of service providers or work location has access to the complete product or process.
- Check the security processes (physical and electronic), policies and training, employee retention rates and financial status of a third party service provider. Training should include IP protection. An undercapitalized service provider is more likely to cut corners on IP protection practices.
- Do reference checks on management and key employees of an R&D center. Establish security processes and policies and training for the WFOE. Training should include IP protection.
- Implement “need to know” levels of access for employees and contractors and establish controls for physical and electronic access to IP based on these access rules.
- Conduct regular audits of an R&D center and third party service providers to look for vulnerabilities that are causing or could cause IP leakage.
- Keep a close watch on both departing employees of an R&D center and the competition to detect IP leakage. Implement a practice of departure interviews and a written reminder to departing employees to remind them of their obligations.

Quick Updates

Ninth Circuit Holds the Line on Search Engine Fair Use in Perfect 10 Copyright Case

The Ninth Circuit has confirmed the continued viability of an important 2003 fair use precedent in a case critical to the continued evolution of Web. 2.0. *Perfect 10 v. Amazon,* 2007 U.S. App. LEXIS 11420 (9th Cir. May 16, 2007). Although the Court of Appeals did not completely dispose of the action, it threw out the preliminary injunction against Google, decided most of the issues in Google’s favor, and remanded the case for limited further proceedings.

Perfect 10 distributes photographs via its adult website and magazine. Myriad third-party websites make infringing copies of these images, which are then cataloged by Google’s search engine. Google’s image search function displays an array of thumbnail-sized images, stored on Google’s servers. Clicking on a thumbnail opens a new window with a Google heading at the top, a link to the original site, and a large section of the web page which displays a full-size image of the underlying web page, framed within the Google-generated page.

The Ninth Circuit had upheld similar functions as fair use in its 2003 decision in *Kelly v. Arriba Soft*. But Perfect 10 persuaded the district court that circumstances had overtaken *Arriba Soft*, and obtained a preliminary injunction against thumbnail copying and display. Perfect 10 entered into a licensing arrangement whereby thumbnails of its pictures could be downloaded to cell phones, and argued that Google’s activities impaired the value of Perfect 10’s copyrights, tilting the fair use determination against Google.

The Ninth Circuit disagreed, focusing on the highly transformative nature of the search engine use and the “great value” the use provides to the public. The Court of Appeals held that even though the defendant had a commercial purpose, market harm cannot be presumed where the use is transformative.

On the framing issue: From the perspective of the end-user, when an image search is performed, it may look as though Google is displaying the web page containing the full-sized infringing photos. But, held the Ninth Circuit, Google is only transmitting a **link** that allows the end user’s browser to integrate a portion of the original source web page into the Google web page. Since it is the infringing third-party sites and not Google that transmits the infringing images to the end-user, such linking and framing directly infringes neither the display nor the distribution rights.

The Ninth Circuit next considered whether Google may be secondarily liable for framing the third-party images. Contributory copyright infringement requires an underlying direct infringement and that the defendant, with knowledge, materially assists in the infringement. Interpreting the U.S. Supreme Court’s 2005 *Grokster* decision, the Court of Appeals re-examined the knowledge element, and held that “a computer system operator can be held contributorily liable if it ‘has **actual** knowledge that **specific** infringing material is available using its system,’ … and can ‘take simple measures to prevent further damage’ to copyrighted works, … yet continues to provide access to infringing works.” Because the district court had not resolved various factual matters germane to this new test, the Ninth Circuit remanded for further consideration.

As to vicarious infringement, the Ninth Circuit held that mere linking to infringing third-party sites, with neither the legal authority nor the practical power to stop those website operators from their infringing activity, is insufficient to establish liability.

Trade Secrets Definition Broadened to Include Other Fundamental Elements

Trade secret misappropriation defendants were unable to prevail on summary judgment merely by showing that they had not used one particular element that plaintiff chose to use in describing its trade secrets, where the evidence showed a genuine issue of material fact regarding whether defendants had misappropriated "other fundamental elements of those trade secrets." *Triple Tee Golf, Inc. v. Nike, Inc.*, 82 U.S.P.Q.2d (BNA) 1452 (5th Cir. 2007).

The dispute in this case began when Jack Gillig of Triple Tee Golf ("TTG") attempted to hire Tom Stites, a golf club designer, to design a new TTG club. Soon after viewing TTG's designs, Stites was hired by Nike as its Director of Product Creation, and turned down the TTG project. At a subsequent trade show, Gillig noticed that a Nike golf club resembled designs he had shown to Stites. Triple Tee responded by suing Nike and Stites, asserting trade secret misappropriation, among other claims. The district court granted defendants' summary judgment motion, holding that all trade secrets asserted by TTG related to a user-adjustable golf club weighting system, and none of defendants' clubs were user-adjustable.

On appeal, the Fifth Circuit rejected TTG's argument that their trade secrets were improperly limited to weighting systems adjustable by the user, excluding adjustability at the factory before being sold to the user. The court agreed with the district court that TTG's trade secrets were properly construed to include only user-adjustable systems. Nonetheless, the court continued beyond the district court's analysis to examine whether lack of user-adjustability necessarily eliminated any genuine issue of material fact regarding the trade secrets claims. The court considered whether defendants had misappropriated TTG's trade secrets by incorporating other proprietary TTG elements into the Nike club design, even though Nike chose to make it permanently weighted rather than user-adjustable.

In reversing the district court's grant of summary judgment, the Fifth Circuit concluded that TTG presented enough evidence to create an issue of material fact regarding whether the defendants misappropriated "other fundamental elements of those trade secrets." The court found that adjustability is "but one of several design elements," and thus is "merely an abstract concept that must be implemented in some very real way." This implementation is at least as important to TTG's trade secret definition as the adjustability itself. If TTG could prove that defendants used fundamental elements of TTG's design in the permanently weighted club, TTG would have a viable trade secrets claim. The court found that, in fact, TTG had already produced enough such evidence to meet the genuine issue of material fact standard.

First Two Federal Circuit Post-KSR Obviousness Decisions Affirm Patents' Invalidity

In its first decisions to issue in the wake of the Supreme Court's *KSR Int'l Co. v. Teleflex Inc*. decision, 127 S.Ct. 1727 (2007), the Federal Circuit has affirmed two district court decisions of obviousness.

In one opinion, the Federal Circuit affirmed a district court's judgment that claim 25 of U.S. Patent 5,813,861 would have been obvious in light of two prior art references and the knowledge of one of ordinary skill in the art. *Leapfrog Enterprises, Inc. v. Fisher-Price, Inc.*, 2007 U.S. App. LEXIS 10912 (Fed. Cir. May 9, 2007)

Claim 25 of the Leapfrog '861 patent discloses a device that allows a child to select a letter in a word appearing in a book and then hear the corresponding phoneme of the letter. Leapfrog accused Fisher Price of infringement resulting from its "PowerTouch" toy. After affirming as to non-infringement, the court applied the recent *KSR* Supreme Court decision to the obviousness analysis. Citing *KSR* for the proposition that "[t]he combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results," the court pointed to two references and the level of skill in the art in affirming obviousness.

The court relied on the Bevan patent, 3,748,748, which discloses using mechanical devices (phonographic needles and a record) to produce the sound of single letters in the word and a Super Speak and Read ("SSR") device (Texas Instruments) that permits generation of the sound corresponding to the **first** letter of a word using only electronic means. Accordingly, the court agreed it would have been "obvious to combine the Bevan device with the SSR to update it using modern electronic components in order to gain the commonly understood benefits of such adaptation, such as decreased size, increased reliability, simplified operation, and reduced cost."

Although the Bevan/SSR combination lacked one element of claim 25 (a reader), as the court noted that there was no evidence that adding a reader to the Bevan/SSR combination was "uniquely challenging or difficult" and thus did not represent "an unobvious step over the prior art."

In the other opinion, issued days after KSR, the Federal Circuit upheld a jury verdict finding the claims of U.S. Patent No. 6,403,865 invalid for obviousness. *Syngenta Seeds, Inc. v. Monsanto Co*., 2007 U.S. App. LEXIS 10496 (Fed. Cir. May 3, 2007). The Syngenta '865 patent claims are directed to corn plants genetically altered with a synthetic "Bt" gene to produce an insecticide. Syngenta's version of the Bt gene, which is native to bacteria, is rich in nucleotides preferred by corn plants: guanine ("G") and cytosine ("C").

The Federal Circuit found sufficient evidence to support the jury's conclusion that a person of ordinary skill in the art would have found it obvious to try a modified corn gene having at a G+C content of at least 60 percent, based on a single prior art reference that taught methods for improving Bt expression and in light of the knowledge of skill in the art. The court also upheld the jury's finding of a reasonable expectation of success, rejecting Syngenta's argument that an "unexpected" degree of success resulted from the increase of G+C content to at least 60 percent.

Parody Defense to Trademark Dilution Claim

The U.S. Court of Appeals for the Fourth Circuit has been asked to decide the extent to which parody can serve as a defense to a claim under the Federal Trademark Dilution Act. Under the revised FTDA, enacted on October 6, 2006, the standard for liability changed from actual dilution to a likelihood of dilution, a somewhat lower threshold that arguably will make it easier for trademark owners to enforce their rights. The FTDA designates certain fair uses of famous marks that would not be considered dilution. One such fair use is parody, which involves the use of a well-known work, usually in a humorous way, to comment on or criticize the trademark owner or its actions. However, it is not a fair use if the purpose of the parody is not social commentary or criticism, but rather, for the purpose of marketing a product. In one of the first cases decided under the revised FTDA, *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC,* 464 F.Supp. 2d 495 (E.D. Va. 2006), a district court in Virginia held that dog toys sold under the name "Chewy Vuiton," which parodied the Plaintiff's marks and trade dress, did not amount to copyright or trademark infringement.

Louis Vuitton Malletier S.A. ("LVM") manufactures luxury consumer goods under its mark and trade dress, which is comprised of an overlapping L and V monogram along with three motifs and a four pointed star. In 2002, LVM also began manufacturing a line of high-end dog products, including collars and leashes, bearing the LVM mark and trade dress. The defendant, Haute Diggity Dog, LLC ("HDD"), sells dog toys and beds using names and logos that spoof various famous products and marks. LVM sued, claiming that HDD's sale of the Chewy Vuiton products infringed its trademarks, trade dress, and copyrights; both parties filed for summary judgment. The court ultimately found that, for each claim, either LVM failed to meet its burden of proving that consumer confusion was likely, or the use constituted a fair use.

In its likelihood of dilution discussion, the court noted that LVM's mark is strong and famous and that the strength of LVM's mark is not likely to be diluted by a parody involving a dog toy product. The court went on to state that "the success of the parodic use depends upon the continued association" with LVM. While the court found that the decorative pattern used by HDD was sufficiently similar to LVM's mark to call to mind LVM, the association was necessary for parody and was acceptable because consumers were not likely to think that the source of the product advertised in the parody was LVM. Due to the lack of source confusion, the parody was a fair use.

LVM filed an appeal, and has argued, along with amicus the International Trademark Association (INTA), that the Virginia district court misapplied the revised FTDA. Specifically, INTA points out that it is not a fair use, and the revised FTDA states that a party using parody is not exempt from liability under the dilution statute where the party's mark is used to mark their own product.

Throughout the spring of 2007, the parties and *amici* have been briefing the issue. The Fourth Circuit's decision could be significant in providing a mechanism for balancing free speech concerns with trademark owners' rights.

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