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Recent Development

RECENT DEVELOPMENTS IN TRADEMARK LAW

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This review covers selected noteworthy decisions of U.S. courts and the Trademark Trial and Appeal Board as reported in U.S.P.Q.2d, Vol. 32, No. 10 (December 5, 1994) through Vol. 33, No. 7 (February 13, 1995). This review also reports on the effects of the GATT implementing legislation in the United States.

**\*304 I. Lanham Act Amendments: GATT You Again**

Effective January 1, 1996, two significant changes will be made to the Trademark Act of 1946 (the Lanham Act)<sup>1</sup> as part of the implementing legislation for the General Agreement on Tariffs and Trade (GATT)<sup>2</sup>:

(1) Section 45 (15 U.S.C. § 1127). The definition of "abandonment" will be amended to require three consecutive years' nonuse for a finding of *prima facie* abandonment, rather than the two years presently required under the statute.<sup>3</sup> The balance of this section is unchanged, including the provisions relating to inference of abandonment, and abandonment of the mark as a result of its becoming generic.

(2) Subsection 2(a) (15 U.S.C. § 1052(a)). New language has been added to the list of marks that are unregistrable. Specifically, in addition to immoral, deceptive, and scandalous marks, a mark may be refused on the grounds that it consists of:

a geographical indication which, when used on or in connection with wines or spirits, identifies a place other than the origin of the goods and is first used on or in connection with wines or spirits by the applicant on or after one year after the date on which the WTO Agreement (as defined in section 2(9) of the Uruguay Round Agreements Act) enters into force with respect to the United States.<sup>4</sup>

The WTO Agreement entered into force on January 1, 1995.

## II. Third Circuit: Duraco Products Is Urning a Reputation

In *Duraco Products, Inc. v. Joy Plastic Enterprises, Ltd.*,<sup>5</sup> the Third Circuit affirmed the denial of a preliminary injunction in a trade dress infringement case, but substituted its own reasoning for that of the lower court. The plaintiff Duraco manufactures and sells plastic urn-shaped planters. Duraco sued Joy Plastics Enterprises, alleging that Joy had infringed Duraco's trade dress by selling urns of a similar shape and texture.<sup>6</sup> The district court denied Duraco's motion for a preliminary injunction, basing its denial on a trademark-type analysis. The lower court found that the design of the Duraco planters was "descriptive at best," and that the descriptive \*305 trade dress had not acquired a secondary meaning.<sup>7</sup> The court also found the design to be functional.<sup>8</sup>

The Third Circuit rejected the use of the familiar "generic, descriptive, suggestive, and arbitrary" trademark analysis in cases where the trade dress is embodied in the product itself, rather than in its packaging.<sup>9</sup> Here, the court distinguished this situation, dealing with "product configurations," from the more usual "product packaging" trade dress case.<sup>10</sup> In cases of product configuration, the court held that the standard for distinctiveness should be whether the trade dress is:

- (1) unusual and memorable;
- (2) conceptually separable from the product; and
- (3) likely to serve primarily as a designator of the product's origin.<sup>11</sup>

The court found the last two factors missing with respect to the urn-shaped planters and held that their configuration was not protectable as an inherently distinctive trade dress.<sup>12</sup> The court also held that there was no evidence of secondary meaning.<sup>13</sup> The court thus affirmed the denial of the preliminary injunction, although for different reasons than those originally stated by the district court.<sup>14</sup>

## III. Ninth Circuit: Gimme Shelter-No Insurance Coverage for Microtec Research

In *Microtec Research, Inc. v. Nationwide Mutual Insurance Co.*,<sup>15</sup> the Ninth Circuit considered insurance coverage for the defense of suits based on advertising or personal injury. Microtec was sued by Green Hills for passing off Green Hill's software as its own. Microtec tendered a defense of the suit to its insurers on the grounds that the suit arose out of an "advertising injury."<sup>16</sup> The Ninth Circuit affirmed the lower court's summary judgment that the complaint did not allege an advertising injury or any kind of defamation that could be covered by the advertising injury coverage.<sup>17</sup>

The Ninth Circuit based its analysis on the definitions of "advertising injury" and "personally injury" set out in each of the insurance policies in question. The first insurance policy defined "advertising injury" as follows:

\*306 [An] injury arising out of one or more of the following offenses:

- a. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
- b. Oral or written publication of material that violates a person's right to privacy;
- c. Misappropriation of advertising ideas or style of doing business; or
- d. Infringement of copyright, title, or slogan.<sup>18</sup>

“Personal injury” is defined as:

injury, other than “bodily injury” arising out of one or more of the following offenses:

....

d. Oral or written publication of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services....”<sup>19</sup>

The second insurance policy defined “advertising injury” as follows:

[An] injury caused by any one of the following offenses that result from the advertising of your products or work:

- libel or slander;
- written or spoken material made public which belittles the products or works of others;
- written or spoken material made public which violates an individual’s right of privacy;
- unauthorized taking of advertising ideas or style of doing business;
- infringement of copyright, title, or slogan.<sup>20</sup>

It defined “personal injury” as follows:

[An] injury, other than “bodily injury” caused by any of the following offenses that result from your business activities other than advertising, broadcasting, publishing or telecasting done by or for you:

...

- libel or slander
- written or spoken material made public which belittles the products or works of others....<sup>21</sup>

Interestingly, it appears that Green Hills deliberately crafted its complaint so as to create a situation in which Microtec was forced to defend itself. Specifically, the complaint against Microtec included claims for false designation of origin and unfair competition.<sup>22</sup> Also, although Microtec had arguably disparaged Green Hills’ software in its advertising, claims based on disparagement were omitted from the complaint.

The Ninth Circuit held that advertising injury coverage does not apply to misappropriation of intellectual property claims such as the one by Green Hills,<sup>23</sup> and that Green Hills’ failure to \*307 allege a disparaging statement precluded personal injury claims of libel, slander, disparagement, or belittlement.<sup>24</sup>

#### **IV. Second Circuit: Deerly Diluted-No Poking Fun at the John Deere Trademark**

In *Deere & Co. v. MTD Products, Inc.*,<sup>25</sup> the Second Circuit addressed the issue of whether advertisers should be allowed to “depict an altered form of a competitor’s trademark to identify the competitor’s product in a comparative ad.”<sup>26</sup> MTD manufactures and sells lawn tractors that compete with some of the products sold by Deere & Co. Deere owns a trademark for a deer design (the Deere Logo) for identifying its products and services. MTD ran an advertising campaign in which the familiar “Deere” deer was depicted in various unflattering ways.<sup>27</sup> Particularly, one commercial depicted the deer, in animated form, as a tiny animal running in apparent fear while being chased by a small barking dog and an MTD tractor. Deere brought suit under the New York anti-dilution statute, which at the time included causes of action for “blurring” and “tarnishment” of the plaintiff’s mark.<sup>28</sup> The district court granted Deere an injunction and MTD appealed.<sup>29</sup> MTD argued that its commercials did not confuse consumers, result in a loss of the trademark’s ability to identify a single manufacturer (*i.e.* blurring), or tarnish the trademark’s positive connotations, and that therefore, MTD’s actions did not fit within the

requirements of the anti-dilution statute.<sup>30</sup>

The Second Circuit agreed that the allegations of blurring and tarnishment were inapposite in the present case, but found that New York anti-dilution law includes a third, undefined cause of action which protects trademark owners from attempts by others to increase sales of competing products by poking fun at the trademark.<sup>31</sup> The court stated that “w herever New York will ultimately draw the line, we can be reasonably confident that the MTD commercial challenged in this case crosses it,”<sup>32</sup> and affirmed the grant of the injunction.<sup>33</sup>

#### **V. Eleventh Circuit: Fifty Ways to Leave Your Licensor-Babbit Electronics Tries to Avoid Accounting to the Licensee**

In *Babbit Electronics v. Dynascan Corp.*,<sup>34</sup> Babbit and its officers sued Dynascan for fraud and tortious interference with several contracts, and Dynascan counterclaimed for trademark infringement and breach of contract. The trial court found against Babbit on all four issues, and the \*308 Eleventh Circuit affirmed the lower court’s decision for the reasons set out in the lower court’s order and opinion.<sup>35</sup>

Babbit’s claim was based on its assertion that at the time it entered into a licensing agreement with Dynascan, it had been misled into believing that Dynascan owned trademark registrations on the subject “COBRA” mark for cordless telephones in various South American countries.<sup>36</sup> In addition, Babbit claimed that Dynascan had interfered with Babbit’s sales contracts with third parties.<sup>37</sup> Babbit’s claims were addressed thoroughly by the trial court and ultimately rejected, as the court found no evidence of false statements or misrepresentations, and further found that the only “interference” in which Dynascan had engaged related to its claim against Babbit for breach of contract.<sup>38</sup>

More importantly, the court focused on Babbit’s activities and motives. The trial court found that Babbit had deliberately gone behind Dynascan’s back to order large quantities of cordless phones from a manufacturer in Korea.<sup>39</sup> Babbit received the clandestine goods, relabelled them with the licensed mark, and sold them without communicating any of these activities to Dynascan. As a result, the court found Babbit and its officers liable for the following:

- (1) breach of contract;
- (2) trademark infringement, even though Dynascan did not have registrations in some countries, Dynascan did not sell in the same markets as Babbit, and the goods were the same goods as those to which the mark might legitimately have been applied under the license;
- (3) counterfeiting, based on Babbit’s knowledge that it was not entitled to use the mark in the manner in which it did; and
- (4) unfair competition, false designation, and dilution under the same facts as relied on above.<sup>40</sup>

As a result of these activities, Babbit was required to disgorge its profits and was found liable for Dynascan’s lost royalties, treble damages, costs, attorneys’ fees, and prejudgment interest, for a total of approximately \$500,000.<sup>41</sup>

#### **VI. Eighth Circuit: There’s No Diet Like Pro-Diet, but Minnesota Pet Breeders Is Not Entitled to an Accounting for Profits**

In *Minnesota Pet Breeders Inc. v. Schell & Kampeter, Inc.*,<sup>42</sup> the Eighth Circuit disagreed with the trial court’s grant of partial summary judgment on the question of whether Minnesota Pet \*309 Breeders (“MPB”) was entitled to an accounting for profits, but found that because MPB had voluntarily dismissed the balance of its claims, it was not entitled to any further day in court.<sup>43</sup>

MPB manufactures and sells pet food, and essentially all of its sales occur in the states of Minnesota, North Dakota, and South Dakota. In 1987, MPB obtained a federal registration of its mark “PRO-DIET” for pet foods. Schell and Kampeter (“S & K”) is a Missouri company that sells pet food under the mark “NUTRA-NUGGETS.” In 1986, S & K added the word “ProDiet” to its mark. In an apparent response to MPB’s registration, however, S & K eventually phased out its use of the word “ProDiet.” At no time did S & K sell any pet food in Minnesota, North Dakota, or South Dakota.<sup>44</sup>

MPB sued S & K, alleging willful infringement of the “PRO-DIET” trademark and seeking an injunction and an accounting of S & K’s sales of the products which had used the mark “ProDiet.” The district court concluded that the existence of

genuine issues of material fact precluded summary judgment on the issue of injunctive relief, but that partial summary judgment should be granted, dismissing MPB's claim to recover S & K's profits.<sup>45</sup> The court's reasoning was based on its understanding that a trademark owner may recover an infringer's profits under the Lanham Act only from trade areas where the owner's trademarked products have achieved actual market penetration.<sup>46</sup> MPB voluntarily dismissed all of its remaining claims for the sole purpose of making the district court's ruling on profits final and appealable.<sup>47</sup>

The Eighth Circuit held that the denial of summary judgment on the issue of injunctive relief was proper, and in light of that holding, the partial summary judgment on accounting for profits was improper.<sup>48</sup> Specifically, the court stated:

Because all Lanham Act Remedies are equitable in nature, and because § 1114(1) makes available “the remedies hereinafter provided” upon proof of likelihood of confusion, we conclude that one equitable remedy, an accounting of profits, cannot be unavailable as a matter of law when another equitable remedy, injunction, requires a trial.<sup>49</sup>

Unfortunately for the plaintiff, MPB, the court stated that MPB had “deprived the court on remand of its ability to do equity and therefore the judgment of the district court must be affirmed.”<sup>50</sup> However, the district court's ruling should have been reversed because MPB had dismissed all of its other claims with prejudice.<sup>51</sup>

### **\*310 VII. Second Circuit: They Took the Look of the Book-Waldman Publishing Tries to Recover for False Designation of Origin**

In *Waldman Publishing Corp. v. Landoll, Inc.*,<sup>52</sup> the Second Circuit held that a claim brought only under the Lanham Act for falsely designating the origin of books cannot result in an injunction prohibiting the defendant from publishing its books, absent a showing of irreparable economic injury as a result of the false designation.<sup>53</sup>

Plaintiff Waldman adapts literary classics that are in the public domain and publishes them in simplified form for young readers. Plaintiff Playmore sells and distributes the books for Waldman.<sup>54</sup> Defendant Landoll publishes and sells a line of children's books that are substantially similar to, although not exact copies of, those sold by the plaintiffs.<sup>55</sup> The plaintiffs had not registered their copyrights in their books; therefore, the complaint was brought under section 43(a) of the Lanham Act, alleging false designation of origin.<sup>56</sup>

The district court held that the plaintiffs had shown a likelihood of success on their claims and would suffer irreparable harm in the absence of a preliminary injunction.<sup>57</sup> As a result, the court issued a preliminary injunction prohibiting Landoll from publishing or selling any books which copied the plaintiff's books to a substantial degree.<sup>58</sup>

On appeal, the Second Circuit found: (1) that Landoll's acts did constitute a false designation of origin under the doctrine of “reverse passing off,” in which one party sells the goods of another as its own,<sup>59</sup> (2) that sufficient originality existed in the plaintiff's books,<sup>60</sup> (3) that the standard of comparison used in determining copyright infringement was appropriate and applicable in determining false designation under the Lanham Act,<sup>61</sup> (4) that the opportunity to copy had existed,<sup>62</sup> and (5) that Landoll's books were similar enough to plaintiff's books so as to constitute a false designation of origin.<sup>63</sup> The court also held, however, that the record was insufficient to determine whether the plaintiffs' books were “works for hire,” and therefore, the ownership or origin of the books was in question.<sup>64</sup>

**\*311** The Second Circuit also held that because their claim was brought under the Lanham Act, the plaintiffs were only entitled to enjoin Landoll from falsely representing the *origin* of its books.<sup>65</sup> The court remanded the case for consideration of whether the plaintiffs could establish that they were harmed by Landoll's actions.<sup>66</sup> The Second Circuit noted that the district court might consider on remand whether the parties' positions had changed since the plaintiffs had registered their copyrights.<sup>67</sup>

### **VIII. Fifth Circuit: C D C.F.E.'s ? M N O C.F.E.'s ! O S A R !-Is the Certification Mark “C.F.E.” a Valid One?**

In *Society of Financial Examiners v. National Ass'n. of Certified Fraud Examiners*,<sup>68</sup> the district court granted summary judgment for the plaintiff on the issues of validity and infringement, and the Fifth Circuit reversed on both issues.<sup>69</sup>

The Fifth Circuit held that the mark “C.F.E.” could be found to be generic for the title “certified financial examiner.”<sup>70</sup> Although both parties asserted that there was no genuine issue of material fact and that summary judgment was therefore

proper, the appellate court disagreed and held that summary judgment could not possibly be granted on the issue of whether it could be classified as generic on the facts presented.<sup>71</sup> The court pointed out that like J.D., M.B.A., Ph.D., and C.P.A., “certified financial examiner” could be found to merely indicate an individual who has been certified, and thus would fail as an indication of source.<sup>72</sup>

Similarly, the court rejected the grant of summary judgment on infringement, citing the dearth of evidence of actual confusion (twelve instances over five years), the possibly similar channels of trade, and visual dissimilarities between the marks.<sup>73</sup> The Fifth Circuit disagreed with the lower court, holding that a trier of fact could certainly have reached conclusions different from those reached by the lower court. The appeals court stated, “Whatever the final outcome of this case, we are persuaded that only a full trial on the merits, preceded by adequate discovery, will properly sort out the protectability of ‘CFE.’”<sup>74</sup>

### **\*312 IX. Fourth Circuit: This Country Ain’t Big Enough for the Both of Us-A Dispute Over the Rights to the Mark “Lone Star”**

In *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc.*,<sup>75</sup> the trial court granted the plaintiffs’ motion for summary judgment on the question of liability and issued a permanent injunction enjoining Alpha from using the mark “LONE STAR GRILL” or any other name or mark containing the words “lone star” in association with restaurant services.<sup>76</sup> The Fourth Circuit affirmed the holding with respect to the plaintiff Lone Star Steakhouse & Saloon (Lone Star), but reversed the lower court with respect to the other plaintiff.<sup>77</sup>

Lone Star is the owner of two registrations for the mark “LONE STAR CAFE” and one registration for the mark “LONE STAR STEAKHOUSE & SALOON.” Plaintiff Max Shayne, Inc. operates the Lone Star Cafe Roadhouse in New York City. The registrations owned by Lone Star were originally obtained by Max Shayne based on first use in 1977, and they were assigned to Lone Star in 1992. In 1991, defendant Alpha began operating a restaurant under the name “Lone Star Grill” in Arlington, Virginia. Plaintiffs sued for trademark infringement and unfair competition under state law.<sup>78</sup> Numerous instances of actual confusion were demonstrated by Lone Star.<sup>79</sup>

Alpha argued that summary judgment was improper because it had not had time to complete its discovery.<sup>80</sup> Both the district court and the Fourth Circuit rejected this argument, pointing out that the Alpha had had ample opportunity to conduct discovery, and had only itself to blame for not carrying out discovery in a timely manner.<sup>81</sup>

Alpha next challenged the grant of summary judgment on the question of infringement. In reviewing the district court’s finding, the Fourth Circuit noted that the district court had improperly hinged its determination of infringement on the fact that the plaintiff’s mark was incontestable.<sup>82</sup> The appellate court correctly pointed out that a finding of infringement requires both a valid protectable mark *and* a likelihood of confusion.<sup>83</sup> Alpha argued that the mark was not incontestable because Max Shayne had abandoned the mark “LONE STAR CAFE” when it began using the mark “LONE STAR CAFE ROADHOUSE.” In response, the appeals court held that although the word “roadhouse” was in larger lettering on some signs, the remaining words “LONE STAR CAFE” were followed by the registered trademark symbol and were used on various items \*313 other than the restaurant’s sign.<sup>84</sup> Thus, the Fourth Circuit found that the district court’s rejection of Alpha’s claim of abandonment was not erroneous.<sup>85</sup>

The district court had not addressed the issue of confusion; therefore, the Fourth Circuit discussed the requirements in that circuit and found that “lone star” was not descriptive. The court considered the other factors, including actual confusion, and held that the entry of a permanent injunction was proper with respect to Lone Star.<sup>86</sup> The court also held that the district court committed error in granting Max Shayne summary judgment on the issue of liability, and reversed the lower court’s ruling with respect to that plaintiff because Max Shayne did not compete in the area in question and had presented no evidence that Alpha’s use damaged Lone Star or caused actual customer confusion.<sup>87</sup>

The Fourth Circuit also rejected Alpha’s assertion that it should not be enjoined because it was the senior user in the Washington, D.C. area. The court noted that Alpha’s use of the mark in that area did not predate the federal registration and found that because Lone Star had expanded into the same area, an injunction was the proper remedy.<sup>88</sup>

Finally, the court affirmed the district court’s denial of Alpha’s motion for leave to file an amended answer and add counterclaims, noting that Alpha had not justified its delay, and that the amendment would prejudice the plaintiff.<sup>89</sup>

## X. Conclusion

The various circuit courts have dealt with numerous trademark law issues in the recent cases reported above. In addition, the amendments to the Lanham Act resulting from the Uruguay Round Agreements Act implementing GATT were addressed. As trademark law continues to evolve, the courts will be faced with problematic issues in trademark-related litigation.

### Footnotes

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<sup>1</sup> *See generally* 15 U.S.C. § 1051 *et seq.* (1988).

<sup>2</sup> *See* Uruguay Round Amendments Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994). Section 523 provides that amendments to the Lanham Act are effective one year after the World Trade Organization Agreement enters into force in the United States. *Id.*, 108 Stat. at 4982.

<sup>3</sup> *See* 15 U.S.C. § 1127 (1988), *as amended* by Uruguay Round Agreements Act § 521, 108 Stat. at 4981-82 (1994) (effective Jan. 1, 1996).

<sup>4</sup> 15 U.S.C. § 1052(a) (1988), *as amended* by Uruguay Round Agreements Act § 522, 108 Stat. at 4982 (1994) (effective Jan. 1, 1996).

<sup>5</sup> 40 F.3d 1431, 32 U.S.P.Q. 2d (BNA) 1724 (3rd Cir. 1994).

<sup>6</sup> *Id.* at 1433, 32 U.S.P.Q.2d at 1725.

<sup>7</sup> *Id.* at 1436-37, 32 U.S.P.Q.2d at 1728.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 1440-41, 32 U.S.P.Q.2d at 1731-32.

<sup>10</sup> *Id.* at 1439, 32 U.S.P.Q.2d at 1730.

<sup>11</sup> *Id.* at 1449, 32 U.S.P.Q.2d at 1738.

<sup>12</sup> *Id.* at 1452, 32 U.S.P.Q.2d at 1741.

<sup>13</sup> *Id.* at 1453, 32 U.S.P.Q.2d at 1742.

<sup>14</sup> *Id.* at 1454, 32 U.S.P.Q.2d at 1742.

<sup>15</sup> 40 F.3d 968, 32 U.S.P.Q.2d (BNA) 1823 (9th Cir. 1994).

<sup>16</sup> *Id.* at 969-70, 32 U.S.P.Q.2d at 1823-24.

<sup>17</sup> *Id.* at 969, 32 U.S.P.Q.2d at 1823.

<sup>18</sup> *Id.*, 32 U.S.P.Q.2d at 1824.

<sup>19</sup> *Id.* at 970, 32 U.S.P.Q.2d at 1824.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 971, 32 U.S.P.Q.2d at 1826.

<sup>24</sup> *Id.* at 971-72, 32 U.S.P.Q.2d at 1826.

<sup>25</sup> 41 F.3d 39, 32 U.S.P.Q. 2d (BNA) 1936 (2nd Cir. 1994).

<sup>26</sup> *Id.* at 40, 32 U.S.P.Q.2d at 1936.

<sup>27</sup> *Id.* at 41, 32 U.S.P.Q.2d at 1937.

<sup>28</sup> *Id.* at 42-43, 32 U.S.P.Q.2d at 1938-39.

<sup>29</sup> *Id.* at 42, 32 U.S.P.Q.2d at 1937-38.

<sup>30</sup> *Id.*, 32 U.S.P.Q.2d at 1938.

<sup>31</sup> *Id.* at 44-45, 32 U.S.P.Q.2d at 1940.

<sup>32</sup> *Id.* at 45, 32 U.S.P.Q.2d at 1940.

<sup>33</sup> *Id.* at 47, 32 U.S.P.Q.2d at 1942.

<sup>34</sup> 38 F.3d 1161, 33 U.S.P.Q.2d (BNA) 1001 (11th Cir. 1994).

<sup>35</sup> *Id.* at 1165, 33 U.S.P.Q.2d at 1002. (The Eleventh Circuit incorporated the lower court's documents as an appendix.)

<sup>36</sup> *Id.* at 1165-66, 33 U.S.P.Q.2d at 1002.

<sup>37</sup> *Id.* at 1166, 33 U.S.P.Q.2d at 1002-03.

<sup>38</sup> *Id.* at 1176, 33 U.S.P.Q.2d at 1012.

<sup>39</sup> *Id.* at 1178, 33 U.S.P.Q.2d at 1013.

<sup>40</sup> *Id.* at 1178-82, 33 U.S.P.Q.2d at 1013-16.

<sup>41</sup> *Id.* at 1182-84, 33 U.S.P.Q.2d at 1016-18.

<sup>42</sup> 41 F.3d 1242, 33 U.S.P.Q.2d (BNA) 1140 (D.C. Minn. 1994).

<sup>43</sup> *Id.* at 1247-48, 33 U.S.P.Q.2d at 1144-45.

<sup>44</sup> *Id.* at 1244, 33 U.S.P.Q.2d at 1141-42.

<sup>45</sup> *Id.*, 33 U.S.P.Q.2d at 1142.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 1244-45, 33 U.S.P.Q.2d at 1142.

<sup>48</sup> *Id.* at 1247, 33 U.S.P.Q.2d at 1144.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 1247-48, 33 U.S.P.Q.2d at 1144-45.

<sup>51</sup> *Id.*

<sup>52</sup> 43 F.3d 775, 33 U.S.P.Q.2d (BNA) 1266 (2nd Cir. 1994).

<sup>53</sup> *Id.* at 785-86, 33 U.S.P.Q.2d at 1267.

<sup>54</sup> *Id.* at 778, 33 U.S.P.Q.2d at 1267.

<sup>55</sup> *Id.* at 778-79, 33 U.S.P.Q.2d at 1267.

<sup>56</sup> *Id.* at 779, 33 U.S.P.Q.2d at 1268.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 783, 33 U.S.P.Q.2d at 1271.

<sup>60</sup> *Id.* at 782, 33 U.S.P.Q.2d at 1270.

<sup>61</sup> *Id.* at 783, 33 U.S.P.Q.2d at 1271.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*, 33 U.S.P.Q.2d at 1271-72.

<sup>64</sup> *Id.* at 783-84, 33 U.S.P.Q.2d at 1271-72.

<sup>65</sup> *Id.* at 785, 33 U.S.P.Q.2d at 1273.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 785-86, 33 U.S.P.Q.2d at 1273.

<sup>68</sup> 41 F.3d 223, 33 U.S.P.Q.2d (BNA) 1328 (5th Cir. 1995).

<sup>69</sup> *Id.* at 224-25, 33 U.S.P.Q.2d at 1331.

<sup>70</sup> *Id.* at 226-27, 33 U.S.P.Q.2d at 1330-31.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 227, 33 U.S.P.Q.2d at 1331.

<sup>73</sup> *Id.* at 228-29, 33 U.S.P.Q.2d at 1332.

<sup>74</sup> *Id.* at 229, 33 U.S.P.Q.2d at 1332.

<sup>75</sup> 43 F.3d 922, 33 U.S.P.Q.2d (BNA) 1481 (4th Cir. 1995).

<sup>76</sup> *Id.* at 925, 33 U.S.P.Q.2d at 1481-82.

<sup>77</sup> *Id.*, 33 U.S.P.Q.2d at 1482.

<sup>78</sup> *Id.* at 925-26, 33 U.S.P.Q.2d at 1482-83.

<sup>79</sup> *Id.* at 927, 33 U.S.P.Q.2d at 1483.

<sup>80</sup> *Id.* at 928, 33 U.S.P.Q.2d at 1484.

<sup>81</sup> *Id.* at 929, 33 U.S.P.Q.2d at 1485.

<sup>82</sup> *Id.* at 930, 33 U.S.P.Q.2d at 1486.

<sup>83</sup> *Id.* at 933, 33 U.S.P.Q.2d at 1489.

<sup>84</sup> *Id.* at 931, 33 U.S.P.Q.2d at 1487.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 935, 33 U.S.P.Q.2d at 1491.

<sup>87</sup> *Id.* at 938, 33 U.S.P.Q.2d at 1493.

<sup>88</sup> *Id.* at 932, 33 U.S.P.Q.2d at 1488.

<sup>89</sup> *Id.* at 940-41, 33 U.S.P.Q.2d at 1493-94.