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LITIGATION INVOLVING PROTECTED DESIGNS

B.R. Pravel†

I. INTRODUCTION

The true value of intellectual property becomes most evident in those instances in which litigation is necessary to protect a person's rights to property. Although in the vast majority of cases, litigation is not necessary to enforce these rights, it remains the ultimate weapon, and when carefully used, assures the proper measure of respect and reward for the created property. This discussion of general intellectual property litigation focuses on the differences and similarities involved in the two major types of protected designs:¹ design patents and proposed design copyright registrations (DCRs) under Senate Bill 791 (Bill 791).²

II. LITIGATION—PREFILING INVESTIGATION AND ANALYSIS

A. *Initial Strategy*

An intellectual property owner generally attempts to resolve a perceived violation of his or her property rights by negotiation and/or settlement before litigation. Sometimes, however, it becomes necessary to file suit without notice to an infringer, in order to prevent the infringer from filing a declaratory judgment suit. Before commencing litigation, various issues should be considered so that the intellectual property owner can achieve the greatest chance of success and simultaneously assure that he or she is acting in good faith.

B. *Statute of Limitations and Laches*

The statute of limitations is important if damages are the primary concern of the design patent owner. Although the statute of limitations does not always prevent filing suit where there exists a continuing tort by continuing infringement of the design, it can limit the amount of damages.³ The statute of limitations period for design patents is currently six years;⁴ however, in Bill 791 the statute of limitations would be reduced to three years for DCRs.⁵

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1. Although other protections exist for designs such as unfair competition, theft of confidential information, and breach of contract, the term "protected design" in this Article refers only to design patents under the United States patent laws and design copyright registrations under the proposed legislation sometimes referred to as industrial design protection.
2. S. 791, 100th Cong., 1st Sess. §§ 1001-1030 (1987). The stated purpose of the Industrial Innovation and Technology Act of 1987 is to provide protection for industrial designs through amendment of the copyright law under 17 U.S.C. § 2 (1988).
3. See *Custer v. United States*, 622 F.2d 554 (Fed. Cir.), cert. denied, 449 U.S. 1010 (1980).
4. 35 U.S.C. § 286 (1988).
5. S. 791, 100th Cong., 1st Sess. § 1022(c) (1987).

It is possible that a shorter time period than that provided by statute might be applied by a court based on the doctrine of laches.⁶ For this doctrine to apply, a court must determine that there has been an unreasonable delay, and representations have been made, or actions have been taken by the design patent owner which an alleged infringer could reasonably have believed were an indication that the owner would not assert any ownership rights against the alleged infringer.⁷

Because of these potential obstacles, the intellectual property owner must be extremely cautious in contacting an alleged infringer before filing suit, and must carefully consider the defense of laches since courts have heavily weighed that defense in infringement decisions.⁸

C. *The Substantive Issues of Validity and Infringement*

The first substantive inquiry before filing suit to protect a design is whether infringement has occurred. In patent design cases, the established test for determining infringement emerged from the 1872 Supreme Court decision in *Gorham Co. v. White*,⁹ where the Court stated:

[I]f, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other.¹⁰

The continued vitality of the *Gorham* test was recently evidenced by the United States Court of Appeals for the Federal Circuit decision in *Avia Group International, Inc. v. L.A. Gear California, Inc.*¹¹ In *Avia*, the court cautioned that "[i]n addition to overall similarity of designs, 'the accused device must appropriate the novelty in the patented device which distinguishes it from the prior art.'"¹² Beyond these requirements, the design patent owner must further prove an infringement by a preponderance of the evidence.¹³

6. The doctrine of laches is based upon the maxim that equity aids the vigilant and not those who slumber on their rights. BLACK'S LAW DICTIONARY 453 (6th ed. 1990).

7. See *Potter Instrument Co., Inc. v. Storage Technology Corp.*, 641 F.2d 190 (4th Cir.), cert. denied, 454 U.S. 832 (1981). A detailed discussion of the doctrine of laches is beyond the scope of this paper.

8. See, e.g., *Baker Mfg. Co. v. Whitewater Mfg. Co.*, 430 F.2d 1008 (7th Cir. 1970), cert. denied, 401 U.S. 95 (1971) (notice to defendant followed by nine-year lapse, held barred); *Bussell v. General Motors Corp.*, 401 F.2d 202 (7th Cir. 1968) (discussion with defendant followed by thirty-six year lapse, held barred).

9. 81 U.S. (14 Wall.) 511 (1872).

10. *Id.* at 528.

11. 853 F.2d 1557 (Fed. Cir. 1988).

12. *Id.* at 1565 (quoting *Shelcore, Inc. v. Durham Indus., Inc.*, 745 F.2d 621, 628 n.16 (Fed. Cir. 1984)).

13. *Lee v. Dayton-Hudson Corp.*, 838 F.2d 1186, 1187 (Fed. Cir. 1988).

In DCR cases, Bill 791 maintains the burden of proving infringement on the owner; however, the test differs from a design patent case.¹⁴ Specifically, the proposed infringement test for DCR is comparable to that now used for copyright infringement in that the owner must establish that the design or work was copied, and that the infringing design or work is "substantially identical" to the registered design or work.¹⁵

While proof of infringement may be more difficult under Bill 791 because of the added requirement of proving that the DCR design was copied, application of accepted and established copyright law principles to a DCR infringement dispute may make proving infringement easier overall.¹⁶ A threshold requirement of proof of copying is proof that the infringer had access to the DCR design. If such access cannot be established directly, copyright precedent holds that it may be established by circumstantial evidence of wide publicity of the protected design.¹⁷ Once access is established, the side-by-side comparison of the protected design and the alleged infringing device should follow. Such a comparison parallels the "substantial similarity" prong of the test for determining copyright infringement.¹⁸

The evidence required to determine the validity of a protected design for a DCR should be more easily developed and presented than that required for a design patent. In the case of *In re Nalbandian*,¹⁹ the court determined whether a design patent would have been "obvious" under the provisions of 35 U.S.C. § 103, based on the vantage point of "the designer of ordinary capability who designs articles of the type presented in the application."²⁰ Such a test would seem to require either an expert's opinion or testimony from a designer of ordinary capability. The *Avia* court, however, discounted an expert's opinion on the legal conclusions of obviousness and held that the "overall appearance" of the design as compared to the prior art references was the controlling factor.²¹ Accordingly, the test for design patent infringement appears to turn on whether the "overall appearance" of the patented design would be suggestive to a person of ordinary capability who designs articles of the type presented in the design patent.

The *Avia* court further indicated that "secondary considerations" or objective evidence, such as commercial success of the patented design, are to be considered on the issue of obviousness in design patents on the same

14. S. 791, 100th Cong., 1st Sess. § 1008(e) (1987).

15. *Id.* § 1008(d); *Cf.* 17 U.S.C. § 501 (1988).

16. Section 1027(a) provides: "Nothing in this chapter shall affect any right or remedy now or hereafter held by any person under [existing copyright law]." S. 791, 100th Cong., 1st Sess. § 1027(a) (1987).

17. *See Miller Brewing Co. v. Carling O'Keefe Breweries of Canada, Ltd.*, 452 F. Supp. 429 (W.D.N.Y. 1978).

18. *See Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980).

19. 661 F.2d 1214 (C.C.P.A. 1981).

20. *Id.* at 1216.

21. *Avia Group Int'l, Inc. v. L.A. Gear Cal., Inc.*, 853 F.2d 1557, 1564 (Fed. Cir. 1988).

basis that such objective evidence is considered in utility patents.²² The issue of commercial success and the nexus required between commercial success and the protected article introduce complexities in proof. Therefore, in the case of design patents, careful consideration at the initial stages of filing suit is necessary on the obviousness over the prior art issue.

The proposed test for validity of a DCR in Bill 791 is much less complicated than a test for the validity of a design patent. Bill 791 requires that the protected design must be "attractive" or "distinct,"²³ but that requirement is tempered somewhat by other language which permits protection if there is a "substantial revision, adaptation or rearrangement of such subject matter."²⁴ The "excluded subject matter" set forth in section 1002(a)(2) of Bill 791 consists of: "staple or commonplace, such as a standard geometric figure, familiar symbol, emblem or motif, or other shape, pattern or configuration which has become common, prevalent, or ordinary."²⁵ This "excluded subject matter" is further defined in section 1002(a)(3) as "different from a design excluded by paragraph (2) and only in insignificant details or in elements which are variants commonly used in the relevant trades."²⁶

Under these statutory requirements, the difference between the DCR design and the prior art need not meet the unobviousness test of 35 U.S.C. § 103, but must consist of variation from the prior art that is more than "insignificant." Even though the courts probably will not require expert testimony on the DCR analysis to prove infringement and/or validity, expert testimony may be received under the Federal Rules of Evidence, and should be offered at trial.²⁷

D. Jurisdiction Issues

Beyond the above considerations for the attorney and protected design owner, another important consideration is the court in which the suit is filed. This consideration entails basic subject matter and personal jurisdiction issues. Presently, the United States district courts have exclusive jurisdiction for design patent litigation,²⁸ but there is no such statutory provision giving exclusive jurisdiction to the federal courts in Bill 791.

III. SUMMARY JUDGMENT UNDER BILL 791

Since it usually takes several years after the suit is filed before a case reaches trial, a summary judgment motion may save time and money in the

22. *Id.*

23. S. 791, 100th Cong., 1st Sess. § 1001(a) (1987).

24. *Id.* § 1003.

25. *Id.* § 1002(a)(2).

26. *Id.* § 1001(a)(3).

27. FED. R. EVID. 702. Rule 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." *Id.*

28. 28 U.S.C. § 1338 (1988).

litigation process.²⁹ In such instances, defendant's motion for summary judgment will allege noninfringement and/or invalidity of the protected design; on the other hand, plaintiff's motion will seek a summary judgment that the defendant has infringed and the patent or DCR is valid. A number of cases involving utility patents have been decided by summary judgment on the issue of noninfringement.³⁰ For example, in *In re Mann*,³¹ where an attempt was made to avoid a public use of an invention more than one year before the filing of the design patent, the court granted summary judgment for the defendant because there could not be an experimental use and the patent was therefore invalid.³² By contrast, the court in *Avia* granted plaintiff's motion for summary judgment, holding that plaintiff's patent was both valid and infringed by the defendant.³³

If Bill 791 is passed, summary judgment should become a more prevalent strategy because a court would merely have to decide as a matter of law whether there has been "substantial revision, adaptation or rearrangement of such subject matter."³⁴ Such a decision is even more likely treated as a matter of law than the issue of obviousness in a design patent case, since secondary factual considerations or objective evidence on such things as commercial success are not in dispute. Since DCR cases generally do not involve disputed facts other than where access to the protected design is at issue, summary judgment is viable.

IV. RELIEF AVAILABLE

A. *Injunctive Relief*

Title 35, section 171 of the United States Code provides: "The provisions of this title relating to patents for inventions shall apply to patents for designs, except as otherwise provided."³⁵ Accordingly, a design patent owner is entitled to an injunction to prevent continued infringement of the design patent under 35 U.S.C. § 283 which provides: "The several courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable."³⁶

29. Summary judgment is granted if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. FED. R. CIV. P. 56(c).

30. *E.g.*, *Townsend Eng'g Co. v. Hitec Co.*, 829 F.2d 1086, 1087 (Fed. Cir. 1987); *Brenner v. United States*, 773 F.2d 306, 307 (Fed. Cir. 1985).

31. 861 F.2d 1581 (Fed. Cir. 1988).

32. *Id.* at 1582. This issue of public use or an offer for sale more than one year before the filing of a design patent results in the patent being invalid by statutory bar. 35 U.S.C. § 102 (1988). Whether there exists a "public use" or an "on sale" bar depends on the totality of circumstances in each case. *See UMC Elecs. Co. v. United States*, 816 F.2d 647, 656 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1025 (1988); *Buildex Inc. v. Kason Indus., Inc.*, 849 F.2d 1461, 1462 (Fed. Cir. 1988).

33. *Avia Group Int'l, Inc. v. L.A. Gear Cal., Inc.*, 853 F.2d 1557 (Fed. Cir. 1988).

34. S. 791, 100th Cong., 1st Sess. § 1003 (1987); *see also* text accompanying note 24.

35. 35 U.S.C. § 171 (1988).

36. *Id.* § 283.

In many cases, an injunction is the primary objective of the patent owner, whether it is a design patent or a utility patent, because the patent owner will generally recover only a reasonable royalty from the infringer. Title 35, section 284 of the United States Code provides that upon finding for a claimant, the claimant is entitled to "damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court."³⁷ Although an injunction applies only to future infringing acts,³⁸ it preserves the exclusive rights of the patent owner in the marketing of the protected design and allows the owner to benefit from the resulting profits from such exclusive rights.³⁹

Beyond the section 284 remedy, a special provision for an additional remedy for the infringement of a design patent exists in 35 U.S.C. § 289 which provides:

Whoever during the term of a patent for a design, without license of the owner, (1) applies the patented design, or any colorable imitation thereof, to any article of manufacture for the purpose of sale, or (2) sells or exposes for sale any article of manufacture to which such design or colorable imitation has been applied shall be liable to the owner to the extent of his total profit, but not less than \$250, recoverable in any United States district court having jurisdiction of the parties.

Nothing in this section shall prevent, lessen, or impeach any other remedy which an owner of an infringed patent has under the provisions of this title, but he shall not twice recover the profit made from the infringement.⁴⁰

Since section 289 does not preclude section 284 recovery, a design patent owner should rely upon the "reasonable royalty" damages of section 284, particularly if the infringer does not in fact market the design at a profit, or the claimant faces difficulty in proving that the infringer made a profit.

B. Willful Infringement

Under section 284, the amount of the damages may be increased up to three times the amount found or assessed.⁴¹ This typically occurs where "willful" infringement exists.

The Federal Circuit has recognized and refined the requirements for establishing willful infringement. For example, in *Underwater Devices Inc.*

37. *Id.* § 284; see also *infra* notes 57-63 and accompanying text.

38. See *Trans-World Mfg. Corp. v. Al Nyman & Sons, Inc.*, 750 F.2d 1552 (Fed. Cir. 1984).

39. See *Flat Slab Patents Co. v. Turner*, 285 F. 257 (8th Cir. 1922), *cert. denied*, 262 U.S. 752 (1923).

40. 35 U.S.C. § 289 (1988).

41. *Id.* § 284.

v. Morrison-Knudsen Co.,⁴² the court held that failure on the part of the infringer to obtain a competent legal opinion on patent validity amounted to willful infringement.⁴³ Three years later, however, in *Rolls-Royce Ltd. v. GTE Valeron Corp.*,⁴⁴ the court held that failure to obtain a competent legal opinion on infringement did not mandate a finding of willful infringement, but was a factor to consider in a totality of circumstances analysis.⁴⁵ Finally, in *E.I. du Pont de Nemours & Co. v. Phillips Petroleum Co.*,⁴⁶ the court held that a patent owner must prove willful infringement by a clear and convincing evidence standard.⁴⁷

In light of this court's treatment, it is clear that increased damages are possible. Therefore, the prudent patent owner should carefully monitor the alleged infringer's specific actions.

C. Attorney Fees

Although attorney fees are not mandatory, 35 U.S.C. § 285 provides: "The court in exceptional cases may award reasonable attorney fees to the prevailing party."⁴⁸ Often, where an infringer is guilty of willful infringement, that determination provides a basis for finding an exceptional case within the meaning of section 285. An example of this exists in *Kloster Speedsteel AB v. Crucible Inc.*,⁴⁹ where the court stated: "Willfulness of infringement relates to the accused infringer's conduct in the marketplace [and] . . . may make the case so exceptional as to warrant attorney fees. . . ."⁵⁰

D. Lost Profits

In order to qualify for the recovery of lost profits, a patent owner must meet the criteria established by the Federal Circuit in *Radio Steel & Manufacturing Co. v. MTD Products, Inc.*⁵¹ These criteria require that the patent owner prove:

- (1) a demand for the patented product;
- (2) the absence of acceptable noninfringing substitutes;
- (3) the patent owner's manufacturing and marketing capability to exploit the demand for the patent; and
- (4) the amount of profit that would have been made.⁵²

42. 717 F.2d 1380 (Fed. Cir. 1983).

43. *Id.* at 1390.

44. 800 F.2d 1101 (Fed. Cir. 1986).

45. *Id.* at 1109.

46. 849 F.2d 1430 (Fed. Cir.), *cert. denied*, 488 U.S. 986 (1988).

47. *Id.* at 1439-40.

48. 35 U.S.C. § 285 (1988).

49. 793 F.2d 1565 (Fed. Cir. 1986).

50. *Id.* at 1580.

51. 788 F.2d 1554 (Fed. Cir. 1986).

52. *Id.* at 1555 (citation omitted).

Because difficulty exists in proving the "absence of acceptable noninfringing substitutes," particularly in the case of a design patent, the likelihood of obtaining lost profits by a design patent owner is even less than in the case of a utility patent. In *Radio Steel*, the court affirmed a district court decision which held that a wheelbarrow subject to a utility patent had several attributes which demonstrated an absence of substitutes.⁵³ Since the various prior art wheelbarrows on the market incorporated "only some, but not all, of the elements of the patent," the court held that the noninfringing substitutes were not "acceptable."⁵⁴ On this analysis, the likelihood of recovering lost profits seems greater in a utility patent than one would normally expect. The test, however, seems inappropriate for a design patent because other designs that have only some of the design features should be "acceptable" from a design standpoint.

E. *The Entire Market Value Rule*

The entire market value rule provides that when the patented feature constitutes the basis for customer demand and the patent owner could have anticipated the sale of unpatented elements in connection with the sale of the claimed invention, the patent owner is entitled to the lost profits based upon the value of the entire apparatus and not just the value of the component(s) in the patent claim. In *TWM Manufacturing Co. v. Dura Corp.*,⁵⁵ the court explained the rule as stating:

The entire market value rule allows for the recovery of damages based on the value of an entire apparatus containing several features, when the feature patented constitutes the basis for customer demand. It is the "financial and marketing dependence on the patented item under standard marketing procedures" which determines whether the non-patented features of a machine should be included in calculating compensation for infringement.⁵⁶

Even if patent owners cannot establish the criteria for the award of lost profits, they are still entitled under 35 U.S.C. § 284 to a reasonable royalty.⁵⁷ A reasonable royalty is generally based upon a hypothetical willing licensor-willing licensee approach, and includes consideration of fifteen criteria set forth in *Georgia-Pacific Corp. v. United States Plywood Corp.*⁵⁸

53. *Id.* at 1554.

54. *Id.* at 1556.

55. 789 F.2d 895 (Fed. Cir.), *cert. denied*, 479 U.S. 852 (1986).

56. *Id.* at 901 (quoting *Kori Corp. v. Wilco Marsh Buggies & Draglines, Inc.*, 761 F.2d 649, 656 (Fed. Cir.), *cert. denied*, 474 U.S. 902 (1985)).

57. 35 U.S.C. § 284 (1988).

58. 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970), *modified*, *Georgia-Pacific Corp. v. United States Plywood-Champion Papers, Inc.*, 446 F.2d 295 (2d Cir.), *cert. denied*, 404 U.S. 870 (1971). The criteria set forth by the district court were: (1) The royalties received by the patentee for the licensing of the patent in the suit, proving or tending to prove an established royalty; (2) rates paid by the licensee for the use of other patents comparable

Additionally, courts have considered as relevant the following factors: prior licenses by the patent owner,⁵⁹ licenses on other patents in the industry,⁶⁰ cost savings to the infringer,⁶¹ and the profits the infringer could anticipate making.⁶² Furthermore, selection of the appropriate method for computing damages has been held to be within the reasonable discretion of the trial court.⁶³

F. DCR Remedies

While the remedies available to a design patent owner for infringement are substantial, similar remedies for a DCR owner should be likewise available for several reasons. First, section 1022(a) of Bill 791 provides that the court shall award the claimant "damages adequate to compensate for the

to the patent in suit; (3) nature and scope of the license, as exclusive or non-exclusive; or as restricted or non-restricted in terms of territory or with respect to whom the manufactured product may be sold; (4) licensor's established policy and marketing program to maintain his patent monopoly by not licensing others to use the invention or by granting licenses under special conditions designed to preserve that monopoly; (5) the commercial relationship between the licensor and licensee, such as, whether they are competitors in the same territory in the same line of business; or whether they are inventor and promoter; (6) the effect of selling the patented specialty in promoting sales of other products of the licensee; the existing value of the invention to the licensor as a generator of sales of his non-patented items; and the extent of such derivative or convoyed sales; (7) duration of the patent and the term of the license; (8) established profitability of the product made under the patent; its commercial success; and its current popularity; (9) the utility and advantages of the patent property over the old modes or devices, if any, that had been used for working out similar results; (10) nature of the patented invention; the character of the commercial embodiment of it as owned and produced by the licensor; and the benefits to those who have used the invention; (11) extent to which the infringer has made use of the invention; and any evidence probative of the value of that use; (12) portion of the profit or of the selling price that may be customary in the particular business or in comparable businesses to allow for the use of the invention or analogous inventions; (13) portion of the realizable profit that should be credited to the invention as distinguished from non-patented elements, the manufacturing process, business risks, or significant features or improvements added by the infringer; (14) opinion testimony of qualified experts; and (15) the amount that a licensor (such as the patentee) and a licensee (such as the infringer) would have agreed upon (at the time the infringement began) if both had been reasonably and voluntarily trying to reach an agreement; that is, the amount which a prudent licensee—who desired, as a business proposition, to obtain a license to manufacture and sell a particular article embodying the patent invention—would have been willing to pay as a royalty and yet be able to make a reasonable profit and which amount would have been acceptable by a prudent patentee who was willing to grant a license. *Id.* at 1120.

59. *Minnesota Mining & Mfg. Co. v. Berwick Indus., Inc.*, 393 F. Supp. 1230, *aff'd*, 532 F.2d 330 (3d Cir. 1976).

60. *Armco, Inc. v. Republic Steel Corp.*, 707 F.2d 886 (6th Cir. 1983).

61. *Hansen v. Alpine Valley Ski Area, Inc.*, 718 F.2d 1075 (Fed. Cir. 1983).

62. *Georgia-Pacific Corp. v. United States Plywood Corp.*, 318 F. Supp. 1116 (S.D.N.Y. 1970), *modified*, *Georgia-Pacific Corp. v. United States Plywood-Champion Papers Inc.*, 446 F.2d 295 (2d Cir.), *cert. denied*, 404 U.S. 870 (1971).

63. *Kori Corp. v. Wilco Marsh Buggies & Draglines, Inc.*, 761 F.2d 649, 654 (Fed. Cir.), *cert. denied*, 474 U.S. 902 (1985).

infringement, but in no event shall such award be less than the reasonable value."⁶⁴ Second, section 1022(b) of the bill provides that the court may award the claimant the "infringer's profits resulting from the sale of the copies if it finds that the infringer's sales are reasonably related to the use of the claimant's design."⁶⁵ Finally, section 1021 of the same bill provides for an injunction in accordance with the principles of equity to prevent infringement.⁶⁶

V. CONCLUSION

Although litigation is never truly simple or even inexpensive, DCR litigation should prove less expensive and somewhat simplified when compared to design patents litigation. Thus, the potential for adequate protection at a reduced cost should result in DCR being a valuable means of deterring blatant copying of industrial designs.

64. S. 791, 100th Cong., 1st Sess. § 1022(a) (1987).

65. *Id.* § 1022(b).

66. *Id.* § 1021.