

Federal Circuit Clarifies Standards for Using Internet Materials as Specimens of Use

On December 23, 2009, the Federal Circuit Court of Appeals gave trademark applicant Michael Sones an early Christmas gift in reversing a Trademark Trial and Appeal Board decision maintaining a refusal to accept Mr. Sones's specimen of use submitted for his application to register the mark ONE NATION UNDER GOD for "charity bracelets." In the Federal Circuit decision *In re Michael Sones*, the court held that a picture of goods is not a mandatory requirement for a website-based specimen of use. The proper test for an

acceptable website-based specimen is "just as any other specimen, ...it must in some way evince that the [applied-for] mark is 'associated' with the goods and services as an indicator of source."

The specimen of use of the applied-for mark submitted with a statement of use consisted of pages from the applicant's website including a product listing consisting of the wording "ONE NATION UNDER GOD™ CHARITY BRACELET for

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Complications Under the Physician's Immunity Statute: Still Rare, Potentially Costly

Attorneys practicing in the medical-patent field routinely submit method-of-treatment claims for prosecution before the U.S. Patent and Trademark Office, as such are considered patentable subject matter under U.S. law. When drafting and enforcing such claims, however, patent practitioners should be aware of the "physician's immunity" statute in force in the U.S. since 1996, as the statute may prevent the enforcement of remedies for infringement of certain method-of-treatment claims against physicians and hospitals.

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U.S. Design Patent— the New Patent King

A case may be made that recent court decisions have made obtaining and enforcing a utility patent more difficult. Conversely, recent court decisions have been largely favorable as to design patents. Although design patents protect ornamental features while utility patents cover functional aspects of an invention, this article suggests that design patent protection deserves greater consideration.

Design patents are on the rise. This is largely due to the fact that the burden

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Trademark Protection Proposals for New gTLDs Open for Comment

As we have previously reported, the timeline for launch of new gTLDs by ICANN has slowed while there is continuing evaluation of overarching issues, including trademark protection. In its Third Draft Applicant Guidebook, ICANN staff had proposed a number of trademark-protection mechanisms, including provisions for creation of a Trademark Clearinghouse ("TC"), which would make verification of rights easier when a new gTLD is in a sunrise period prior to launch. The Draft also proposed the creation of a Uniform Rapid Suspension System, which is a post-delegation dispute-resolution mech-

anism intended to more swiftly and less costly address the most obvious cases of trademark infringement or cybersquatting in domain names. Subsequent to the latest Guidebook proposal, a Special Trademarks Issues (STI) review team was created to further analyze the proposed rights-protection mechanisms. The STI team consisted of representatives from the various ICANN constituencies, including business and intellectual-property constituencies. The STI recently issued its recommendations, which are available at www.icann.org and open for comment

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Random House Asserts Digital Rights in Its Older Titles

In the mid 1990s, with the dawn of mainstream reliance on the internet and electronic communication, many of the large publishing companies revised their standard publishing contracts with authors to explicitly name rights in digital publication, along with the traditional printing rights. For many publishers, one of the constant areas for profit in a struggling industry remains its authors' backlists, the republication and sale of works long after their initial run. Now, with the swift rise in popularity of e-books in step with the growing use of digital book readers, many publishing companies find themselves scrambling for a way to claim digital rights for works in their backlists whose contracts did not explicitly include such rights, as some of these works had been published before the existence of the digital format.

The battle between authors and publishers over digital rights has now come to head in several inter-related events. On December 11 Random House sent a letter to many literary agents, announcing its position that all digital rights in its backlists vested with Random House. Many of the contracts that do not explicitly name the digital publishing rights still grant the rights to publish books "in book form" or "in any and all editions" according to

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Phony Floridians Foiled

Have you ever paid Federated Institute for Patent and Trademark Registry for services rendered in acquiring a patent or mark? Hundreds of companies paid on phony invoices issued by this Florida company, a Florida court recently found, allegedly to the tune of \$2.6 million.

The scheme: Companies applying for marks or patents from various government agencies received invoices from

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Specimens of Use (continued from page 1)
\$2.00” and under this listing the wording “ONE NATION UNDER GOD™ CHARITY BRACELET, CHOICE OF BLUE OR RED \$2.00 EACH. No photograph of the product was displayed on the submitted website materials. The web page also displayed a “shopping cart” function for online ordering, including a “View Cart” and “Add to Cart” function.

During prosecution, the trademark examiner treated Sones’s specimen of use as a ‘web catalog’ and strictly adhered to a rule from the Trademark Manual of Examining Procedures (TMEP) requiring a picture of the relevant goods as part of an acceptable catalog or similar specimen of use. In following this rule, the trademark examiner noted that the submitted specimen did not show a picture of the goods in close proximity to the mark— which, as described above, is entirely correct. In the Final Office Action, the trademark examiner took a more entrenched position, emphasizing that “a display is acceptable **‘only if’** it includes **‘a picture of the relevant goods.’**” (emphasis in original quote) The Board’s decision followed the bright line rule applied by the trademark examiner and concluded that Sones failed to satisfy “the criteria ...that the specimen (1) include a picture of the relevant goods and (2) show the mark sufficiently near the picture of the goods to associate the mark with the goods.” The Board also noted what it believed to be an inadequacy of Sones’s description of the goods on the submitted materials.

In reaching its decision, the Federal Circuit reviewed and commented on the origins of the rule applied by the trademark examiner and the Board. This rule originated in a federal district court decision *Land’s End, Inc. v. Manbeck*, addressing a specimen of use from a mail order catalog. While the *Land’s End* decision made reference to the catalog page showing a picture of the goods and corresponding

description—thus constituting “a display associated with the goods”— the decision hinged on the catalog page’s “point of sale” characteristics through the inclusion of order forms as part of the catalog. The USPTO interpreted and adopted the *Land’s End* decision and created a new section in the TMEP specifically for “catalogs as specimens.” Trademark examiners routinely apply this rule to electronic specimens of use, regardless of whether they are catalog pages, and the Board has regularly applied this standard on review.

In the *Sones* decision, the Federal Circuit clearly states that it does not believe the *Land’s End* decision established a clear rule requiring that specimens of use from the Internet always include a picture of the goods. The Federal Circuit pointed to the *Land’s End* decision’s reliance on the “point of sale” nature of the specimen, and less on the fact that the catalog page included a picture. The Federal Circuit also indicated that Internet specimens should be viewed in the same manner as actual goods sold in a brick-and-mortar store. Product labels and product packaging displaying the mark are readily accepted without a picture of the goods. Likewise, product displays such as tradeshow booths, have been found to be acceptable, even though goods were not present or visible at the tradeshow booth. The TMEP recognizes that a website is akin to an electronic retail store and that a web page is a “shelf-talker” or “banner” encouraging consumers to buy a product. The TMEP also recognizes that ordering from a website is the “equivalent” to picking up a box in a store, and boxes as product packaging do not need a photograph of the goods per se to link a trademark to the goods inside. Accordingly, the Federal Circuit questioned the need for a photograph in the context of Internet specimens. The Federal Circuit further pointed out that the TMEP also includes a section concerning specimens of use en-

titled “Electronic Displays” which makes reference to websites, but does not recite the elements of the test from *Land’s End*.

The Federal Circuit acknowledged that a “visual depiction” of a product is an important consideration in determining the sufficiency of an Internet specimen and the absence of a picture could certainly support a lack of association between a mark with the source of the goods. Nevertheless, a picture is not the only means for establishing an association between a mark and the goods, and a bright-line rule as applied by the trademark examiner and maintained by the Board was not correct. The Federal Circuit identified factors, as examples, to be considered in examining an Internet specimen of use, and possibly offsetting the lack of picture, as the “point of sale” nature of the specimen and whether the actual features or inherent characteristics of the goods are recognizable from the textual description.

The Federal Circuit vacated the decision of the Board and remanded the case for further proceeding consistent with the Federal Circuit’s decision.

This decision raises interesting issues that could shape future USPTO analysis of specimens of use and TMEP sections. The Federal Circuit is clearly looking to substance over form in specimens of use. Will this ease review of non-traditional or “new media” specimens of use? The Federal Circuit has made a distinction between a catalog as a specimen of use and an Internet reference as a specimen of use, but did not offer guidance on Internet-based catalogs. Whereas the TMEP section pertaining to catalogs as specimens of use includes factors that do not fully reflect the *Land’s End* decision, might an amendment to this TMEP section be forthcoming? These issues are likely to be addressed as the Board and USPTO digest the Federal Circuit’s decision.

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the comments made in the letter. Shortly thereafter, the Authors Guild revealed its own response to Random House's action on December 15, refuting Random House's claim by pointing to a 2002 New York case also involving Random House and Rosetta Books LLC (*Random House, Inc. v. Rosetta Books LLC*, 283 F.3d 490, 62 U.S.P.Q.2d (BNA) 1063 (2d Cir. 2002)). In that case, Random House had pointed to the same clause in its contracts granting publishing rights "in book form", that it is currently using to justify its claim to e-book rights in backlist titles. The Southern District of New York refused to grant a preliminary injunction to stop Rosetta from publishing the digital books of a number of authors in Random House's own backlist, finding that Random House did not have the electronic rights to the works of William Styron, Kurt Vonnegut Jr. and Robert Parker. Despite having the rights for the earlier print editions of the books "in book form," the digital rights to works that had been created before the advent of digital publishing were not automatically encompassed within the contracts and therefore vested with the author. The court of appeals subsequently affirmed the refusal to grant the injunctions against Rosetta. However, in late 2002 Random House and Rosetta settled their litigation and avoided trial on the merits. The case was also decided under New York state law, and could conceivably lead to a different approach elsewhere where state courts take a less restrictive approach in interpreting contracts. Indeed the New York appeals court pointed out that Random House did have some appeal to its argument that an e-book is merely "a 'form' of a book, and therefore within the coverage of [those] licenses."

One could argue that Random House's own actions do contradict its claim that the digital rights are inherently included in prior grants, considering it has explicitly contacted authors requesting that

the digital rights be released to Random House, and has also amended its standard contracts in 1994 to explicitly include such rights where necessary. While such actions may be seen as a way to just remove all doubt as to who controls the rights rather than as an admission that the digital rights are not included in prior grants, it certainly indicates that the issue and scope of prior contracts are not as clear cut as Random House is claiming.

Random House's announcement may also be a reaction to action by one of its authors, William Styron, author of "Sophie's Choice," and one of the authors involved in the earlier case with Rosetta. Styron recently entered an agreement with a different publishing company to release the e-book version of several of his novels that are in Random House's backlist. Around the same time, Steven Covey, the author of the popular "Seven Habits" series of books, announced that he had reached an independent and exclusive deal with Amazon to publish his books in digital format, presumably for use with the Kindle reading device. In reply, Simon & Schuster, the publisher of Covey's traditionally-published works, announced its intent to still publish its backlists in digital formats.

The issue seems to have not yet come to blows with publishers in Britain, where the e-book readers are less ubiquitous and a more common view is that publishers do not maintain the digital rights in their backlists unless they had been specifically granted. On the flip side, however, there also appears to be more reluctance in Britain for authors to turn to other e-publishing sourced beyond their print publisher. While such a gentlemen's agreement is working for the time being, it may only take one author on the scale of someone like Steven Covey to step towards seeking digital publishing deals elsewhere and challenge this arrangement.

Despite the New York case's prior finding, the fact that the parties did eventually reach a settlement and never went to trial leaves the issue somewhat open-ended, and Random House does maintain that since the matter eventually ended in a settlement, it is not a final ruling on the merits, only on the issue of the injunction. In refusing the injunction, the Rosetta court stated that the digital publishing rights for works created before the existence of digital publishing remained with authors, but this was under a fairly restrictive interpretation of the scope of the contracts. Would the same be true for works that were created after the existence of digital publishing, but before publishing contacts were amended to explicitly name such rights? If a contract granted the general publishing right using the catchall phrase of "in book form" or "in any and all editions," one could reasonably view this as encompassing digital publishing, provided the format was in existence at the time of the contract. While digital formats were certainly not contemplated for many books in a publishing company's backlist that were created before the dawn of digital publishing, there is a window between the start of digital publishing and the time when contracts were amended to specifically address digital rights.

With the stronghold by Amazon's Kindle in the e-publishing industry, followed closely by Barnes and Noble's new Nook and the Sony Reader, and the expected foray of Apple into the market in 2010, this issue is only beginning to develop. Furthermore, as digital versions are often far less costly for publishers to produce, authors are concerned that the royalty percentages provided by old contracts for the print editions may simply be inequitable and view the digital printing rights as a way to re-negotiate a more favorable percentage. Added on this, many large publishing companies intend to delay release of the digital format for many new titles, in

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an attempt to hold onto any potential profit from the hardback formats. In light of each party's at least partial motivation to increase its own profits, large publishing

companies may have been better off approaching author's and agents to rework old agreements, rather than making unilateral announcements claiming all rights under former terms.

Random House's letter may be just one more attempt to revive a struggling industry, and the first shot in what will likely be a long war over the ownership of the increasingly lucrative digital rights.

Immunity Statute (continued from page 1)
Under 35 U.S.C. 287(c), a medical practitioner who infringes a patent by performing a medical or surgical procedure on a human body (the Section also provides immunity for procedures performed on a nonhuman animal used in medical research or instruction directly relating to the treatment of humans) is immune from liability for that infringement, including freedom from injunctions, damages and attorneys fees. The immunity does not apply if the performance included the use of a patented product (machine, manufacture, composition of matter) in violation of patented claims to the product. While nicknamed to indicate physician's immunity, this statute provides immunity to non-physician medical treatment providers as well as health care entities related to the performance (e.g. hospitals). Section 287(c) also provides that immunity does not apply to certain device manufacturers, pharmacy or clinical lab services, or to US patents having effective filing dates prior to September 30, 1996.

The Supreme Court was given the opportunity to comment on subject matter that might fall under Section 287(c) in *Laboratory Corporation of America Holdings v. Metabolite Laboratories, Inc., et al.*, 548 U.S. 124, 126 S.Ct. 2921 (US S.Ct. 2006). At issue was the validity of claim 13 of U.S. Patent No. 4,940,658, which reads as follows:

A method for detecting a deficiency of cobalamin or folate in warm-blooded animals comprising the steps of:

assaying a body fluid for an elevated level of total homocysteine; and

correlating an elevated level of total homocysteine in said body fluid with a deficiency of cobalamin or folate.

Commentators hoped the Supreme Court would consider whether this diagnostic method claim would be considered protected medical activity under 35 U.S.C. 287(c), and whether physicians and hospitals may enjoy immunity from liability after infringing this claim. However, the Supreme Court dismissed the case on procedural grounds and did not consider 35 U.S.C. 287(c). Dissenting Supreme Court Justices commented that this claim should have been considered by the Court to make the public aware whether such a claim falls under 35 U.S.C. 287(c).

In *Emtel, Inc. v. Lipidlabs, Inc.*, 2008 U.S. Dist. LEXIS 77597 (S. Dist. Tex. 2008), a district court discussed 35 U.S.C. 287(c) in some detail. In *Emtel*, the holder of U.S. Patent No. 7,129,970 alleged infringement of claims including a method claim self-

categorized as a business method, directed in part to delivering medical services by having a physician diagnose medical problems from a distance. The alleged infringer filed a motion for summary judgment, requesting dismissal of the suit in part due to immunity as a provider of health services under 35 U.S.C. 287(c). The district court denied the motion for summary judgment under 35 U.S.C. 287(c), stating that the claims at issue were not infringed and therefore section 287(c) immunity did not apply.

Also, in response to the patent holder's assertion that the physician's immunity statute does not apply because "a Diagnosis is not a 'medical or surgical procedure,'" the *Emtel* Court noted that a procedure can refer to diagnosis in the medical field, citing medical dictionary definitions and reviewing legislative history records to rebut the patent holder's arguments. The Court also construed the phrase "the performance of a medical or surgical procedure on a body," suggesting that a diagnosing physician need not physically interact with a patient to deliver medical or surgical treatment under 287(c), and that a company providing communication links between physician and patient may qualify for 287(c) immunity.

General Recommendations

When drafting medical method claims for filing in the United States, we recommend considering whether the claims may fall under Section 287(c) (for instance, if they are directed to a medical or surgical method, or even a diagnostic method), and whether a potential infringer might be a physician or a hospital. Where Section

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until January 26, 2010. These recommendations provide greater detail to the processes than previous recommendations did, and in some cases are more limited in scope of protection.

In the Trademark Clearinghouse Proposal, the team consensus was that the Clearinghouse was not a rights-protection mechanism, but was to be used as a beneficial implementation tool for rights-protection mechanisms, such as during a Sunrise or Trademark Claims period of a new gTLD. The Clearinghouse is to be operated by an arms-length contractor, who would validate the trademarks included in the TC and create a centralized trademark database to provide information to the new gTLD registries. The database would include only "text mark" trademarks from all jurisdictions, which were nationally or multinationally registered, including countries where there is no substantive review. However, equal protection would not be required to be provided by registries to marks registered in a country with no substantive review. Common-law rights would be excluded from the database, except for court-validated common-law marks.

The TC database would only be used for validation during pre-launch of a new gTLD, and would not be used post-launch to screen requested domain names for trademark matches. The matches reported to a registry would only include identical matches between the domain name string and validated trademarks. The proposal states that inclusion of a validated mark in the TC database is not proof of any right, nor does it confer any rights on the trademark holder. Conversely, failure to file should not be perceived to be a lack of vigilance by trademark holders.

A minority opinion from the Intellectual Property Constituency objects to the unequal protection of no-substantive-

Immunity Statute *(continued from page 4)*

287(c) may be a later issue, we recommend that a claim set include claims having patented products and non-treatment steps where possible. Also, claims should be included in the application that will be geared toward manufacturers and others in the medical industry that do not qualify for 287(c) immunity.

We also recommend that patent litigators seeking immunity under Section 287(c) remember that the immunity likely only applies if infringement has been found. The statute does not prevent patent holders from alleging infringement or allow alleged infringers to avoid suit altogether. Rather, the statute provides immunity from the enforcement of remedies for infringement against medical practitioners and related health care entities.

review marks. It notes that this might prejudice marks from a large number of countries, including most of Europe, which do not engage in substantive review. It might also prejudice small businesses and not-for-profits whose budgets may not allow for a global registration program beyond their home country.

The Business Constituency and At-Large Advisory Committee also objected to the "identical match" provision. They suggested that a "match" between a validated mark and requested domain name should include the Mark plus significant words from the class description in the Nice Classification system, as was used in the .ASIA Sunrise period. This would further deter cybersquatters and curb registrations of domain names that include a trademark along with common words associated with it.

In the proposed Uniform Rapid Suspension Procedure (URS), the consensus of the STI Review Team is that the procedure would be a beneficial rights-protection mechanism for inclusion in the new

Multiple forms of patent protection should be considered, including utility, design and plant patents. It may be that a design patent provides the only means of patenting the product, in contrast to patenting the use of the product during a medical or surgical procedure.

Further, global marketing of a new invention should be considered during the initial claim drafting of the US utility application. In particular, patent protection and enforcement of such claims are treated differently in various countries. For example, most foreign patent offices do not allow method-of-treatment claims, but rather require "use" style claims instead. Therefore, certain claims may be composed in the US application in anticipation of the subsequent examination in specific foreign patent offices.

gTLD program. Whereas the Draft Guidebook proposal made the URS optional for new registries, the STI team calls for mandatory use of the URS for all new gTLDs. It is intended to be a post-delegation dispute-resolution mechanism to more swiftly and less costly address the most obvious cases of trademark infringement or cybersquatting in domain names. However, some constituencies question its effectiveness, cost and time savings when comparing it to the UDRP procedure.

In a URS, a Complainant would need to satisfy the same elements as in a UDRP, but with a higher burden of proof. Namely, a URS Complainant would need to establish clear and convincing evidence that there is no genuine issue of material fact requiring further consideration. Upon the filing of a complaint, and passing initial examination, an "Initial Freeze" status would be applied to the domain name. The freeze would dictate that the domain name cannot be transferred and the WHOIS record cannot change, but the domain name would still resolve to

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Design Patent (continued from page 1)

on design patent owners to prove infringement has been reduced, courtesy of the Federal Circuit's 2008 decision in *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665 (Fed. Cir. 2008) (en banc), cert. denied 129 S.Ct. 1917 (2009) that changed the test for design patent infringement, by dropping one of two previously required infringement tests. In particular, the Federal Circuit's point-of-novelty test was dropped in favor of the Court's ordinary-observer test. (Although the Federal Circuit also suggests that a test similar to the point-of-novelty test should be taken into consideration during the ordinary-observer test.) The patent in *Egyptian Goddess* was directed to the ornamental features of a nail buffer. While not a typical product for a design patent, the district court held that the infringer did not demonstrate the patent to be invalid. The Federal Circuit affirmed the finding of non-infringement.

In contrast, ongoing developments in patent law have been less favorable to owners of utility patents. The 2007 U.S. Supreme Court decision in *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 127 S. Ct. 1727 (2007) has changed the tests applied by the USPTO when deciding to grant a patent, and by the US courts when deciding whether to invalidate a patent. The ruling has created great consternation within the patent community, raising concerns that it would be very difficult to obtain a patent, and that issued patents *en masse* could be held invalid. The *KSR* decision considered a claim directed to a combination of an electronic sensor with an adjustable automobile pedal so that pedal's position can be transmitted to a computer that controls the throttle in the vehicle's engine. The Court held that the claim was invalid as a combination of familiar elements according to known methods which does no more than yield predictable results.

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the original IP address and all features of the domain would still function (e.g. resolving to a website, routing e-mail). However, the effect of a decision in favor of the Complainant is limited. Rather than allowing a transfer of the domain name as in a UDRP, a successful Complaint in a URS would only result in the domain name being placed in "hold" status. As a result, the domain name would still remain in the Registrant's name in WHOIS information during the course of the registration, but would no longer resolve to the original website, pointing instead to an informational web page provided by the URS service provider about the URS process.

While the initial intent was to create a streamlined and swifter version of the UDRP, the timelines of the proposal merely create a shorter timeframe for the examination process, while still allowing 20 days for the registrant to file an answer. Even if a registrant were to default, there is still the possibility of filing an answer within 30 days of a decision, or even later upon the payment of additional fees. Either party would have the right to seek a de novo appeal, along with the option of pursuing a UDRP or court action. Initial URS complaints would be decided by one panelist, while an appeal would be decided by a three-person panel. The URS would also call for penalties against trademark holders that try to abuse the process, along with penalties against Examiners who abused the process. The full URS process would also be subject to a review by ICANN one year after the first date of operation.

Minority positions were voiced again by the Business Constituency and At-Large Advisory Committee, requesting the transfer of the domain name in a URS. Otherwise, it would be necessary to file a UDRP if a cybersquatter registered a domain name that the trademark holder

intended to utilize. With similar costs necessary to investigate and prepare a complaint for a URS, the cost savings in filing fees and minimal time savings may not be worth the limited value of placing the domain name on hold, while allowing it to be free for future registration upon expiration.

While the various constituency groups and stakeholders have had their voice in preparing a consensus Trademark Protection Proposal for use with new gTLDs, there is not full consensus on all issues. Trademark holders and other interested parties are encouraged to provide their comments to ICANN during the public comment period. The proposals presented by the STI team, along with public comments, will then be considered by ICANN when it finalizes the proposed model for trademark protection in the new gTLD program.

Phony Floridians (continued from page 1)

Federated Institute for Patent and Trademark Registry, indicating money was "due" for "charges of registration." The companies paid the invoices, believing them to be legitimate charges associated with their intellectual property. According to official reports, Federated Institute did not render a service or pay fees with monies it collected, but rather spirited its booty across the sea into Swiss bank accounts.

The Florida court considered testimony provided by a WIPO PCT expert and held this behavior violated Florida's Deceptive and Unfair Trade Practices Act. Full restitution is being sought for targets of the scheme.

We recommend that all IP holders be aware that hoaxers are looking to the lucrative IP field for potential targets. More information about schemes to mislead or cheat IP holders is available at http://wipo.int/pct/en/warning/pct_warning.htm.

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It remains unresolved whether the US Supreme Court intended *KSR*'s patentability analysis to apply to design patents. The Federal Circuit declined to address this issue in its 2009 decision in *Titan Tire Corp. v. Case New Holland, Inc.*, 556 F.3d 1372, 1384 (Fed. Cir. 2009). That case was directed to a design patent covering the ornamental features of a tractor tire. The Federal

Circuit indicated that the issue of whether it was necessary to consider the *KSR* analysis was not relevant. Instead, the issue of obviousness, in the context of a preliminary injunction, was affirmed as to the district court's *Durling* analysis (*Durling v. Spectrum Furniture Co.*, 101 F.3d 100 (Fed. Cir. 1996)). The *Titan Tire Corporation* decision suggests that perhaps the analysis of *KSR*, which was

directed to a utility patent, may not be applied to design patents.

Make no mistake. Design patents are a potent tool and should be given serious consideration as a means of intellectual property protection for a vast array of products, provided there is an ornamental aspect of the invention which is not dictated by function.