IP/ENTERTAINMENT LAW WEEKLY CASE UPDATE FOR MOTION PICTURE STUDIOS AND TELEVISION NETWORKS

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Global-Tech Appliances, Inc., et al. v. SEB S.A., US Supreme Court, May 31, 2011

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- In a patent infringement case, the Supreme Court held that to be liable for inducing infringement, a party that actively induces infringement must have knowledge that the induced acts constituted patent infringement, though evidence of willful blindness is sufficient to support a finding of knowledge.

Although this case is a patent infringement inducement case, it may have some impact on the manner in which contributory infringement and inducement are viewed in the copyright context. The Supreme Court affirmed the Federal Circuit's decision, holding that Petitioners violated 35 U.S.C. § 271(b) by actively inducing infringement by willfully blinding themselves to the infringing sales that they encouraged Respondent's competitor to make.

Petitioner developed a deep fryer for Respondent's competitor by buying the Respondent's overseas deep fryer and copying all but its cosmetic features. The Respondent's overseas deep fryer bore no U.S. patent markings. Additionally, after copying the design, Petitioners retained an attorney to conduct a right-to-use study, and refrained from telling the attorney that its designed was directly copied. The attorney did not locate Respondent's patent and issued an opinion later stating that Petitioners' deep fryer did not infringe any of the patents he had found.

Respondent sued and subsequently settled its infringement claims against the competitor for whom Petitioners developed the infringing deep fryer, and then sued Petitioners for direct infringement and inducing infringement. A jury found for the Respondents on both theories and Petitioners appealed, arguing that there was insufficient evidence to support the finding of induced infringement because Petitioners did not actually know of Respondent's patent until it received notice of Respondent's lawsuit against its competitor.

Both the District Court and the Federal Circuit affirmed the judgment. The Federal Circuit found that Petitioners actively induced infringement because there was adequate evidence that Petitioners deliberately disregarded a known risk that Respondents had a protective patent. The Supreme Court affirmed on different grounds, holding that the test for knowledge under §271(b) is not deliberate disregard of risk, and that willful blindness would be sufficient as evidence of knowledge.

Willful blindness is a doctrine traditionally used in criminal law. It requires that (1) the defendant subjectively believes there is a high probability that a fact exists and (2) the defendant takes deliberate actions to avoid learning that fact. A willfully blind defendant is "one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts." The willfully blind defendant has a scienter that surpasses recklessness and negligence.

For example, in this case, that the Petitioners knew that the Respondent's product had valuable technology for the U.S. market is evidenced by its decision to copy all but the cosmetic features of the Respondent's fryer. Additionally, there was evidence that the Petitioners' CEO knew that overseas models do not bear U.S. patent markings, and deliberately copied the overseas model rather than the U.S. model. The Court found the most persuasive evidence that the CEO neglected to inform the attorney from whom Petitioners sought a right-to-use opinion that the product was a knock-off of Respondent's deep fryer. Even more telling, the CEO could not provide any evidence to raise doubt to the inference that this was withheld from the attorney to manufacture a claim of plausible deniability in the event Petitioners were accused of patent infringement.

Thus, the Court found that there was sufficient evidence in this case for a jury to conclude that Petitioners subjectively believed there was a high probability that the Respondent's deep fryer was patented, that Petitioners took deliberate steps to avoid knowing that fact and affirmed the judgment of the Federal Circuit.

Justice Kennedy dissented, writing that willful blindness is insufficient for the statutory knowledge standard, and that the majority should remand to the Federal Circuit to consider whether there is sufficient evidence of knowledge to support the jury's finding of inducement.

Brantley v. NBC Universal, USCA Ninth Circuit, June 3, 2011
Click here for a copy of the full decision.

- Ninth Circuit holds that plaintiffs, cable and satellite TV subscribers, fail to state an antitrust claim against television programmers and distributors where the complaint alleges bundling of "high demand" and "low demand" channels and alleges injury to consumers, but fails to allege injury to competition.

Plaintiffs are a putative class of retail cable and satellite television subscribers who brought suit against television programmers, including NBC Universal Inc., Viacom, Inc., the Walt Disney Company, Fox Entertainment Group and Turner Broadcasting System, Inc. (programmers) and distributors, including Time

Warner Cable, Inc., Comcast Corporation, Comcast Cable Communications LLC, CoxCom Inc., The DIRECTV Group, Inc., EchoStar Satellite LLC and Cablevision Systems (distributors), alleging that the programmers' practice of selling only multi-channel cable bundles prevented distributors from offering *a la carte* programming and violated Section 1 of the Sherman Act. Plaintiffs sought monetary damages as well as an injunction compelling programmers and distributors to make channels available on an individual, non-bundled basis.

The Ninth Circuit affirmed the district court's dismissal of plaintiffs' third amended complaint with prejudice for failure to state a claim for relief under Section 1 of the Sherman Act. Specifically, the Ninth Circuit agreed with the district court that the complaint failed to allege any cognizable injury to competition.

Plaintiffs alleged that programmers, entities that own television programs and channels, and sell programming wholesale to distributors in the "upstream market," have two categories of channels: "must-have," high-demand channels with a large number of viewers, and a group of less desirable, low-demand channels with low viewership. Plaintiffs alleged that programmers derive market power from their "must-have" channels because distributors, entities that sell programming to consumers in the "downstream market," can't market and sell a programming package without those channels. Plaintiffs alleged that programmers exploit this market power by bundling the high and low demand channels together for sale to distributors. Plaintiffs claimed that this bundling violated Section 1 of the Sherman Act by reducing consumer choice and inflating subscription fees.

The district court dismissed plaintiffs' initial complaint for failure to show that their alleged injuries were caused by an injury to competition. Plaintiffs alleged in their amended complaint that the programmers' practice of selling bundled cable channels prevented independent programmers from entering and competing in the upstream market for programming channels. After the district court denied defendants' motion to dismiss that complaint, holding that plaintiffs had adequately pleaded both injury to competition and antitrust standing, the parties conducted initial discovery. Plaintiffs subsequently abandoned this theory and filed a third complaint deleting all allegations that the defendants' bundling practices foreclosed independent programmers from participating in the upstream market. Plaintiffs also filed a motion requesting a ruling that they did not have to allege that potential competitors were foreclosed from the market in order to defeat a motion to dismiss. The parties agreed that defendants could file a motion to dismiss and that if they prevailed, plaintiffs' third complaint would be dismissed with prejudice. The district court granted defendants' motion to dismiss with prejudice because plaintiffs failed to allege any cognizable injury to competition and denied plaintiffs' motion to rule on the question whether allegations of foreclosed competition are required to state a Section 1 claim.

The Ninth Circuit affirmed the district court's dismissal for failure to state a claim. It reasoned that while plaintiffs' complaint did allege a type of vertical restraint imposed by upstream programmers on downstream distributors, that restraint could not be construed as an injury to competition.

The court rejected plaintiffs' argument that the sale of multi-channel packages harms consumers by (1) limiting the manner in which distributors compete with one another because distributors are unable to offer *a la carte* programming, (2) reducing consumer choice, and (3) increasing prices. The court found that these allegations, without more, don't state a claim under Section 1 of the Sherman Act.

According to the court, limitations on the manner in which the distributors compete with one another do not constitute a cognizable injury to competition without proof of competitive harm. It found that plaintiffs' complaint failed to identify any such harm. The complaint's allegations of reduced choice and increased prices address only the element of antitrust injury (whether the consumers have standing because they suffered the sort of injury that flows from an antitrust violation), not whether plaintiffs have satisfied the pleading standard for an actual violation. The court also noted that, although plaintiffs may be required to purchase bundles that include unwanted channels instead of individual channels, antitrust law recognizes the ability of businesses to choose the manner in which they do business absent an injury to competition.

The court also rejected plaintiffs' argument that because most or all of the programmers and distributors engage in the bundling practice, it constitutes an injury to competition. While circumstances might arise in which competition is injured or reduced due to a widely applied practice that harms consumers, the court found that plaintiffs failed to explain how the defendants' bundling practice injured competition (as opposed to consumers). The court found that the complaint included no allegations that the programmers' sale of cable channels in bundles has any effect on efforts by other programmers to produce competitive programming channels or on competition between distributors on cost and quality of service. In the absence of any allegation of injury to competition, as opposed to injuries to consumers, the court concluded that plaintiffs failed to state a claim for an antitrust violation.

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