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PATENTS

Fed. Cir. Decision Curtails Appellees' Right to Cross-Appeal

By Erik Paul Belt

Thanks to a recent U.S. Court of Appeals for the Federal Circuit decision, an appellee in a patent infringement case no longer will be able to file a cross-appeal for the sole purpose of preserving its right to argue alternative claim interpretations to support the judgment.

In the case, *Bailey v. Dart Container Corp. of Michigan*, 292 F.3d 1360 (Fed. Cir. 2002), the Federal Circuit issued a precedential order holding that a party may file a cross-appeal only "when acceptance of the argument it wishes to advance would result in a reversal or modification of the judgment rather than an affirmance." 292 F.3d at 1362. In doing so, the Federal Circuit dismissed the cross-appeal of an accused infringer, depriving that party of the tactical advantage that cross-appeals afford: the opportunity to file a reply brief in addition to its opposition brief. With no cross-appeal, the appellant gets an initial and a reply brief—and the last word at oral argument—while the appellee gets only its opposition brief. See Fed. R. App. Pro. 28 and 34.

The patentee in *Bailey* received an unfavorable claim construction after a Markman hearing. To expedite appeal, the patentee conceded that the accused products do not infringe under that claim construction and obtained a Rule 54(b)

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PRACTICE POINTERS

Beyond Cybersquatting: Helping Clients Develop Effective Brand Protection Strategies

By Mark McGuire

Extending a company's traditional brand protection program into the digital world involves more than safeguarding against simple domain name abuse. It requires a comprehensive, proactive and well-focused brand protection strategy that will be able to combat third-parties' unauthorized attempts to do everything from affiliating themselves with your client, to making their pop-up advertisements appear to visitors of your client's web site.

As every trademark professional knows, brands and their underpinning trademark rights are a critical element of business value. Nowhere is this truer than in the digital world, where a strong brand represents credibility in a sea of unsubstantiated claims, unproven vendors and anonymous individuals.

While the digital world raised the importance and value of brands, it also dramatically increased the scope and speed of brand misuse and infringement. By eliminating geographical boundaries, opening new channels of communication with customers and allowing businesses to transact business anonymously, the Internet has spawned an environment in which unscrupulous competitors, con artists, pornographers, saboteurs, hackers and other criminals easily can trade on the value of well-known brands, misdirect and confuse customers, and otherwise infringe on established trademark and other intellectual property rights. Left unchecked, this online brand abuse can have an immediate and significant impact on brand equity that may have taken years—and significant capital—to establish.

Domain Name Disputes

As businesses attempted to create online presences in the middle of the 1990s, they often found that their well-known brands had already been registered in the .com domain extension. A certain gold rush mentality was under way, with many individuals (referred to as either cyber-pirates or online entrepreneurs, depending on one's perspective) registering numerous well-known names. See, e.g., *Intermatic Inc. v. Toeppen*, 947 F. Supp. 1227 (N.D. Ill. 1996) (involving a defendant who had registered more than 200

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Beyond Cybersquatting

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ing as a result of domain piracy, many companies undertook costly domain name registration activities to pre-empt domain speculation, and initiated numerous enforcement actions against inactive domain names.

Utilize Technology, Build Efficiencies. With more than 3 billion existing pages, the Web is simply too massive and dynamic to monitor using manual human efforts alone. Technology providers exist to help intellectual property practitioners police online abuse across the entire Internet universe. To be effective, however, a monitoring service must be capable of separating damaging online abuse from innocuous uses of a company's brands, images and content online. The most effective services will alert a company only to actionable occurrences of online abuse that meet the company's enforcement thresholds.

With these guideposts in mind, intellectual property practitioners can establish digital brand protection strategies that move beyond simple domain name monitoring to successfully combat a wide range of online brand abuses in a focused and efficient manner.

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Right to Cross-Appeal

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judgment to that effect, thus saving the parties from a trial. The patentee then appealed, and the accused infringer filed a cross-appeal. The patentee moved to dismiss the cross-appeal.

The patentee argued that a party who is not aggrieved by a judgment may not appeal from it. See *Intellectual Prop. Dev. Inc. v. TCI Cablevision of Cal. Inc.*, 248 F.3d 1333, 1339 (Fed. Cir. 2001) ("A party that receives all it has sought generally is not aggrieved by the judgment and cannot appeal from it"). The accused infringer, as the victor in the lower court proceeding, had nothing to complain about; the judgment denied the patentee's infringement claims and granted the defendant's counterclaims for a declaratory judgment of noninfringement. The accused infringer sought the cross-appeal in order to preserve its right to argue noninfringement based on alternative grounds (e.g., the accused products do not contain structures meeting other claim limitations that were construed in favor of the patentee).

Before *Bailey*, the Federal Circuit had dismissed cross-appeals that a prevailing party had filed merely to preserve its right to argue alternative claim interpretations to support the judgment. See, e.g., *Mantech Environmental Corp. v. Hudson Environmental Servs. Inc.*, 152 F.3d 1368, 1370 (Fed. Cir. 1998) (dismissing a cross-appeal because the district court did not rule against the cross-appellant on any claims). But the Federal Circuit also had entertained cross-appeals in similar cases. Moreover, it had never laid down a firm rule on the issue. See, e.g., *Budde v. Harley Davidson*

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Inc., 250 F.3d 1369 (Fed. Cir. 2001).

In the *Bailey* case, the Federal Circuit addressed this apparent conflict and held that a cross-appeal is improper and must be dismissed when the prevailing party is seeking only to make alternative arguments for affirming the judgment and is not seeking to modify or reverse some aspect of the judgment. The court arrived at the decision partially out of its desire to reduce the amount of briefing and to protect appellants from the inequity of allowing the appellee the chance to file an additional brief and have the last word. 292 F.3d at 1362.

The typical cross-appeal is one that has been filed after a court holds that the patent-in-suit is valid but not infringed. In that case, the accused infringer must file a cross-appeal if it hopes to challenge validity in case the noninfringement finding is overturned. See *Radio Steel & Mfg. Co. v. MTD Prods. Inc.*, 731 F.2d 840, 844 (Fed. Cir. 1984). Another example of a properly filed cross appeal is one that is filed by a patent owner who proves infringement but is disappointed by the damages award. If the infringer appeals, the patent owner may cross-appeal to modify the damages. See, e.g., *Dow Chem. Co. v. U.S.*, 226 F.3d 1334, 1347 (Fed. Cir. 2000).

In short, a cross-appeal is proper only when the cross-appellant "seeks to enlarge its own rights under the judgment or to lessen the rights of its adversary under the judgment." *Bailey v. Dart*, 292 F.3d at 1362. That is now the established rule in the Federal Circuit.

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