



## Ninth Circuit Adopts Good Faith Defense for Lanham Act Claims Premised on Allegedly False Patent Infringement Allegations

BY RODGER R. COLE AND MARYBETH MILIONIS

In *Fisher Tool Co., v. Gillet Outillage*, 530 F.3d 1063 (9th Cir. 2008), the Ninth Circuit adopted the Federal Circuit's standard requiring a showing of bad faith in order to maintain Lanham Act and state law claims premised on allegedly false representations of patent infringement made by a patentee, its distributors, agents and/or attorneys to third parties. In so doing, it affirmed summary judgment for Gillet due to Fisher Tool's lack of evidence that Gillet, and those working in concert with it, made the representations in bad faith. Summary judgment on Fisher Tool's malicious prosecution claims was similarly affirmed in the absence of evidence that the underlying patent infringement suit was filed in bad faith.

### Practical Impact

This decision provides a safe harbor for patentees, and those working in concert with them, for statements made to third parties regarding alleged patent infringement so long as they are made in good faith. For those accused but exonerated patent infringers seeking to file a collateral lawsuit for Lanham Act violations, malicious prosecution, or other state claims premised on a patentee's failed infringement suit or representations of infringement to others, they will be required to submit probative evidence of the patentee's bad faith to withstand summary judgment.

### Factual Background & Claims

Gillet is a French company that manufactures hose clamp pliers and owns a number of U.S., French and other patents on those pliers. Upon learning that Fisher Tool, a U.S. company, was making similar pliers, Gillet consulted with its attorneys as to whether Fisher Tool infringed its patents. Three different infringement analyses were performed: two by Gillet's outside counsel and a third by another outside attorney. All three opined that Fisher Tool pliers infringed Gillet's patents. Gillet's attorneys then drafted letters expressing its "strong opinion" that Fisher Tool's pliers infringed. Those letters were subsequently sent to Gillet's customers via its U.S. distributor.

Gillet then filed an infringement action in the Northern District of California. Gillet then dismissed the suit after the district court judge issued its *Markman* hearing order narrowly construing Gillet's claims. After Gillet dismissed the infringement suit, Fisher Tool filed this lawsuit against Gillet, its U.S. distributor, and its attorneys for malicious prosecution, violations of Section 43(a) of the Lanham Act, and various California tort laws. Gillet successfully moved for summary judgment on all claims. Fisher Tool appealed the district court's order.

### No Lanham Act Liability for Infringement Representations Made in Good Faith

Lacking any evidence of bad faith on the part of Gillet, its U.S. distributor, and its attorneys, the Ninth Circuit affirmed summary judgment on Fisher Tool's claim that the letter accusing it of infringing Gillet's pliers patents constituted false advertising under Section 43(a) of the Lanham Act and otherwise violated California tort law. In deciding this issue, the Court adopted the Federal Circuit's requirement that when Lanham Act and state tort claims rest on a defendant's representation of patent infringement by the plaintiff, the plaintiff must demonstrate that the representations were made in bad faith. As noted in the discussion of malicious prosecution, Fisher Tool failed to offer any evidence that Gillet lacked a good faith belief that its pliers patent had been infringed. Accordingly, it had no liability for communicating that belief to its customers.

In adopting this standard, the Ninth Circuit also expanded its reach to cover entities, such as distributors and attorneys, who act in concert with a defendant to enforce its patent rights. In the absence of any evidence that Gillet's agents drafted or distributed the letter in bad faith,

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they faced no liability under Section 43(a) or California law. Even the inference that they did not intend to carry out the letter's threat to sue all those distributing Fisher Tool's pliers was not sufficiently probative evidence of bad faith to reverse summary judgment.

### Malicious Prosecution & the Good Faith Standard

On appeal Fisher Tool sought reversal of summary judgment on its malicious prosecution claims arguing that Gillet acted in bad faith by withholding information from its attorneys it "knew or should have known would defeat" the underlying patent infringement suit. At issue was whether or not Gillet knew of a purported "mistranslation" in its patent. The Ninth Circuit rejected this claim on the basis that (a) the mistranslation was not clear on the face of the patent as French-to-English dictionaries appeared to support the translations advanced by Gillet and (b) that in any event Fisher Tool had no evidence that either Gillet or its attorneys knew or should have known about the mistranslation. More generalized allegations by Fisher Tool that Gillet otherwise knew of facts rendering its patent invalid or unenforceable were similarly rejected as, presuming Gillet knew of them, "the company could reasonably have concluded that they were neither 'pertinent' nor 'material' and therefore didn't have to be disclosed to its lawyers."

Summary judgment on the malicious prosecution claims brought against Gillet's law firm was also affirmed for lack of evidence showing an absence of probable cause to bring the suit. California law requires malicious prosecution plaintiffs demonstrate that the lawsuit at issue was so completely lacking in apparent merit that "no reasonable attorney would have thought the claim tenable." Here the Court pointed to the three infringement analyses as evidence of probable cause. As Fisher Tool failed to proffer evidence that the analyses did not meet professional standards or were otherwise performed in bad faith, summary judgment was proper. That the district court eventually construed the claims more narrowly than expected was irrelevant as to whether or not the lawsuit was filed in good faith on the basis of the infringement analyses. The Court further found that even if the pre-filing investigation as to the validity of the patent was negligent, that too was irrelevant as the infringement claims were at least "tenable."

### Opinion Letters Remain Important Even in the Wake of *Seagate*

BY SAINA S. SHAMILOV

Last year's *Seagate* decision by the Federal Circuit left some wondering whether there remained any use for opinion letters addressing infringement, validity or enforceability of a patent. Several cases in 2008 suggest that opinion letters do, in fact, remain strategically important. Patent infringement is a strict liability offense. Once it is determined that infringement has occurred, the only consideration is whether infringement was willful and thus warrants an enhanced damages award. For decades,

accused infringers in patent suits have relied on opinions of counsel to defend against willful infringement claims that may lead to enhanced damages. An opinion of counsel is a letter written by a patent attorney that concludes that a patent is invalid, unenforceable, and/or is not infringed by a potential or accused infringer's products or services. Reliance on opinions has provided accused infringers with a defense against willful infringement allegations, while allowing them to continue developing, manufacturing, using, or selling accused technology. Indeed, potential infringers, upon receiving notice of another's patent rights, previously had an affirmative duty to seek and obtain competent legal advice from counsel before continuing or initiating any possible infringing activity. This affirmative duty was imposed on them by their general duty to exercise due care to determine whether or not they are infringing a patent once on notice of the patent.

The standard changed last year when the Court of Appeals for the Federal Circuit overruled the affirmative-duty-of-care-standard it originally had set out 25 years prior in *Underwater Devices Inc. v. Morrison-Knudsen Co.*, 717 F.2d 1380 (Fed. Cir. 1983). In its landmark decision in *In re Seagate Technology LLC*, 497 F.3d 1360 (Fed.Cir. 2007), the Federal Circuit abandoned the affirmative-duty-of-care-standard and the affirmative obligation to obtain an opinion of counsel as a requirement for a defense of willful infringement, and set out a new two-part standard for proof of willful infringement permitting enhanced damages. First, the new standard requires a showing, by clear and convincing evidence, of at least "objective recklessness" on behalf of an accused infringer, i.e., that the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent. Second, once objective recklessness is established, the patentee must prove that the risk was either known or so obvious that it should have been known to the accused infringer.

The court explained that the new standard is more in line with definitions of willfulness set out in other areas of law. The term "willful" is not unique to patent law. As used in other civil contexts, the term generally describes reckless behavior. According to the court, the previous *Underwater Devices* standard was "akin to negligence" and hence, was inconsistent with application of willfulness theories in other civil contexts. The court also noted that the new standard is in line with Supreme Court precedent equating willfulness with recklessness. The court provided no specific guidance on how to apply the new standard and specifically reserved further application of it for future cases.

The new standard raised several questions, one of which is whether opinion letters, which are no longer required, can nevertheless be useful in defending against willfulness allegations. Indeed, after the new standard was articulated by the Federal Circuit, some commentators predicted that opinion letters would not be useful anymore in defending against willfulness allegations and enhanced damages. However, some recent decisions suggest otherwise.

The Federal Circuit itself suggested, in *Finisar Corp. v. DirectTV Group, Inc.*, 523 F.3d 1323 (Fed. Cir. 2008), that obtaining opinion letters, although not required, remains a very useful tool against willfulness allegations. In *Finisar*, the Federal Circuit held that a competent opinion letter of non-infringement or invalidity shows that the accused infringer did not engage in objectively reckless behavior. The accused infringer in *Finisar*, DirectTV Group, obtained an opinion letter of non-infringement with respect to the accused patent and proceeded to use its accused television broadcast satellite systems while relying on the letter. The Federal Circuit concluded that DirectTV's reliance on the competent opinion letter provided "a sufficient basis for [the accused infringer] to proceed without engaging in objectively reckless behavior with respect to the [accused] patent." Thus, although the court abandoned the affirmative duty to obtain a legal opinion to avoid a finding of willfulness, a competent opinion letter may still negate a claim of an objectively reckless behavior and provide a defense to willful infringement.

While opinion letters may still be useful in defending against willfulness, they may not be enough on their own. In *Cohesive Technologies, Inc. v. Waters Corp.*, 526 F. Supp. 2d 84 (D. Mass. 2007), a Massachusetts court based its finding of no willfulness on a fact that the defendant obtained an opinion letter from in-house counsel. But, in addition to considering the opinion letter obtained by the accused infringer, the court found that other facts in the dispute between the parties supported a lack of objective recklessness. The court found that Waters Corporation, the defendant, engaged in sufficient due diligence in determining whether its accused products infringed the patent at issue in the case prior to manufacturing the accused product. Once Waters Corporation was on notice of the patent, it engaged scientists to evaluate whether the accused product infringed the claims of the asserted patent. The scientists conducted several experiments and independently concluded that the asserted patent was not infringed. The scientists also met with the in-house counsel to discuss their findings and the opinion letter reflected their conclusions. The results of the experiments and conclusions of the scientists were presented at trial and the defendant's positions in the case were consistent with conclusions in the opinion letter. Thus, in addition to the competence of the opinion letter, due diligence in determining whether the patent is infringed prior to commencement of litigation and credibility of defense positions during litigation also may be important in defending against willfulness.

Other recent decisions confirm the importance of arguments and positions advocated by accused infringers during litigation with respect to willful infringement. In *ResQNet.com, Inc. v. Lansa, Inc.*, 533 F. Supp. 2d 397 (S.D.N.Y. 2008), although the accused infringer was unsuccessful and lost at trial as to both infringement and invalidity issues with respect to an accused patent, the court refused to find willfulness and enhance

damages because the defendant's arguments at trial were "substantial, reasonable and far from the sort of easily-dismissed claims that an objectively reckless infringer would be forced to rely upon." In one of very few post-*Seagate* decisions, *Black & Decker, Inc. v. Robert Bosch Tool Corp.*, 260 Fed. Appx. 284 (Fed. Cir. 2008), the Federal Circuit stated that legitimate and credible defenses to infringement and invalidity arguments presented during litigation will demonstrate lack of objective recklessness on behalf of the accused infringer and negate a finding of willfulness.

These recent decisions suggest that under the new standard articulated in *In re Seagate Technology*, as with the previous *Underwater Devices* standard, the totality of circumstances surrounding infringing activity still are considered in determining whether infringement is willful and warrants enhanced damages. The decisions also suggest that reliance on a favorable opinion of counsel, although not critical to the determination of whether infringement was willful as it was under the old test, is still a factor that courts may consider in determining whether the accused infringer's behavior was objectively reasonable and thus not reckless. Thus, the *In re Seagate Technology* decision did not render opinion letters obsolete. Applications of the new standard, although not vast, still show that competent opinion letters relied upon by accused infringers may establish a lack of willfulness.

## Quick Updates

### Federal Circuit Validates Open Source Licenses

Although open source software licenses have been used for years, there have been relatively few court decisions on open source issues. The Court of Appeals for the Federal Circuit recently provided some guidance in this area. An August 13 decision in *Jacobsen v. Katzer*, 535 F.3d 1373 (Fed Cir. 2008), held that the Artistic License, one of the common forms of open source licenses, only granted the user a copyright license if certain conditions were met; if they were not, then no license was granted and unauthorized copying, modification, and distribution could lead to copyright liability.

In the trial court, the defendants had convinced the judge that the Artistic License was intentionally broad. Any failure to follow the terms of the license, the district court held, might only lead to a breach of the license but would not create liability for copyright infringement. Further, defendants argued, since the license was free, any breach would not be compensable in damages. As a breach of contract, defendants argued that injunctive relief would not be available either. The district court denied the plaintiff's request for a preliminary injunction.

The Federal Circuit took the plaintiff's appeal from the Northern District of California because the original complaint included a patent non-infringement declaratory relief claim, which was not at issue in the appeal.

Copyright issues not being exclusive to the Federal Circuit, the Federal Circuit applied Ninth Circuit law. The Federal Circuit explained that there are important economic aspects to open source licenses even though money does not change hands. The copyright holder can enjoy faster development than might otherwise be possible, quickly gain market share and reputational benefits, and have the software improved free of charge by experts who may be better at software development and debugging than the original developer.

Moving on to whether a license had been granted to defendants, the Federal Circuit observed that the Artistic License expressly states, “The intent of this document is to state the conditions under which a Package may be copied,” and that the grant clause itself states that a user is given the right to copy, modify, and distribute the software “provided that” at least one of four enumerated conditions are met (attribution, internal use within an organization only, renaming modified executables and documenting changes, or making other arrangements directly with the copyright holder). The Federal Circuit held that absent a user meeting one of these conditions, no license was granted and a copyright claim was available to the plaintiff. The Federal Circuit held that these limitations were not merely contractual covenants.

Using rather broad language, the Federal Circuit described such conditions as being “vital to enable the copyright holder to retain the ability to benefit from the work of downstream users.” The restrictions were held to be “clear and necessary to accomplish the objectives of the open source licensing collaboration, including economic benefit.” The Federal Circuit held that injunctive relief might be even more important in an open source regime than under a traditional licensing arrangement, as open source licenses “might well be rendered meaningless absent the ability to enforce through injunctive relief.” As a result, the Federal Circuit vacated.

The law of open source licenses remains far from settled, and other courts may come to a different conclusion. Thus, time will tell whether or not the *Jacobsen* case will stand as a watershed decision legitimizing the fundamental basis of open source licenses.

### Three District Courts Say “Making Available” Music Files Not Enough to Violate the Public Distribution Right

Copyright holders own the exclusive right to distribute copies of their works to the public under §106(3) of the Copyright Act. But what does it mean to “distribute” a work on the Internet? Must copies actually be created on other users’ computers, or is it enough that the defendant offer or make them available for download? Earlier authority appears inconsistent or confused on the issue. But, subject to some qualifications discussed below, each of three district court cases decided this Spring that making copyrighted works available for possible download through

peer-to-peer networks is by itself not enough to violate the distribution right.

The Copyright Act does not define “distribution,” but some authority has supported the view that it encompasses offers or makes works available, regardless of whether copies are actually disseminated. In *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997), for example, the Fourth Circuit held that a library distributed a copyrighted work when it added the work to its collections, listed the work in its catalog and made the work available for borrowing or browsing. In *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), the Ninth Circuit stated, “Napster users who upload file names to the search index for others to copy violate plaintiff’s distribution rights.” However, the somewhat ambiguous language of *Napster* was likely dicta and appears to have been at least indirectly repudiated by the Ninth Circuit’s later decision in *Perfect 10 v. Amazon*, as noted below. In the view of some courts, *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985), equates the term “distribute” with “publication”; and the Copyright Act in turn defines publication to include the “offering to distribute copies...to a group of persons for purposes of further distribution.” Over the past decade, many other cases have gone both ways on the issue.

In the first of the current cases, *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153 (D. Mass. 2008), the court squarely held that merely listing music files as available for downloading on a P2P network did not itself infringe the distribution right. Distinguishing *Harper & Row*, the court held that although “publication” has been given a broad interpretation, all publications were not necessarily distributions. The context of the decision was an effort to learn the identity of the individuals who had made works available on a P2P network. Notwithstanding certain qualifications, and notwithstanding its limiting interpretation of the distribution right, the court ruled that plaintiffs had sufficiently alleged actual distribution for them to be entitled to proceed.

The second case, *Elektra Entertainment Group, Inc. v. Barker*, 551 F. Supp. 2d 234 (S.D.N.Y. 2008), was decided the same day as *London-Sire*. Elektra had alleged that defendant “infringed Plaintiffs’ exclusive rights of reproduction and distribution by downloading, distributing, and/or making available copies of protected sound recordings using an online media distribution system,” namely, the Kazaa peer-to-peer file sharing network. The defendant moved to dismiss in part based on Elektra’s allegation that defendant “ma[de] the Copyrighted Recordings available for distribution to others” failed to state a claim of infringement. The court ruled (contrary to *London-Sire’s* holding) that distribution and publication were co-terminous. But in light of the statutory definition of publication, the court held that merely “making [copyrighted works] available” did not violate the distribution right. Rather, plaintiffs would have to prove defendant “offer[ed] to distribute copies or phonorecords to a group of persons for purposes of further distribution.”

Whatever the sufficiency of the complaint on this point, it is doubtful whether it can usually be shown that one who makes recordings available to a P2P network contemplates that copies will be obtained for further distribution, as opposed to personal use.

Just one month later, in *Atlantic Recording Corp. v. Howell*, 554 F. Supp. 2d 976 (D. Ariz. 2008), another court followed the approach of *London-Sire*. The Howell court relied in part on the analysis in *Perfect 10 v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007), which held that the conclusion that a “distribution requires an ‘actual dissemination’ is consistent with the language of the Copyright Act.” After reviewing the large body of law on this issue, the *Howell* court agreed with what it deemed “the great weight of authority that § 106(3) is not violated unless the defendant has actually distributed an unauthorized copy of the work to a member of the public. ... Merely making an unauthorized copy of a copyrighted work available to the public does not violate a copyright holder’s exclusive right of distribution.”

The fight over the scope of the distribution right in the P2P context is far from over, but these recent cases may suggest a limiting trend. However, given that none of the rulings represented a final, appealable decision, it will likely be some time before these issues reach the various appellate courts for more definitive guidance.

### ***Tiffany v. eBay* – eBay’s Having Breakfast at Tiffany’s Expense**

In a gem of a case, a district court in New York held that eBay is not liable for trademark infringement when its users sell counterfeit Tiffany items. *Tiffany (NJ) Inc. v. eBay, Inc.*, 2008-1 Trade Cas. (CCH) P76, 219 (S.D.N.Y. 2008). This is an important case outlining website liability for user-generated content and the obligations of website and brand owners in policing infringing activities.

eBay’s unique online marketplace allows sellers to sell directly to buyers. eBay charges a listing fee and takes a cut of the ultimate sale price, but never takes possession of the sale item. In a proactive effort to reduce the sale of counterfeit items on its website, eBay created and implemented several anti-fraud procedures and takedown policies, in addition to providing educational tools for brand owners and sellers.

Tiffany and Company, known for its jewelry and iconic little blue box packaging, has been working with eBay for years to combat the posting and sale of counterfeit Tiffany items offered by sellers on eBay’s website. Tiffany availed itself of all of eBay’s anti-fraud procedures and when it reported a potentially infringing item, eBay immediately removed the listing. Tiffany, however, was not satisfied eBay was doing enough to reduce the sale of counterfeit Tiffany items. When eBay refused to meet Tiffany’s additional policing demands, Tiffany sued eBay based on several claims, including contributory trademark infringement.

The crux of the contributory trademark infringement claim came down to who should bear the burden of policing a

brand owner’s trademarks in Internet commerce. Tiffany argued that eBay had *general knowledge* that counterfeit problems existed and it therefore had an obligation to monitor and control its website and preemptively remove listings of Tiffany jewelry. eBay countered that it is the brand owner’s responsibility to monitor and report potentially infringing items, which eBay would then remove. The court ultimately concluded that it is the brand owner’s responsibility to police its trademarks. However, the provider of an online marketplace is not absolved of its responsibilities.

Indeed, the court concluded that, unlike a classified advertising service, eBay’s services are analogous to a flea market, making eBay more than a mere passive conduit. As such, a service provider like eBay is susceptible to liability for contributory trademark infringement if it “knows or has reason to know” it is supplying its services to someone engaging in trademark infringement.

Throughout its opinion, the court applauded eBay’s numerous proactive anti-fraud efforts because there is no duty to take steps against *generalized* knowledge of infringement. Further, when eBay had the requisite knowledge of infringement, it took appropriate steps to remove listings and suspend sellers.

Tiffany complained that eBay’s anti-fraud procedures required Tiffany to devote substantial time and resources to monitor and report listings and that “because eBay was able to screen out potentially counterfeit Tiffany listings more cheaply, quickly, and effectively than Tiffany, the burden to police the Tiffany trademark should have shifted to eBay.” The court dismissed those arguments because, regardless of who can more easily police, the rights holder bears the burden of policing its trademarks. The court also took note of Tiffany’s overall lack of investment in its policing efforts, stating it was “relatively modest” in light of the counterfeit issues it faces.

While this is a victory for eBay and online marketplaces generally, it’s important to note that eBay avoided liability in part due to its extensive fraud and counterfeit prevention policies and programs. Other online marketplaces that do not have such internal policies in place may still have reason to be concerned.

Tiffany recently appealed this ruling, making these issues far from resolved. Indeed, the court hinted that these issues may be picked up by the legislature if policymakers decide that current laws are “inadequate to protect rights owners in light of the increasing scope of Internet commerce and the concomitant rise in potential trademark infringement.” In the meantime, however, the court noted that “the law is clear: it is the trademark owner’s burden to police its mark, and companies like eBay cannot be held liable... based solely on... generalized knowledge that trademark infringement might be occurring on [its] websites.”



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