

Seagate's Sea Change

THE LAW DOESN'T EVOLVE quickly. In the last several years, however, the courts have repeatedly reshaped intellectual property law. In particular, the law governing patents has undergone substantial revision. This month's column addresses the most recent noteworthy patent decision and the impact it may have on your business going forward.

Previously, patent law imposed a "duty" on anyone who was placed on notice that they might be infringing someone's patent. Once on notice, the duty required a potential infringer to use "due care" to investigate whether it infringed a patent. This usually meant talking with a patent lawyer and obtaining his or her opinion about infringement.

Why were opinions so important? Because if you failed to fulfill your duty of due care, and there was a lawsuit, you were much more likely to be found to be a "willful" infringer and willful infringers can be assessed damages up to three times as severe.

Duty eliminated

The rules have changed, though. In a 2007 decision known as the "Seagate" case, the Federal Circuit appellate court decided there should no longer be a duty of due care on accused patent infringers. Instead, the court focused the willfulness analysis on whether the accused infringer acted despite an unjustifiably high risk. This requires considering if the infringer acted even though there was an "objectively high likelihood" that it infringed a valid patent. Also to be considered is whether the infringer knew or should have known of the risk. It was a dramatic change in the law from both a business perspective and a litigation perspective.

Here's how Seagate has played out so far. On the business side not much seems to have changed; companies are still obtaining patent opinions. Opinions are still helpful in eventual litigation, but at heart these opinions are meant to help decision-makers with tough calls. Do we make the new game and risk infringement, or do we redesign it?

On the litigation side, things have changed dramatically. As I'm writing this column, I'm aware of 14 cases following Seagate that address willful infringement claims. Only 1 of the 14 cases resulted in a finding of willful infringement. Notably, none of the 14 cases resulted in increased damages against an accused infringer.

So, whether navigating through difficult business decisions or preparing to battle in litigation, make sure to keep Seagate and its implications to your business on the radar.

Marc S. Cooperman is a partner with Chicago's Banner & Witcoff Ltd., where he focuses on IP litigation. He can be reached at mcooperman@bannerwitcoff.com.



Worlds Colliding

Virtual worlds can help mend the industry's ills

By Richard Gottlieb

Have you ever seen that old movie *When Worlds Collide*? It's about the earth getting smashed by a rogue planet called Bellus, and its moon, Zyra. I wonder if the guy who wrote it was dating a girl named Zyra Bellus, and in the interest of "advancing his relationship" with her he named a planet and moon for her. If he did, I hope it worked, because those are pretty stupid names for planets.

As dumb as the names of the planets were, the name of the movie was great. It provided an image of the awesome power that would be released when giant things crash into each other. That's the image that comes to mind when I think of the impact of the merging of traditional toys and virtual worlds.

Virtual worlds take place largely on the Internet, and involve new "worlds" where people can immerse themselves. Through the use of an avatar (a graphical image that represents the user in the virtual world) players

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can walk, fight, fly, have relationships and do whatever else is possible in a world that is not limited by physical boundaries. World of Warcraft and Second Life are two examples of highly successful virtual worlds in which people pay to play and exchange virtual and, increasingly, real money to buy virtual products. Children's versions are becoming more popular, as exemplified by Disney's purchase of the kid-friendly Club Penguin site for \$700 million.

The toy industry has begun embracing virtual worlds in a big way too, and what Ganz's Webkinz began has been followed a host of other toy companies. Irwin Toy's Me2 was one of the most talked about at this year's Toy Fair because its pedometer-like device allows entry into a virtual world where the more exercise a child does in the real world, the more virtual money they earn to buy virtual products on the website. In this case, not only does the virtual world add play value, it makes for healthier kids.

And believe me, there are more toy-related virtual worlds to come. The combination of the traditional and the virtual is not only here to stay but it is going to remake the toy industry. Here's why:

Economic inflation

China accounts for 87 percent of the world's toys, and as long as its factories were the low price leaders in manufacturing that wasn't a problem. Now, however, inflation is running hot and sales are going to turn cold unless the industry figures out how to manage price increases. One way to do that is to increase toys' virtual value. By doing so, the consumer will feel they're getting more value while the manufacturer reduces its dependence on labor and raw materials.

Toys are getting better

When you take a traditional play pattern and add a virtual component, you've made a better product. Why? Because it loses nothing of its traditional value and gains a whole new world of play.

When a child buys a Webkinz stuffed animal he or she doesn't stop hugging and loving it. Rather, they hug it and love it while they play for hours online with a virtual version of that animal. When a girl buys Hidden City's Bella Sara trading cards, she still enjoys the collectible aspect, plus gets the added fun of seeing the horse on the card come to life on-screen.

Considering the industry's steady sales declines over the last five years, we could use a paradigm shift sparked by toys like these.

Taking back electronic play

The toy industry screwed up when it turned its back on the makers of video game consoles. We forced

them to start a new industry, and they've been cannibalizing our business ever since. As a consequence, we've been losing market share while they grow exponentially. Toys tied to virtual worlds are changing that balance. The toy industry is beginning to fill the gap between traditional and virtual play by combining those elements; in doing so, it's taking a bold step, because first movers usually win and, believe it or not, the toy industry is the first mover in this phenomenon.

Where will it get us?

We could, in some cases, see manufacturers use physical, three-dimensional toys as a delivery system for after-market sales. Think about it: Manufacturers could sell the physical toy at cost and make their profit in the aftermarket with subscriptions to more advanced virtual worlds, or sell incremental physical products through a website or at retail.

We could also see the traditional toy industry not only move into that gap between traditional and virtual entertainment, but ultimately take over both industries. This would bring the virtual play industry back into the traditional toy industry fold, and repair the error made over 30 years ago.

So, I think "When Worlds Collide" is the perfect description of what's happening. And in this case, the collision is not only a good thing, it's a great thing.

Richard Gottlieb is president of Richard Gottlieb & Associates, New York, a provider of business development services, and author of the book *Ambassador to the Kingdom of Wal-Mart*. He can be reached at richard@usatoyexpert.com.



In late January, Blizzard Entertainment said World of Warcraft registered its 10 millionth user worldwide. The site's 2.5 million fans in North America pay the Irvine, Calif., company approximately \$15 a month to play the game. —Blizzard Entertainment