

## 'Doodling' IP Rights Part 2

LAST MONTH WE discussed the recent decision in which Fisher-Price's Doodle Pro trade dress and trademark was found not to infringe the rights of Pilot Corp.'s (PCA) Magna Doodle drawing toy. This month, we'll discuss another lesson from that case, and its broader application to the industry.

When PCA sued Fisher-Price, it requested a preliminary injunction. This means both parties submitted briefs and evidence to the court early in the case to assist the court in deciding who would likely win at trial. The theory is that, if the plaintiff proves it's likely to ultimately win and it is suffering ongoing harm that cannot be fully compensated with money at trial, the court should "preliminarily" enjoin (or prevent) the ongoing harm.

### Surveying the marketplace

In this case, among the evidence both parties provided were several consumer surveys designed to measure "actual confusion" in the market between the parties' respective trademarks. This is an important factor in determining whether there is trademark infringement. After reviewing the results, the court denied the injunction. There were several reasons for the decision, but the court pointed to "significant problems" with PCA's survey, the most important of which was that the manner in which the trademarks were presented to consumers in the survey differed significantly from how consumers would see the trademarks in the marketplace.

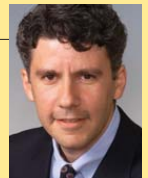
The court's denial of the preliminary injunction came in November 2004. Following that decision, the parties engaged in discovery and briefed another set of motions to the court. That spanned at least another 12 months. With a roadmap from the court listing its problems with PCA's survey, you'd expect PCA to conduct a new one to correct the problems, right? Well, instead, PCA submitted the same survey to the court a second time.

Unsurprisingly, the court's reaction to the survey the second time around was the same as its reaction the first time. Unsurprisingly, the court concluded that the survey was still flawed and "largely irrelevant." Unsurprisingly, PCA lost.

The lesson? Learn from your failures.

Litigation presents numerous opportunities to take calculated risks. It's unclear why PCA risked sticking with its original survey. Certainly, the chances of the court accepting its survey the second time were low. PCA did not effectively use the foresight it had gained from its first loss. Don't make the same mistake.

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# Big Picture People

There's a benefit to knowing your sales reps

By Richard Gottlieb

Many years ago, when I was a salesperson working for a small distributor in Virginia, I had a line that was really hot. Everywhere I went it was selling like crazy, so I attempted to sell the products to a particularly challenging customer.

I tried to tell him everything I knew about the product, everything I knew about how well his competitors were doing with it, and, ultimately, why he should carry it. But he just wouldn't listen. Like he usually did, he shut me up, he shut me out and he shut me down. He just did not care what I had to say.

I always thought he was kind of dumb when he did this. He was clearly not taking advantage of the view I had of his business. After all, I visited him and his competitors monthly. I was in a position to see what was moving and what was not among all of them.

Well, I was a lot younger in those days, and more in-

*"Sales reps are constantly moving through the marketplace. They see the industry horizontally and vertically."*

clined to "teach a lesson." So the next time I was in his office, I went to the men's room and purposely arranged my order pad so that he could not miss seeing it. Sitting right on top was a very large order for the product that I had just written for another customer.

Just as I had hoped, a few minutes after I came back, he said in a soft voice: "You know, I have been thinking and maybe I will buy some of that stuff."

"I'm sorry," I responded, "but we're selling so much of it that we've put it on allocation. After you turned me down last time, I gave your allocation away."

He looked a bit like Sylvester the Cat after a cigar, once again, had exploded in his face. The next day, I called him to say I had gotten him his allocation back. After that, he always made time to spend with me.

As this little story suggests, because they typically represent a number of lines and call on a variety of customers, independent sales representatives have a truly unique vantage point from which to observe not only their immediate customers, but their industry.

Unlike buyers and sales managers, reps are constantly moving through the marketplace. Going from store to store and manufacturer to manufacturer, they see the industry horizontally and vertically. They accrue not only data, but a sum of knowledge far greater than its parts. As such, it can be greatly beneficial to foster a better relationship with your sales reps, whether you're a sales manager or a buyer.

### Keeping tabs on your money

If you are a sales manager, it can save you from selling to a customer who is not credit-worthy. Because reps represent a number of lines, they know earlier than just about anyone who is not paying on time. Because of this, reps are way ahead of the curve and frequently

know bad credit before credit reporting services do.

They also know what licenses are hot. Again, because they are carrying a number of lines they are also carrying a broad array of licenses. This means they are constantly getting buyer reactions to which licenses are selling and which are not. Generally, they can provide sales managers with a great deal of information about current trends. They get to see a fad start, watch it grow, and eventually fade away.

### Eyeing your competition

If you are a buyer, a sales rep is in the best position to let you know which products are doing well at your competitors. Typically, there are one or two customers who are early adopters and get on board with a new product early. Reps can see by their reorderers and enthusiasm how those untested lines are trending.

They can also provide a buyer, just like a sales man-

ager, with a great deal of information about licenses. They can tell a buyer which licenses they should be carrying and which ones are underperforming in their stores in comparison to their competition.

Finally, they can point out emerging or successful promotional and merchandising techniques.

### Time to talk

Maybe it's just me, but it seems like sales managers—and buyers in particular—used to spend more time talking to reps. Not only did sales calls last longer and were more leisurely, but the contact continued away from the office. Perhaps, with the press of business and the resulting lack of time, buyers and sales managers spend less time asking reps that once familiar refrain: "What's going on?"

Smart retailers and manufacturers may want to encourage their buyers and sales managers to actually spend more time with salespeople. In fact, they may want to encourage them to take them up on those invitations to socialize at lunch or after work.

So, when you come into contact with a salesperson, allow for some extra time during or after your next meeting. Think about what information your rep may be able to give you to improve your competitive positioning. Plan some good questions in advance of the meeting, listen to what they have to say, and you may find out "what's happening."

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Total employment on the manufacturing side of the U.S. toy, doll, game and children's vehicles industry peaked in 1993 at 42,300 workers. By 2005, that total had dropped nearly 60 percent to 17,400 workers. —U.S. Dept. of Commerce