

THE LEGAL DEPARTMENT

Patent Predictions

PROTECTING INTELLECTUAL property can hardly be called cheap or predictable. In fact, about the only thing predictable about IP litigation is that outcomes are hard to predict. And, after a decision from the U.S. Supreme Court in April, attorneys' ability to provide meaningful advice to clients in assessing risk in advance of litigation has likely just taken a turn for the worse.

A typical patent infringement lawsuit will cost each party millions in attorneys' fees if it goes to trial. Add on the prospect of millions of dollars in damages and the possibility of an injunction, and these cases can become "bet-the-company" exercises. At a minimum, patent cases swallow up an enormous amount of resources, often with questionable prospects for return on that investment. With such a scenario, clients often seek opinions and advice in advance of litigation to minimize risk or justify the investment these cases represent.

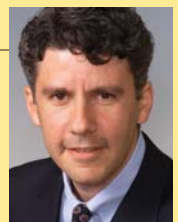
Just ask LeapFrog, Fisher-Price and Mattel. For over three years they have been battling a patent infringement case concerning computerized interactive learning toys. In one of the first cases decided since the Supreme Court's April 2007 ruling in *KSR v. Teleflex*, LeapFrog's patent was declared "obvious." It was based on the logic of combining several pieces of existing technology ("prior art"), including a 30-year-old puzzle game that used a phonograph to reproduce letter sounds.

There's a fair chance that before the *KSR* decision, the LeapFrog decision would not have held up. But the court rejected as supposedly too "rigid" what little certainty there was in the legal obviousness analysis. Before *KSR*, courts required there to be some evidence of "teaching, suggestion or motivation" to combine prior art to invalidate a patent as obvious. The rationale was that without some evidence to combine the prior art, any accused infringer could look at the prior art with hindsight and essentially piece together the invention.

Instead of affirming the long-established test requiring objective evidence of a teaching suggestion or motivation to combine, the court opted for what it called a more "flexible" approach. Now, the obviousness inquiry is to consider the "common sense" of prior inventors, and whether combining prior art references would result in "unexpected" results, or "synergy."

Regardless of whether the Leapfrog case was decided correctly, one thing is certain—it's the first of a long line of cases redefining how the risks of IP litigation will be analyzed.

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# The Yo-Yo Lesson

Growing sales through hands-on play

By Richard Gottlieb

In lower Manhattan, there can be found a dapper, older gentleman (and he really does appear to be a gentleman) who speaks with an English accent, dresses in excellent suits and ties, and sits on a stool in the middle of the street, selling potato peelers. Now, this would be just an oddity if it were not for the fact that he draws big crowds and sells lots of potato peelers to lots of people.

These are not fancy potato peelers. There is no ergonomic handle and there is no upscale look. These are just plain metal potato peelers that could have been found in your great-grandmother's kitchen drawer.

This man is doing what I call "kinesthetic marketing," something I define as a type of marketing in which a consumer or a demonstrator holds, manipulates and/or transforms a product and by so doing creates the sale. It's a technique that is now rarely seen.

*"By not allowing [kids] to actually touch our products...we may be losing them and their interest in traditional play."*

One has only think back to the fondly remembered "yo-yo years" to find an example of when companies used to engage in this kind of up-close, in-person marketing. Some of you more "mature" readers may remember when big yo-yo companies like Duncan and Royal would declare a "yo-yo year" (occurring about once every seven years) and send yo-yo champions out across the country to demonstrate tricks. They would show up at schools, shopping centers and major retailers to wow all the kids in town. They would create enough excitement to sell a ton of yo-yos and to create yo-yo enthusiasts for years to come.

Today, we depend upon television to get the message across. I wonder, however, if by putting a glass wall between us and children, we are taking away the vital hands-on nature of teaching kids to play. By not allowing them to actually touch our products and feel the excitement, we may, as a result, be losing them and their interest in traditional play.

### Just doing it

One woman who is practicing this kind of hands-on marketing is Mary Couzin. Mary is known and respected (possibly loved) by many as a games enthusiast. Through her Web site, [www.discovergames.com](http://www.discovergames.com), Mary helps emerging game manufacturers go to market and, hopefully, become successful.

Mary does something else, however, that is extremely important, not only to game manufacturers, but the entire toy industry. Mary is teaching children and families to love board games. How does she do it? By getting them to sit down and play.

Each year, Mary runs Chi-Tag, the Chicago International Toy & Game Fair. Mary arranges for hundreds of game manufactures to come to a convention

center in Chicago, put out their games and then let up to 20,000 men, women and children come in and actually play them. Based on the Essen Game Fair in Germany, which drew 160,000 people last year, Chi-Tag is creating a second and third generation of game players. It is also a catalyst for collateral game promotion. Because Chi-Tag is covered by the local press, game awareness is raised in newspapers, the Internet, magazines, television and radio.

I believe that Mary, by engaging in this kind of marketing, is doing something that no one else in the industry is doing. By harnessing the power of play, she is creating new game players and energizing old ones. In so doing, she is adding additional game consumers for right now, for tomorrow and for the day after. Instead of wringing her hands because the pie is getting smaller, Mary is making it bigger for everyone.

Where is the rest of the toy industry in creating

similar play events? Why aren't we applying Mary's hands-on marketing model and creating toy events in all major cities? Why aren't we, instead of sulking over age compression, actively going out and exciting children and their parents about toys?

I want to make it clear that Mary Couzin's motive is really not to create new, little consumers. Mary does this because she honestly believes in the power of games to bring families together and to create healthier children. According to a Duke University study issued in 2006, Americans are more isolated than ever. Mary wants to bring them back together.

### Going mobile

Mary is not stopping with Chicago. She has plans to take her concept to San Francisco, Boston, Baltimore, Atlanta, Minneapolis, Orlando and Denver. In addition, Mary is working with Mayor Daley in Chicago to create "The Art of Play." The city of Chicago, thanks to Mary, will be celebrating play all summer long with over 150 events. Imagine a city the size of Chicago promoting play!

Mary's motivation, though highly altruistic, is creating revenue for manufactures and retailers now and for tomorrow. She is creating a bigger pie. Let's as an industry emulate Mary and do the good deed of bringing children back to games and other toys. It's good for kids. And it's good for us.

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Despite the impact of earlier than usual Easter sales, extreme weather and higher gasoline prices, overall U.S. retail sales rose 2.6 percent in April over the prior year and 0.5 percent from March 2007. —The National Retail Federation