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MESSAGE FROM THE COMMITTEE

Welcome to the third quarterly installment of the YLD Intellectual Property and Internet Law Committee Newsletter for the 2017-2018 bar year! Our Committee is dedicated to providing resources, opportunities, and knowledge to help young lawyers build their IP and Internet Law practices.

The leadership of the Committee is here to serve you and your fellow committee members!

Co-Chairs: Christopher Suarez and Ben Hodges

Vice-Chairs: Joe Conti, Ava Miller, Michelle Miu, Nicole O'Hara, and Rachel Smoot

Visit our webpage to take advantage of the Committee’s resources. If you are interested in writing a practice article, creating or presenting a CLE program, or becoming more involved with the Committee, please contact Chris Suarez at CSuarez@wc.com or Ben Hodges at ben.hodges@foster.com.

NEWS AND ANNOUNCEMENTS

Committee Calls

Please feel free to join one of our upcoming committee calls, where you can learn more about what the committee is doing and some of our current initiatives. (Dial-in: 888-759-6037; Passcode: 202 4345279)

- April 24th, 1 PM
- May 29th, 1 PM
- June 26th, 1 PM

IP and Video Games Webinar

Learn about the copyrights, trademarks, and patents involved from both a law firm and in-house perspective.

- Date: April 26, 2018
- Time: 1:00–2:00 p.m. EST
- Moderator: Michelle Miu; The Myers Law Group; Irvine, CA
- Speakers:
  - Giselle Girones; Shullman Fugate PLLC; Jacksonville, FL
  - Ben Hodges; Foster Pepper PLLC; Seattle, WA
  - Yang Perng; NCSoft; Bellevue, WA
- Register at: https://www.americanbar.org/groups/young_lawyers/events_cle/ip_video_games_issues_copyrigh ts_trademarks_patents.html
2018 Spring Conference Net Neutrality Panel

Join us for “Net Neutrality: Free Competition or Chaos?” at the 2018 Spring Conference.

- Date: May 11, 2018
- Time: 11:30 a.m.–12:30 p.m. EST
- Location: The Brown Hotel; Broadway C, Third Floor; 335 West Broadway; Louisville, KY
- Register at: https://www.americanbar.org/groups/young_lawyers/events_cle/2018-spring-conference.html

Committee Volunteering Opportunities

Newsletter: submissions for our July newsletter will be due by July 20. If you are interested in contributing, please contact Ava Miller at armiller@wsgr.com.

Connect with Us!

If you would like us to notify you of official committee business through social media, tag you in relevant content, and/or help you connect with Committee members and the ABA YLD leadership, email Nicole O’Hara at nohara@grossmcginley.com with as much of the following information as you deem relevant:

- Name
- City/State
- Firm
- Practice Area(s)
- Email
- Role in ABA/YLD
- Any other IP law bar groups/organizations/committees in which you participate
- If you read and/or write for any IP law publications or blogs
- Username for Facebook, LinkedIn, Twitter, YouTube, and/or Google+

Lastly, please let us know if you post anything relevant to the Committee, IP Law, Internet Law, or young lawyers. Feel free to tag any or all of the Committee chairs and vice-chairs, as well as #ABAYLDIP, @ABAYLD, @ABAEsq, or @ABAIPL.

ARTICLES

The Facebook Cambridge Analytica Incident: What Happened and the Road Ahead

By: Inayat Chaudhry

There have been a lot of security incidents in the news lately. But most recently, the Facebook and Cambridge Analytica scandal has started a serious public dialogue about the way in which users’ personal data is used and sold—in this case, without their permission. So, what is this Facebook Cambridge Analytica incident about? Cambridge
Analytica is a controversial political data firm that was founded by Stephen Bannon, a former adviser to President Trump, and Robert Mercer, a Republican donor. The firm was hired by Trump’s 2016 election campaign and promised tools that could identify the personalities of American voters and influence their behavior. Though the firm had secured a $15 million investment from Mercer, it did not have the tools it needed to do what it had promised. So, the firm harvested this information from the Facebook profiles of more than 50 million users without their permission by using an app called “This Is Your Digital Life.” The harvested data included users’ identities, friend networks, and “likes.” If your data was collected on Facebook by Cambridge Analytica, you should receive a message like the one below on your Facebook home page:

Was My Information Shared?

Based on our investigation, you don’t appear to have logged into “This Is Your Digital Life” with Facebook before we removed it from our platform in 2015.

However, a friend of yours did log in.

As a result, the following information was likely shared with “This Is Your Digital Life”:

- Your public profile, Page likes, birthday and current city

A small number of people who logged into “This Is Your Digital Life” also shared their own News Feed, timeline, posts and messages which may have included posts and messages from you. They may also have shared your hometown.

The short version of how this data was harvested is that in 2014, researchers asked users to take a personality survey and download an app that scraped private information from their and their friends’ profiles—this activity was permitted by Facebook at the time but since has been banned. A professor from Cambridge University, Aleksandr Kogan, built his own version of the app and began collecting data for Cambridge Analytica after Cambridge University’s Psychometrics Center, which had developed the original technique, declined to work with Cambridge Analytica. Despite all of this scraping of information, Facebook maintains and has reiterated in various statements that no data breach was involved but instead that the data was used in an unauthorized way. Nonetheless, Facebook could have done things to prevent exactly this kind of incident by implementing “privacy by design,” a term of art used frequently in privacy law circles. For example, while drafting permissions for its apps, it should have protected its users’ private information more robustly by taking into account risks associated with third-party data use. In fact, Facebook’s CEO, Mark Zuckerberg, has apologized for not better
policing app developers and announced that Facebook is reviewing tens of thousands of apps that had access to large amounts of its users’ data in previous years.

Back in 2012, Facebook settled Federal Trade Commission (“FTC”) charges that it had deceived consumers by failing to keep privacy promises it had made to its users. One of the promises made under the settlement agreement, known as a consent decree, was the requirement to “within 180 days, and every two years after that for the next 20 years, to obtain independent, third-party audits certifying that it has a privacy program in place that meets or exceeds the requirements of the FTC order, and to ensure that the privacy of consumers’ information is protected.” Following the Cambridge Analytica revelations, on March 28th, 2018, the FTC announced that it would open an investigation into Facebook’s privacy practices. But, we will have to wait and see whether the FTC will consider this incident as Facebook having violated the consent decree.

That is not the only investigation that Facebook is facing. Zuckerberg endured ten hours of testimony in Congress on April 10 and 11 of 2017. At these hearings, lawmakers repeatedly asked whether users control how their data is shared with and used by advertisers, developers, and other third parties. While Zuckerberg repeatedly talked about how users can decide what their fellow Facebook users can see, he did not answer the question that was asked. This only evidences the need for a public conversation about this to even have a shot at getting regulations protecting user privacy online implemented in the United States. Europe, on the other hand, is already taking such measures. The upcoming European General Data Protection Regulation “(GDPR)” imposes requirements on how user data is collected and how user data must be deleted at the user’s request. Since the GDPR goes into effect in May 2018, there have been many conferences about it lately. And, the question about technology companies making changes to their privacy policies—for just their European users versus all of their users—almost always comes up. In fact, in the hearing before the House Committee on Commerce and Energy, Zuckerberg stated that the changes Facebook is making in response to the GDPR will be available worldwide.

During the hearing on April 11, Representative Raul Ruiz, a Democrat from California, posed a pertinent question to Zuckerberg: “[w]ould it be helpful if there was an entity clearly tasked with overseeing how consumer data is being collected, shared and used, and which could offer guidelines, at least guidelines for companies like yours to ensure your business practices are not in violation of the law?” Zuckerberg replied by saying “it’s an idea that deserves a lot of consideration.” And, I agree. The Facebook Cambridge Analytica incident along with the Equifax breach from last year highlight the need for just such a new agency that can promulgate guidelines and regulations about the way in which consumer data is used and shared online. It is time.

Inayat Chaudhry is currently a law student at UC Berkeley School of Law, focusing on technology law. She went back to school to get her Masters in Law after receiving her J.D. and working in San Francisco for a year on intellectual property, technology, and privacy law issues.
Trademark Coexistence: Using Negotiation to Create a Win-Win Situation

By: Heather Bowen

Why is it important to register a trademark?

Having a trademark registered and approved by the United States Patent and Trademark Office (“USPTO”) rewards a trademark registrant for engaging in commerce via his/her creative ideas and efforts. Official trademark registration is crucial to a trademark owner’s long-term success. Not only does a trademark owner’s approved registration prohibit infringers from using the trademark for personal or compensatory gain without the trademark registrant’s appropriate permissions, but it also deters potential infringers in the marketplace from creating and/or using a mark that is too similar or identical to a trademark already registered. Moreover, registration on the USPTO’s Principal Register guarantees legal protection over the trademark, allowing the trademark holder the ability to sue in federal court to enforce the trademark against an opposing party and to recover damages from willful infringement.

How do potential conflicts arise?

There are some instances in which trademark owners are operating under comparable names or have other similarities between their respective trademarks, and may seek some measure of recourse over the ownership of the conflicting trademarks. These instances generally arise, for example, where a trademark is being opposed by another owner who possesses the same or similar trademark, where the trademark owners have each used the business name or logo in coincidentally concurrent uses, or where the trademark owners are operating in or have expanded into different territories or industries. Often, the issue of conflicting trademarks arises when a new applicant is advised of a potential ground for rejection by the USPTO via an office action. In these and amidst other circumstances, a trademark applicant may seek to enter into a consent agreement with the trademark registrant for the coexistence of their trademarks in the marketplace. In this way, the applicant might be able to come to a simple solution with the registrant regarding the fundamental rights most relevant to each owner as opposed to engaging in often lengthy and costly litigious battles.

How does the USPTO handle consent agreements?

A trademark applicant may enter into a consent agreement with a trademark registrant to combat a USPTO office action against them. However, the USPTO may refuse a trademark application on the basis of a likelihood of confusion with a prior or pending application under Section 2(d) of the Lanham Act if the consent agreement does not adequately explain away the likelihood of confusion.¹ By relying on Section 1207.01(d)(viii) of the Trademark Manual of Examining Procedure² in addition to precedent established by the Federal Circuit and the Trademark Trial and Appeal Board,³ the USPTO may give weight to consent agreements in determining whether an application creates a likelihood of confusion. This stresses the importance of trademark

owners using a specialist to conduct a thorough comprehensive search of their trademark to avoid potential conflicts from arising in the future.

Heather Bowen is a Northwestern Pritzker School of Law Post-Graduate Fellow at Start Small Think Big in New York City where she helps entrepreneurs and small business owners develop a solid legal infrastructure for their business. In addition, she is a member of the ABA Young Lawyers Division Intellectual Property Committee and active contributor to the intellectual property newsletter, Chair of the Publications Development Subcommittee of the ABA Trademark Litigation Committee, and member of the International Trademark Association’s Academic Committee. Heather Bowen can be reached at heather@startsmallthinkbig.org.

Are We There Yet?  Autonomous Vehicles and IP
By: Tiffany Johnson

Autonomous vehicles are likely the first to come to mind in considering the future of transportation. Even companies that the average person would not fathom are concerned with autonomous vehicles devote substantial resources to acquiring intellectual property protection for technology related to autonomous vehicles. For example, State Farm Mutual Automobile Insurance Company owns patents directed to generating insurance coverage for autonomous vehicles based on a system and method of collecting data.\(^1\) Additionally, companies associated with sensor technology, materials, automation, security, and a myriad of suppliers in other industries are sure to rely on intellectual property globally as autonomous vehicles become more prevalent in society. As the day approaches when most of us will drive an autonomous vehicle, are we, as attorneys, there yet? Are we ready to equip IP owners with the tools they need to protect their IP and defend against legal claims and threats?

One of the most evaluated aspects of autonomous vehicles and IP is the need for cross-functional and inter-industry collaboration among automotive companies and their suppliers. While the automotive industry relies on collaboration in manufacturing traditional vehicles, the necessity for collaboration rises to a higher level for autonomous vehicles. With integrating technology and innovative ideas among these collaborators, a plethora of legal issues will inevitably arise. IP disputes, licensing issues, data security, product liability, public policy considerations, and several other legal issues will require IP attorneys to glean insight from new and developing case law.

Bosch leads the industry with the most autonomous driving patent filings globally.\(^2\) As a supplier, Bosch is sure to partner with car manufacturers to produce autonomous vehicles. Thus, it is critical to understand who will own and retain IP rights as they are created in this industry. With a lack of legislation and case law specific to autonomous vehicles, attorneys should encourage clients and potential clients in the transportation

\(^1\) See e.g., U.S. Patent No. 9,760,951 (issued Sept. 12, 2017); U.S. Patent No. 9,779,458 (issued Oct. 3, 2017).
industry to be the first to seek IP protection for their ideas and to document, document, document their work. According to several consulting groups, autonomous vehicles will create a market worth billions of dollars. As it is too early to gauge how much of the market will be tied to IP, it is important for IP attorneys to be aware of the potential that IP owners in this industry hold.

*Tiffany A. Johnson is a member of the ABA YLD IP Committee and the Diversity Sub-Committee Chair of the Section of Litigation, IP Committee. As a former patent examiner with the United States Patent & Trademark Office, Tiffany is an associate at Klemchuk, LLP, a law firm in Dallas, Texas. Contact Tiffany at tiffany.johnson@klemchuk.com.*