Intellectual Property Weekly Abstracts Bulletin — Week Of May 22, 2017

May 24, 2017

Copyright Decisions

Four copyright registrations expunged where Respondent was not the author and owner of the works
Gemstone Travel Management Systems Inc. v. Andrews, 2017 FC 463

The Court granted Gemstone's application to expunge four copyright registrations and to amend one copyright registration to replace "Gemstone Travel Management Systems" with "Gemstone Travel Management Systems Inc". As a preliminary matter, the Court declined to consider the Respondent Andrews' irregular and late-filed submissions. Andrews had filed neither a record nor a memorandum of fact and law, but did make a number of written submissions in a letter submitted to the Court on the scheduled hearing date.

In an earlier application, the Court had dismissed Andrews' application for declarations and remedies relating to alleged copyright infringement and infringement of moral rights, but had concluded that, in the absence of a cross-application, the Court was without jurisdiction to expunge the copyright registrations sought by the Respondents in that application (see 2016 FC 624, our summary here). The present application was brought by Gemstone to remedy this jurisdictional defect.

The Court had previously concluded that Andrews was not an author of the software in the registrations at issue, or a joint author, and therefore, his application must fail since it is based on him being an author. The other registered owner and author of the registrations at issue did not object to their expungement from the Register in this application.

Other Decisions of Interest

Order of *Mandamus* requiring Health Canada to issue a Product Licence Application is overturned on appeal
Canada (Health) v. The Winning Combination Inc., 2017 FCA 101

The Federal Court of Appeal has overturned an earlier decision of the Federal Court (see 2016 FC 381, our summary here) relating to the non-issuance of a Product Licence Application (PLA) for the Winning Combination's natural health product RESOLVE, a smoking cessation aid.

The Federal Court had earlier found that several decisions by the Natural and Non-Prescription Health Products Directorate and its predecessor in Health Canada were made in breach of procedural fairness. *Mandamus* was ordered, requiring Health Canada to issue a PLA within 30 days.

On appeal, the Attorney General conceded that the licensing decision and reconsideration process under the *Regulations* had not been reached in accordance with procedural fairness. However, the Attorney General maintained her position that the order of *mandamus* be set aside and that the question of whether a Natural Product Licence should be issued in respect of Resolve be remitted to the Minister for redetermination.

The Court of Appeal agreed that the judge erred in granting *mandamus* for two reasons. The first related to the finding of systemic bias and the finding that no adequate remedy was available to Winning Combination. The Court of Appeal stated that the finding of bias on the part of the government officials did not, in the absence of further evidence, justify the conclusion that the Department as a whole was systemically incapable of making a fair assessment of the Winning Combinations' application.

The second error in granting *mandamus* related to fresh evidence provided on appeal as to whether the product is a Natural Health Product or a drug. This decision would guide which regulatory regime governs the product. It was found that a serious scientific question exists that is best addressed through an expedited redetermination, not a directed verdict.

The argument that the Minister was *functus officio* was balanced with the need for the Minister to ensure the safety of licenced products to be consumed by Canadians. There was nothing found in the regulatory scheme that supports the position that the Minister may not revisit all licensing requirements.

Ultimately the decision was remitted to the Minister for redetermination within 90 days of the decision. Solicitor and client costs were awarded to the Winning Combination and the prior Federal Court decision to award the Winning Combination solicitor and client costs was upheld.

Industry Updates

Health Canada has released a Notice: Publication of Update to the Guidance Document: Data Protection under C.08.004.1 of the *Food and Drug Regulations*.

On 24 March 2017, the Canadian Intellectual Property Office (CIPO) released a Notice withdrawing their notification of incompatibility that was submitted under Section 703(f) of the Administrative Instructions under the *Patent Cooperation Treaty*. The Notice indicates that CIPO now accepts electronic filings of international applications that conform to Section 703(b), items (ii) to (iv) of the Administrative Instructions.

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