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Patents—Torts—Inventor's Right to Professional Credit—"Droit Moral"—Interference with Prospective Economic Advantage.—*Misani v. Ortho Pharmaceutical Corp.*

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purpose of section 8(b)(4).³⁰ Regarding this point, it is of consequence that the Board has similarly rejected *per se* rules as applicable to section 8(b)(4) (i), and concluded that any determination should be based on all the evidence in the particular case and not by an *a priori* assumption.³¹

Based on this rejection of blanket rules and upon the absence of any statutory language which could reveal any intent to radically alter judicial precedent, the Court has correctly interpreted that what Congress condemned as coercion was not picketing *per se* but only picketing which is the equivalent of a boycott against the secondary employer generally. This would seem to be in keeping with its determination in *NLRB v. Drivers Local 639* that "[S]ection 13 [of the Act] is a command of Congress to the courts to resolve doubts and ambiguities in favor of an interpretation . . . which safeguards the right to strike."³²

In the final evaluation of the decision, it must be emphasized that in validating consumer picketing, when limited to the struck produce, the Court does so on the finding that the appeal did not affect the secondary employer in any way except through the medium of customer product preference. Even allowing for the limiting effect of these controlled circumstances on the decision, an increase of union activity in the area of consumer appeals is to be expected, not necessarily limited to the utilization of placard-carrying union members.³³

PETER J. NORTON

Patents—Torts—Inventor's Right to Professional Credit—"Droit Moral"—Interference with Prospective Economic Advantage.—*Misani v. Ortho Pharmaceutical Corp.*¹—Defendant employed plaintiff as a chemist, subject to a standard assignment to the defendant of all plaintiff's inventions developed during her employment. Plaintiff claimed that, while so employed, she invented a chemical compound and the process for making it. Plaintiff's supervisor, also a defendant, alleged that this discovery was made under his direction as part of a long-term inventive process in which he was developing the compound. On this basis, and as agent for the defendant company, he filed for a patent, naming himself as inventor. Following the issuance of the patent, plaintiff protested defendant's claim to inventorship, but her protest was dissolved when the Patent Office disallowed the patent on the ground that the compound was unpatentable. Although defendant

³⁰ *United Wholesale Employees Local 261 v. NLRB*, 282 F.2d 824 (D.C. Cir. 1960); *NLRB v. Brewery Workers Local 366*, 272 F.2d 817 (10th Cir. 1959).

³¹ Brief for Respondents, pp. 10-11, *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760*, *supra* note 1.

³² 362 U.S. 274, 282 (1959).

³³ The International Ladies Garment Workers Union has distributed to the general public shopping bags bearing the message, "JUDY BOND INC. ON STRIKE—DON'T BUY JUDY BOND BLOUSES," thereby creating, in effect, *consumer pickets*, an interesting innovation. Barmash, *Behind Those Shopping Bags*, N.Y. Herald Tribune, July 26, 1964 (Magazine), p. 10.

¹ 83 N.J. Super. 1, 198 A.2d 791 (1964).

CASE NOTES

had specifically claimed only the compound, he had described the process for obtaining it in his application. Plaintiff subsequently obtained a patent on the process in her own name, and now contends that the descriptive inclusion of the process in defendant's application gave implied credit to him for its invention, even though he had not specifically claimed it. She claimed, then, that for the period of time between the issuance and public record of the patent to defendant, and the issuance of her own subsequent process-patent, she was deprived of her right to claim intellectual and professional credit for the invention of the process, and that this deprivation constituted a cause of action sounding in tort. At trial, the jury rejected the claim, finding no cause of action in the deprivation of intellectual credit for an invention. On appeal, reversing and remanding for retrial, the court HELD: The assignment of patent rights did not include the assignment of the right to intellectual credit for the invention, and the deprivation of this right gave rise to a cause of action for interference with prospective economic advantage.

Both the statutes² and the Patent Office regulations³ require that, in general, the only proper applicant for a patent is the inventor himself.⁴ Exceptions to the general rule occur when the inventor is dead or legally incapacitated,⁵ or, when patent rights have been assigned to another and the inventor refuses to apply or cannot be found.⁶ In these instances, the assignee or other party showing "sufficient proprietary interest"⁷ in the acquisition of the patent may apply, but in all cases the application must indicate the true inventor.

Similarly, the oath or affirmation required of all applicants attests that the applicant is the actual inventor, and the statute provides for variations in the form of the oath when someone other than the inventor himself applies for the patent under one or other of the relevant exceptions.⁸ Thus, a patent must be supported by the oath of the "original and first" inventor, whether or not patent rights issue to him or his assignee.⁹ A false oath voids whatever patent may issue as a result of the process containing the perjury.¹⁰

Such extensive statutory insistence upon naming the true inventor lays a reasonable, though not explicit, basis for the court's inference in this case

² 66 Stat. 797 (1952), 35 U.S.C. § 102 (1958) provides:

A person shall be entitled to a patent unless— . . .

(f) he did not himself invent the subject matter sought to be patented . . .

66 Stat. 798 (1952), 35 U.S.C. § 111 (1958) provides: Application for patent shall be made by the inventor . . .

³ 37 C.F.R. § 1.41(a) (1960): "A patent must be applied for and the application papers must be signed and the necessary oath executed by the actual inventor in all cases . . ."

⁴ *Wende v. Horine*, 191 Fed. 620 (N.D. Ill. 1911).

⁵ 66 Stat. 799 (1952), 35 U.S.C. § 117 (1958); 37 C.F.R. §§ 1.42, 1.43 (1960).

⁶ 66 Stat. 799 (1952), 35 U.S.C. § 118 (1958); 37 C.F.R. § 1.47(b) (1960).

⁷ 37 C.F.R. § 1.47(b) (1960).

⁸ 66 Stat. 799 (1952), 35 U.S.C. § 115 (1958); 37 C.F.R. § 1.65 (1960).

⁹ *Kennedy v. Hazelton*, 128 U.S. 667, 672 (1888), *Standard Oil Development Co. v. James B. Berry Sons Co.*, 92 F.2d 386 (3d Cir. 1937).

¹⁰ *Liquid Carbonic Corp. v. Goodyear Tire and Rubber Co.*, 38 F. Supp. 520, 526 (N.D. Ohio 1941).

that the law protects an inventor's interest in having credit for his invention. Though possibly novel in its formulation, the claim for such credit derives naturally from the stated requirements concerning the authentic inventor.

In the instant case, the court denominates the claimed right as the "professional right of intellectual credit,"¹¹ and interprets it as a property right in that its possession affects its holder's economic status as part of his bargaining power in securing future employment. In some ways this right resembles the European concept of "droit moral" or moral right of an author, composer, or other intellectual worker to the honor and reputation stemming from his creativity. Analytically separate from the protection offered by copyright laws, the author's personal, moral right has, at least since 1909, found statutory protection in several South American and European countries,¹² and in France the doctrine has received "official [judicial] recognition" since 1901.¹³ Gradually, international copyright conventions adopted this concept, extending its protection to citizens of participating countries.¹⁴

Prior to the Universal Copyright Convention, signed at Geneva in 1952, the concept of moral right was not an apparent adjunct to American copyright theory.¹⁵ This Convention, however, which has been adopted by the United States,¹⁶ approaches the concept of "droit moral" in Article V, 1: "Copyright shall include the exclusive right of the author to make, publish, and authorize the making and publication of translations of works protected under this Convention," and in Article V, 2, paragraph 5: "The original title and the name of the author . . . shall be printed on all copies of the published translation."¹⁷ While not specifying the precise nature of the rights thus protected, these sections of the Convention have nonetheless been interpreted as referring to "prerogatives which, in the European copyright terminology, are nothing else but moral rights."¹⁸

Where, therefore, copyright primarily protects an economic interest flowing from personal creativity, the doctrine of moral right protects "the personality of creators as such and as expressed in their works."¹⁹ It is an inalienable,²⁰ personal, non-pecuniary (though valuable) right, covering

¹¹ *Misani v. Ortho Pharmaceutical Corp.*, 83 N.J. Super. 1, 11, 198 A.2d 791, 797, supra note 1.

¹² Bolivia was apparently the first country to legislate specifically on behalf of "droit moral." 2 Olgner, *Le Droit d'Auteur* 48 (1935).

¹³ Roeder, *The Doctrine of Moral Right: a Study in the Law of Artists, Authors and Creators*, 53 Harv. L. Rev. 554, 556 (1940).

¹⁴ Copinger and Skone Jones, *Law of Copyright* 347 (9th ed. 1958).

¹⁵ Roeder, supra note 13, at 557:

Busy with the economic exploitation of her vast natural wealth, America has, perhaps, neglected the arts; in any event American legal doctrine has done so, and the paucity of material outside the copyright law on the rights of creators forms a vivid contrast to continental jurisprudence. See also 48 Yale L.J. 715 (1939).

¹⁶ 6 U.S.T. 2731 (1952); 17 U.S.C. § 9(c) (Supp. V, 1964).

¹⁷ 68 Stat. 1030 (1947), 17 U.S.C. § 9 (1958).

¹⁸ Boggsch, *Universal Copyright Convention—An Analysis and Commentary* 67 (1958).

¹⁹ Roeder, supra note 13, at 578.

²⁰ Wittenberg, *The Law of Literary Property* 111 (1957).

CASE NOTES

the author's good name and credit derived from his creativity, and the integrity of the work itself.²¹ Although the United States has adopted the Universal Copyright Convention, the language of moral right does not appear to have been incorporated into federal copyright law, unless Section 1 of the Act of July 30, 1947,²² which grants initial protection to authors and others falling within the scope of the Act, may be broadly construed so as to extend its protection to an author's honor and reputation as well as his economic interests.

Even in Europe, moral right doctrine appears limited to intellectual workers as opposed to technical inventors. The feeling seems to be that the latter are fully capable of taking care of their own interests while writers and intellectuals need special care:

alors que la plupart des industriels sont de puissants capitalistes, la plupart des auteurs sont, à leurs débuts, et trop souvent pendant toute leur carrière de malheureux travailleurs, qui traînent toute leur vie une misère plus ou moins dorée.²³

This preference for artists over inventors colors the common law tradition as well, although not as effectively as in Europe: "Had Milton not written the *Paradise Lost* it would never have been written; had Watt not found the application of steam under high pressure another would have found it."²⁴ Although the plaintiff in the instant case claims a right which derives from her inventive creativity, the court acted in accord with an honored tradition by refusing to consider the violation of the right as an invasion of personal integrity. Rather, it placed the right on a par with other aspects of plaintiff's bargaining power, thus achieving the far less revolutionary, but much more legally oriented, ground of interference with prospective economic advantage.

Merely to possess a right, however, is not necessarily to possess a cause of action for a violation of that right. The phrase "*damnum absque injuria*" clearly implies that while a right may be violated (*damnum*), the violation may not constitute legally recognizable harm (*injuria*).²⁵ To render the violation actionable, a legally grounded duty must run from defendant to plaintiff with respect to the right at issue,²⁶ and compensable loss, occasioned by failure to respect the right, must follow. Granting, then, as the court in the instant case did, the existence of the right to intellectual credit for an invention, the issue is not merely whether the right falls into an established tort category, but whether, in fact, the elements of duty and damage are

²¹ According to Olganier, *supra* note 12, at 54-55, protection of moral right extends even beyond the period of copyright protection.

²² 66 Stat. 752 (1952), 17 U.S.C. § 1 (1958).

²³ "For while the majority of industrial people are powerful capitalists, the majority of authors are, at the start and, too often, throughout their careers, unhappy laborers who trail a somewhat gilded poverty their whole lives through." Olganier, *supra* note 12, at 54.

²⁴ 22 Halsbury, *Laws of England* 217, cited, *ut sic*, in *Legislation Safeguarding the Interests of the Inventor* (*Das Recht des Schöpferischen Menschen*) 44 (1936). Search through the second (Hailsham) edition (1936) and Lord Symonds' edition (1953) of Halsbury failed to unearth this somewhat Pecksniffian observation of Lord Halsbury's.

²⁵ See *Alabama Power Co. v. Ickes*, 302 U.S. 464, 479 (1938).

²⁶ *Roach v. Hostetter*, 48 Cal. App. 2d 375, 119 P.2d 749 (1941).

sufficiently present to justify recovery.²⁷ In its decision, the court restricted itself merely to announcing the existence of the right to intellectual credit, without elaborating on its protection other than by asserting that "vindication of the claim . . . is readily assimilable to the principle of an action for interference with prospective economic advantage."²⁸

Interference with another's obtaining employment, other than in a legitimate competitive situation, is not a novel tort.²⁹ Yet to use such interference as the basis for a cause of action, the plaintiff must show that it was intentional,³⁰ and, in New Jersey, the situs of the instant case, that it was wanton, malicious,³¹ and unjustifiable.³² As stated in *Louis Kamm, Inc. v. Flink*,³³ interference with the right "to enjoy the fruits and advantages of [one's] own enterprise, industry, skill and credit" is actionable, but only if it is "without the justification of competition or the service of any interest or lawful purpose." The necessity of proving an intent to interfere fed by malice is obvious. Should the defendant in such an action be found to have received a patent under an honest mistake as to his inventorship, or in ignorance (inexcusable as it may be) of the clear mandate that applications be filed in the name of the true inventor, it could not be said that he intended to interfere with the plaintiff's existing or prospective economic advantage. The law's desire to protect intellectual credit should surely not create what would be a strict liability on a person who blunders, mistakenly or stupidly, onto that privileged field.

The importance of the instant decision lies in its enunciation of the right to intellectual and professional credit for inventions, and not in whatever hope it may raise in the plaintiff that she will prevail on this theory should the case reach re-trial. For the facts as explained in the decision give little indication of the defendants' intent in making the original application in the name of the defendant supervisor. The plaintiff has, however, a new chance to explore these issues and for this reason the instant decision, apart from its value as a contribution to the continuing elaboration of protectible rights, is to be admired.

ROBERT J. MULDOON, JR.

Taxation—Priority of Federal Tax Lien—*United States v. Vermont*.¹—In October, 1958, the state of Vermont made an assessment and demand for withheld state income taxes of \$1628 due from Cutting & Trimming, Inc., a Vermont taxpayer. Under state law a tax lien for the amount due, plus

²⁷ See Prosser, Torts 3-4 (1955).

²⁸ *Misani v. Ortho Pharmaceutical Corp.*, 83 N.J. Super. 1, 13, 198 A.2d 791, 798, supra note 1.

²⁹ See *Birmingham Broadcasting Co. v. Bell*, 259 Ala. 656, 68 So. 2d 314 (1953).

³⁰ *Dade Enterprises v. Wometco Theatres*, 119 Fla. 70, 160 So. 209 (1935).

³¹ *George F. Hewson Co. v. Hopper*, 130 N.J.L. 525, 33 A.2d 889 (1943).

³² *Stein v. Schmitz*, 21 N.J. Misc. 218, 32 A.2d 844 (1943).

³³ 113 N.J.L. 582, 587, 175 A. 62, 66 (1934), cited with approval in *Outdoor Sports Corp. v. American Federation of Labor, Local 23132*, 6 N.J. 217, 78 A.2d 69, 75 (1951).

¹ 377 U.S. 351 (1964).