An IP Hodgepodge: Just Add Chocolate

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Even an obscure column on intellectual property should ideally make some attempt at what an English Lit. 101 professor would call thematic unity. That is, it should be about something in particular.

Well, this column isn't about anything in particular; it's about a bunch of things that have nothing to do with each other. The reason is there have been a number of interesting, but completely unrelated developments recently in the IP area.

Toblerone Bar Beats Up Rival

Toblerone is a fancy brand of chocolate bar. Its maker recently went to court to stop a rival chocolate bar-maker from marketing a bar with a somewhat similar shape, called Alpenhorn (Kraft Jacob Suchard et. al. v. Hagemeyer Canada). The case is all about chocolate. Just reading it can make you gain ten pounds.

Kraft sought summary judgment. Hagemeyer brought a cross-motion to dismiss the case. The issue before the Ontario court was what's the test, when determining if consumers would be "confused"? Is it enough that consumers think the two products, although recognizably different, might come from the same source? Yes, said Mr. Justice William Festeryga. There was a likelihood of confusion if consumers might think that the new bar was put out by the same company as Toblerone.
After reviewing competing survey evidence filed by the two sides, Justice Festeryga ordered a permanent injunction against sale of the Alpenhorn bar.

AZT patent decision upheld.

As well as being interesting if you're into patent law, this case could come in handy as a doorstop. The reasons of Mr. Justice Wetston of the Federal Court, Trial Division in Apotex and Novopharm v. Glaxo Wellcome released March 25, 1998 are 163 pages long.

Glaxo claimed that its patent for AZT, the famous AIDS drug, was infringed by generic versions of AZT. Generic drug companies Apotex and Novopharm sought a declaration that the patent was invalid.
The compound AZT was not new, having been known since 1964. In 1986, Glaxo filed for patent protection when it became apparent that AZT seemed effective against AIDS.
The patent claimed AZT combined with inactive ingredients in various formulations. Some claims were limited to their use in the treatment of AIDS.

Some cases say the mere combination of an active ingredient with a carrier is not a patentable invention. The generics argued these claims were therefore invalid. The generics also argued that in so far as the patent claimed the use of the formulation to fight AIDS, the invention was a method of medical treatment, and therefore not patentable .
Justice Wetston rejected the generics' arguments for the most part, and found that some of the patent claims were valid and infringed. The case is under appeal.

Trade-mark register gets wired

In completely unrelated news, the trade-mark register entered the digital age in January, 1998. You can go to the Canadian Intellectual Property Office (CIPO) website, and have a look at the register of trade-marks. Applications are also shown, together with some information about the status of the file.

The website is free. It is up to date to about two weeks earlier. Although looking at the web site is no substitute for a full scale search, it comes in handy.

CIPO plans to put Canadian patents on line at some point, although this will be more difficult because of the many diagrams and drawings found in patent documents.

As well, CIPO will soon permit trade-mark applications to be made on-line. At first, this will only be available to a small number of firms in a pilot project. If that works, the scheme will be expanded to include run-of-the-mill schmucks such as you and me.

Patented Medicine Regulations get a facelift

These Regulations apply only in patent disputes in the pharmaceutical industry. Originally passed in 1993, they replace the normal common law governing interlocutory injunctions, by imposing various automatic injunctions and regulatory delays where there's a dispute about a drug patent.

There are so many cases arising out of the Regulations that it sometimes seems the Federal Court must have no time for anything else.

The government, recognizing that there seemed to be too much litigation under the complex and badly drafted Regulations, has been trying to decide what to do. Health

Minister Allan Rock advocated abolishing the Regulations, but was overruled by the Prime Minister at the end of 1997.

After intense lobbying, the government released revised Regulations in early March 1998. They do not differ much from the earlier Regulations. Damages can now be awarded if the generic is kept off the market by the effect of the Regulations, but later wins the case.

Some of the changes deal with various interlocutory issues, such as the timing of the case, and the disclosure of documents. There are also complex transition provisions. Within hours of the release of the revised Regulations, both sides were in court arguing how the changes should affect the dozens of existing cases.

So much for reducing the amount of litigation!