2018-1614

United States Court of Appeals for the Federal Circuit

SYNGENTA CROP PROTECTION, LLC,

Plaintiff-Appellant,

– v. –

WILLOWOOD, LLC, WILLOWOOD USA, LLC, WILLOWOOD AZOXYSTROBIN, LLC, WILLOWOOD LIMITED,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina in Case No. 1:15-cv-00274-CCE-JEP Honorable Catherine C. Eagles, Judge

BRIEF FOR *AMICUS CURIAE* NEW YORK INTELLECTUAL PROPERTY LAW ASSOCIATION IN SUPPORT OF NEITHER PARTY

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CERTIFICATE OF INTEREST

Pursuant to Fed. Cir. R. 29 and 47.4, counsel for amicus curiae New York Intellectual Property Law Association, certifies the following:

1. The full name of the parties I represent: New York Intellectual Property Law Association
2. The name of the real parties in interest I represent: New York Intellectual Property Law Association
3. All parent corporations and any publicly held companies that own 10 percent of more of the stock of the parties I represent: N/A
4. The names of all law firms and the partners or associates that appeared for the party now represented by me who appeared in the trial court or are expected to appear in this Court:

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5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47. 4(a)(5) and 47.5(b): None

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STATEMENT OF INTEREST OF AMICUS CURIAE

This amicus curiae brief is submitted on behalf of the New York Intellectual Property Law Association ("NYIPLA").[1]

The NYIPLA is a professional association of approximately 1,100 attorneys whose interests and practices lie in the area of patent, trademark, copyright, trade secret, and other intellectual property law. The NYIPLA's members include a diverse array of attorneys specializing in patent and copyright law, including in-house counsel for businesses that own, enforce, and challenge patents and copyrights, as well as attorneys in private practice who procure copyright protection through the U.S. Copyright Office and who prosecute patents and represent entities in various proceedings before the U.S. Patent and Trademark Office ("PTO"). Many of the NYIPLA's member attorneys participate actively in patent and copyright litigation, representing both owners and accused infringers. The NYIPLA, its members, and the clients of its members share an interest in having the standards governing the enforceability of patents and copyrights be reasonably clear and predictable.

The arguments set forth in this brief were approved on May 3, 2018 by an

[1] Plaintiff-appellant Syngenta has consented to this brief, but defendant-appellee Willowood did not. Accordingly, NYIPLA has filed a motion for leave to file brief of amicus curiae New York Intellectual Property Law Association in support of neither party.

absolute majority of the total number of officers and members of the Board of the NYIPLA (including such officers and Board members who did not vote for any reason including recusal), but do not necessarily reflect the views of a majority of the members of the Association or of the firms or other entities with which those members are associated.

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person other than amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

After reasonable investigation, the NYIPLA believes that no member of the Board or Amicus Committee who voted to prepare this brief on its behalf, or any attorney in the law firm or corporation of such a Board or Committee member, or attorney who aided in preparing this brief, represents either party to this litigation. Some Committee or Board members or attorneys in their respective law firms or corporations may represent entities which have an interest in other matters which may be affected by the outcome of this litigation

I. INTRODUCTION

NYIPLA respectfully submits this brief to address a patent law issue and a copyright law issue determined by the District Court below.

A. The Patent Law Issue

Extraterritorial patent infringement provisions in the U.S. Patent Laws began in 1984 when Congress passed 35 U.S.C. §271(f)[2], which overruled the Supreme Court's holding in *Deepsouth Packing Co., Inc. v. Laitram Corp*., 406 U.S. 518 (1972). In *Deepsouth,* the Court had held that when components of a patented invention are made in the United States, but assembled outside the United States, there is no infringement under §271(a). Section 271(a) provides that "whoever without authority makes, uses, offers to sell, or sells any patented invention, *within the United States* or imports *into the United States* any patented invention during the term of the patent therefor, infringes the patent." (Emphasis added.) Thus, §271(f) was seen as a way of preventing the theft of American inventions through the unfair practice of *assembly abroad*.

---

[2] 35 U.S.C. §271(f) -

(1) Whoever without authority supplies or causes to be supplied in or from the United States all or a substantial portion of the components of a patented invention, where such components are uncombined in whole or in part, in such manner as to actively induce the combination of such components outside of the United States in a manner that would infringe the patent if such combination occurred within the United States, shall be liable as an infringer.

(2) Whoever without authority supplies or causes to be supplied in or from the United States any component of a patented invention that is especially made or especially adapted for use in the invention and not a staple article or commodity of commerce suitable for substantial noninfringing use, where such component is uncombined in whole or in part, knowing that such component is so made or adapted and intending that such component will be combined outside of the United States in a manner that would infringe the patent if such combination occurred within the United States, shall be liable as an infringer.

Another way of avoiding §271(a) was the use of a patented process abroad to create products that were then imported into the United States. Congress addressed this perceived loophole when it enacted §271(g) in 1988. Congress' motivation was to prevent a manufacturer from evading liability for patent infringement by using a patented process abroad and then importing the product into the United States. As Senator Grassley stated:

> There, of course, is something very inherently unfair about U.S. research-based industries pouring resources into a product or a process patent and then having that product or process pirated abroad and shipped back into this country for sale. *See Marion Merrell Dow, Inc. v. Am. Cyanamid Co*., 1994 U.S. Dist. LEXIS 5950, at *3-4 (D.N.J. May 4, 1994).

The portion of §271(g) directed to the importation of a patented product into the United States was not added to the statute until 1996. Prior to that, the statute defined infringement activity only as "offers to sell, sells, or uses within the United States a product which is made by a process patented in the United States." The motivation for adding the "import" provision to §271(g) was in recognition that an ITC proceeding only allows for the exclusion of imports at the border. Section 271(g) additionally allowed for recovery of infringement damages, and for an injunction against products previously imported and now already in the United States.

Also related to a determination of the acts that establish infringement was the consideration of joint infringement, *i.e*., where the acts required for

infringement are carried out by more than one person. In *Muniauction, Inc. v. Thomson Corp*., 532 F.3d 1318 (Fed. Cir. 2008), the Court held that "direct infringement [under §271(a)] requires a single party to perform every step of a claimed method." *Id.* at 1329. Where "multiple parties combine to perform every step of a claimed method, the claim is directly infringed only if one party exercises 'control or direction' over the entire process such that every step is attributable to the controlling party, *i.e*., the 'mastermind.'" *Id.* (quoting *BMC Resources, Inc. v. Paymentech, L.P*., 496 F.3d 1373, 1380-81 (Fed. Cir. 2007)). This holding was accepted by the U.S. Supreme Court in *Limelight Networks, Inc. v. Akamai Techs. Inc.*, 134 S. Ct. 2111, 2119 (2015), and confirmed by the Federal Circuit in *Akamai Techs.*, *Inc.*, *v*. *Limelight Networks*, *Inc.*, 797 F.3d 1020, 1022 (Fed. Cir. 2015) (*en banc*) (per curiam). This is the so-called "single entity" rule.

The Supreme Court in its *Akamai* decision stated that "our case law leaves no doubt that inducement liability may arise 'if, but only if, [there is] … direct infringement.' *Aro Mfg. Co. v. Convertible Top Replacement Co*., 365 U.S. 336, 341, 81 S. Ct. 599 (1961)." 134 S. Ct. at 2117. Thus, liability for induced infringement under §271(b) requires direct infringement under §271(a) and the single entity rule.

With respect to extraterritorial patent infringement under §§271(f) and (g), the Supreme Court also held in its *Akamai* decision that the single entity rule does

not apply to §271(f) because of its language. 134 S. Ct. at 2118. However, until the present case, no court has ruled on the applicability of the single entity rule to §271(g). In this case, the District Court held without analysis that the single entity rule applies to §271(g).

Given the language of §271(g), and for the other reasons discussed below, this Court should vacate so much of the District Court's decision holding that §271(g) infringement requires the application of the single entity rule to the making of a product abroad "by a process patented in the United States."

B. The Copyright Law Issue

This Court should also vacate the District Court's decision that the Federal Insecticide Fungicide and Rodenticide Act (FIFRA) precludes copyright protection for the required elements of pesticide labels as against so-called me-too applicants. FIFRA provides for the expedited processing by the EPA of applications for permission to distribute pesticides that are identical to or substantially similar in composition and labeling to previously registered pesticides. 7 U.S.C. §136a(c)(3)(B). "Labeling" refers to the label and other printed material accompanying a pesticide. As substantial similarity is the standard for copyright infringement, the District Court held that FIFRA's mandate that the me-too labeling be substantially similar to the original registrant's labeling works as an implied repeal of the Copyright Act as applied to labels.

However, the Supreme Court, when faced with two federal statutes seemingly in irreconcilable conflict with each other, previously held that it is error to infer Congressional intent to preclude suits under a statute when neither the text nor history of the statutes support such an intent, and when both statutes can be enforced under their own terms. *Pom Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228 (2014).

Here, FIFRA mandates that the me-too applicant's labeling copy the health and safety information contained in the original labeling, which categories of material are primarily not protectable under copyright under several doctrines. FIFRA regulations acknowledge the possibility that the label may contain non-FIFRA material, and to the extent that the original registrant's labeling contains potentially copyrightable material (such as decorative illustrations), the statute does not expressly or impliedly preclude such suits. Thus, nothing prevents a me-too applicant from complying with both FIFRA and the Copyright Act.

II. ARGUMENT

A. The Court's Determination that Infringement Under §271(g) Is Bound by the "Single Entity Rule" Is Inconsistent with the Basis for the Rule

In the patent part of this case, *Syngenta Crop Protection, LLC v. Willowood, LLC*., Fed. Cir. No. 18-1614 (on appeal from the U.S. District Court for the M.D. North Carolina, 1:15-cv-274, Catherine Eagles, J.), 2017 WL 1133378 (M.D.N.C.

March 24, 2017), the plaintiff, Syngenta Crop Protection, LLC ("Syngenta") sued the Willowood companies ("Willowood") for, *inter alia*, infringement of process Patent No. 5,847,138 (the "'138 Patent"). The '138 Patent is directed to a chemical process for producing "azoxystrobin technical," a relatively pure form of the chemical. Azoxystrobin is a fungicidal compound used to protect various crops. The process of the patent requires the performance of an etherification step followed by a condensation step.

Westwood Ltd. buys azoxystrobin technical from its Chinese supplier, Yangcheng Tai He Chemicals Corp. ("Tai He") and sells it to Willowood USA, which imports the azoxystrobin technical into the United States and uses it to formulate end products that it sells to the public. However, there is conflicting evidence as to whether Tai He controls its own process, acts independently from Willowood, or contracts at arms-length with other companies who perform portions of the manufacturing process. Syngenta asserted infringement of the '138 Patent under 35 U.S.C. §271(g), which provides in pertinent part that it is an act of infringement to "import … into the United States or offer … to sell, sell … , or use … within the United States a product which is made by a process patented in the United States."

Syngenta brought a motion for summary judgment of infringement, asserting that the Willowood companies infringed the '138 Patent under §271(g) by

importing into the United States azoxystrobin technical made by the claimed process, using it to formulate end products, and selling the azoxystrobin technical and resulting end products in the United States. In its defense Willowood asserts that §271(g) requires that a single entity perform the patented process, and that the evidence shows that no single entity performed all the steps claimed in the '138 Patent. In deciding the summary judgment motion, the District Court held "that the single-entity rule in §271(a) should also apply in §271(g) infringement actions." 2017 WL 1133378, at *5. Thus, finding a disputed question of material fact as to whether more than one entity manufactured the azoxystrobin technical and the single entity rule is satisfied, the District Court denied Syngenta's motion for summary judgment as to infringement of the '138 Patent. The District Court held:

> The single-entity rule requires that "all steps of a claimed method are performed by or attributable to a single entity." *See Akamai Techs.*, *Inc.*, *v*. *Limelight Networks*, *Inc.*, 797 F.3d 1020, 1022 (Fed. Cir. 2015) (*en banc*) (per curiam).[3] If more than one actor is involved in practicing the steps, "the acts of one are attributable to the other such that a single entity is responsible for the infringement .... in two sets of circumstances; (1) where that entity directs or controls others' performance, and (2) where the actors form a joint enterprise." *Id.* at *5.

The District Court also stated that:

[3] *See also*, *Limelight Networks, Inc. v. Akamai Techs. Inc.*, 134 S. Ct. 2111, 2119 (2015).

> The Federal Circuit has not decided whether the single entity requirement applies to claims of infringement under §271(g), and there do not appear to be district court decisions on this question. While there are arguments both ways, the Court concludes that the single-entity rule in §271(a) should also apply in §271(g) infringement actions. *Id*.

While the District court cited the *Akamai* case for the single-entity rule, the rationale for that rule is not contained in that case. Instead, *Akamai* relies on the reasoning in *BMC Resources, Inc. v. Paymentech, L.P*., 496 F.3d 1373 (Fed. Cir. 2007). 797 F.3d at 1022. *BMC* holds that:

> Infringement requires, as it always has, a showing that a defendant has practiced each and every element of the claimed invention. *Warner–Jenkinson*, 520 U.S. at 40, 117 S. Ct. 1040 (element-by-element analysis for doctrine of equivalents). This holding derives from the statute itself, which states "**whoever** without authority **makes, uses, offers to sell, or sells** any patented invention within the United States, or imports into the United States any patented invention during the term of the patent therefor, infringes the patent." 35 U.S.C. § **271(a)** (2000). Thus, liability for infringement requires a party to make, use, sell, or offer to sell the patented invention, meaning the entire patented invention.
>
> Where a defendant participates in infringement but does not directly infringe the patent [*e.g*., under **§271(b)**], the law provides remedies under principles of indirect infringement. However, this court has held that inducement of infringement requires a predicate finding of direct infringement. *Dynacore*, 363 F.3d at 1272. *BMC Resources, Inc. v. Paymentech, L.P*., 496 F.3d 1373 (Fed. Cir. 2007).

Thus, the single-entity rule for §271(a) is derived from the use of the word "whoever" in the statute, *i.e*., "whoever" is taken to refer to a single person.

Section 271(g) reads as follows:

> **Whoever** without authority **imports** into the United States or sells or uses within the United States **a product which is made by a process patented** in the United States shall be liable as an infringer, if the importation, sale, or use of the product occurs during the term of such process patent. In an action for infringement of a process patent, no remedy may be granted for infringement on account of the noncommercial use or retail sale of a product unless there is no adequate remedy under this title for infringement on account of the importation or other use or sale of that product. A product which is made by a patented process will, for purposes of this title, not be considered to be so made after—
>
> (1) it is materially changed by subsequent processes; or
>
> (2) it becomes a trivial and nonessential component of another product.

In §271(g) the "whoever," or single person, is the one **doing the importing**, not the one **practicing the patented process**. In fact, the only requirement of the process is that the imported product be "made by a process patented in the United States."

In effect, the language of §271(g), *i.e.*, "a product which is made by ***a process patented in the United States,***" coupled with the language of §271(a) "***any patented invention [used] within the United States***" tells you everything you need to know. For a process invention, under §271(a) "***any patented invention"*** is the process patented in the United States and infringement occurs by use of that process within the United States. Under §271(g) the "***process patented in the United States"*** is the same as under §271(a), but infringement does not occur by use of that process within the United States. Instead, infringement occurs by *importation of a product of that process* into the United States. The object of the

actor and the act in §271(a) (the patented invention) should not be confused with the object of the actor and the act in §271(g) (the product). Imposing a single-entity rule on §271(g) ignores that difference.

Section 271(b) states that: "Whoever actively induces **infringement** of a patent shall be liable as an infringer." Thus, infringement is required for the finding of liability under §271(b), and §271(a) requires that infringement to be by a "single entity" in accordance with the single entity rule. In contrast, §271(c), §271(f), and §271(g) require certain acts, but they do not require "infringement" as a predicate act for liability, as does §271(b).[4] Also, in §271(b) the "whoever" refers to a single entity inducing the infringement, but the reference to "infringement" invokes §271(a), which also requires a single entity. Since §271(g) does not use the word "infringement" as a predicate act, and does not implicate §271(a) or the single entity rule.

In *Limelight Networks, Inc. v. Akamai Techs. Inc.*, 134 S. Ct. 2111, 2119 (2015) the Supreme Court also considered §271(f), noting that:

> [It] imposes liability on a party who "supplies or causes to be supplied in or from the United States all or a substantial portion of the

[4] Section 271(g) does deny a remedy "for infringement on account of the noncommercial use or retail sale of a product unless there is no adequate remedy under this title for infringement on account of the importation or other use or sale of that product." However, this "infringement" is not a predicate act for liability under §271(g).

> components of a patented invention ... in such manner as to actively induce the combination of such components outside of the United States in a manner that ***would infringe the patent if such combination occurred within the United States***." As this provision illustrates, when Congress wishes to impose liability for inducing activity that does not itself constitute direct infringement, it knows precisely how to do so. *Id.* at 2118 (emphasis added).

Thus, the absence of "whoever" and "infringement" eliminates the single entity rule for §271(f)—and the same is true for §271(g), which only requires a product "made by a process patented in the United States."

With respect to importing into the United States, both §271(a) and §271(g) have similar language. Section 271(a) applies to "whoever without authority … imports into the United States any patented invention;" and §271(g) applies to "[w]hoever without authority imports into the United States ... a product which is made by a process patented in the United States." Infringement of a process patent under §271(a) is achieved by **using** the patented process in the United States. The other acts listed in §271(a), *i.e*., making, offering to sell, selling or importing "any patented invention," can only refer to infringement of a product patent. In effect you cannot import a process.

In essence, §271(a) covers the importation into the United States of a product that infringes a United States product patent. There is no extraterritorial effect from application of §271(a). In contrast, for §271(g) to apply, the product need not infringe a United States product patent. Rather, the product **must have**

been made abroad by a "process patented in the United States." Section 271(g) thus has a clear extraterritorial effect. The infringing acts covered by §271(g) are importation of a product made by a process patented in the United States. Because the acts of practicing the process occurred abroad, there is no direct infringement of a United States process patent, and those actors who are not importers are not liable as infringers. As the Supreme Court noted in *Akamai* in connection with §271(f), "when Congress wishes to impose liability for inducing activity that does not itself constitute direct infringement, it knows precisely how to do so." The same logic applies to §271(g). Thus, while the "import" language used in §271(a) and that used in §271(g) sound similar, they have different meanings, especially as applied to process patents.

For the reasons discussed above, this Court should vacate so much of the District Court's decision that relies on the application of the single entity rule abroad to infringement under §271(g).

B. The Court Erred in Holding that FIFRA Precludes Copyright Protection for Pesticide Labeling

Syngenta alleged that Willowood's labeling infringed Syngenta's copyright in its original labeling. Willowood moved at summary judgment to dismiss, asserting various defenses, including preclusion, arguing that because FIFRA mandates that the me-too applicant's labeling be "identical or substantially similar" to that of the original registrant, FIFRA precludes suits by original registrants

under the Copyright Act, which otherwise prohibits an unauthorized work that is identical or substantially similar to a copyrighted work.

The Court agreed, and dismissed the copyright claim, holding:

> FIFRA contemplates that a "me-too" applicant will copy from the original pesticide label in ways that would otherwise infringe a copyright. 7 U.S.C. § 136a(c)(3)(B)(i)(I). Even with some changes, use of the original pesticide label as a "go by" for the new label will result in copyright infringement. *See* 17 U.S.C. § 106; *Lyons P'ship, L.P. v. Morris Costumes*, Inc. 243 F.3d 789, 801 (4thCir. 2001) (discussing similar standard for copyright infringement). In enacting FIFRA, Congress intended a narrow exception to copyright protection for the required elements of pesticide labels as against me-too registrants.

Order, *Syngenta Crop Protection, LLC v. Willowood, LLC*, 1:15-cv-00274-CCE-JEP (M.D.N.C. Apr. 10, 2017), ECF No. 150.

This is error, as there is no explicit or implicit support in the text or history of FIFRA that shows Congress intended even a narrow exception to copyright protection. First, when confronted with the effect of the statute on different intellectual property rights of original registrants, namely trade secret rights, Congress explicitly amended FIFRA to address the issue. Furthermore, because FIFRA only mandates the me-too applicant's use of data and information necessary for the safe and effective distribution and use of pesticides, which material is unprotectable under the Copyright Act under several doctrines, FIFRA does not force the applicant into a lose-lose situation. Both statutes can be applied under their own terms.

The Supreme Court articulates the procedure for resolving an alleged conflict between federal statutes in *Pom Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct 2228 (2014). Plaintiff filed a Lanham Act claim against Coca-Cola, alleging that Coca-Cola made false and misleading statements in connection with promoting a juice product. Coca-Cola asserted that the Federal Food, Drug, and Cosmetics Act (FDCA) and its regulations precluded Lanham Act challenges to the name and label of Coca-Cola's juice.

In the absence of express terms in a statute referring to preclusion of another statute, the Supreme Court will look to text, history and structure (*i.e*. scope and purpose) of the statutes in perceived conflict. If the statutes have complementary purposes, the Supreme Court will determine whether there is irreconcilable conflict between the statutes, or whether each statute can be enforced on its own terms. *Id*. at 2236-37. The Supreme Court noted that the question of preclusion of a cause of action under one federal statute by the provisions of another federal statute, is resolved by the traditional rules of statutory interpretation. *Id*. at 2236. Thus, the *Pom Wonderful* decision does not limit itself to the two statutes in question.

As a preliminary point, there were no express terms in either statute speaking to whether Lanham Act suits were precluded by FDCA. *See id*. at 2238. The Supreme Court also noted that there were no provisions nor history from which it could be inferred that Congress intended to limit such suits. The Supreme

Court placed special emphasis on the absence of such provisions, given that both statutes had coexisted for decades. Finally, noting that the two statutes had complementary purposes, the Supreme Court determined that nothing in either statute prevented the other statute's enforcement according to its own terms. *Id*. at 2238-39. The Supreme Court concluded that if Congress had believed that the statutes were in irreconcilable conflict, "it might well have enacted provisions addressing the issue" by now. *Id*. at 2237.

Here, similarly, there are no express terms in either FIFRA or the Copyright Act that speak to limitations on copyright suits pertaining to FIFRA applications.

With regard to whether Congressional intent may be inferred from statutory text or history, the strongest argument that Congress did not intend to preclude copyright protection for the original registrant's labeling is that FIFRA explicitly addresses a different intellectual property right owned by the original registrant, namely a trade secret, while remaining silent on copyright. FIFRA requires original registrants to disclose otherwise confidential data relating to the pesticide in question, and to make that data available to subsequent applicants. After litigation raised the potential conflict of these provisions with state-law proprietary rights in data, FIFRA was amended to provide for an exclusive use period in which only the original data submitter may utilize that data. 7 U.S.C. §136(c)(1)(F). Furthermore, once the exclusive period ends, subsequent me-too applicants must

compensate the original data-submitter for use of the data. *Id*. FIFRA was first amended in 1978 to include these exclusive use and mandatory licensing mechanisms, implemented through EPA regulations that have been continuously revised since that time.

The exclusive use and data compensation provisions document Congress' awareness that the FIFRA registration process scheme impinges upon a registrant's proprietary rights. It is doubtful Congress intended that FIFRA only impliedly addresses copyright, while the statute has expressly addressed trade secret rights for forty years. Furthermore, as both FIFRA and the Copyright Act have been amended numerous times, the absence of express provisions suggests that Congress does not perceive an irreconcilable conflict between the two. If it had, it could "have enacted provisions addressing the issue" and precluded copyright suits by now. *Pom Wonderful*, 134 S. Ct. at 2237.

The District Court's order implies that there is an irreconcilable conflict between the statutes by erroneously holding that compliant labels unavoidably infringe. *Syngenta Crop Protection, LLC v. Willowood, LLC*, 1:15-cv-00274-CCE-JEP, Order ECF No. 150 (M.D.N.C. Apr. 10, 2017). The error arises from the term "identical or substantially similar" appearing in both statutes. However, considering the different purposes of the statutes, the terms, as applied to labeling, are properly directed to different aspects of the labeling. FIFRA mandates

substantial similarity for health and safety information, while the Copyright Act would apply only to material that is not required by FIFRA (*e.g.*, creative expression such as decorative illustrations or photographs).

FIFRA provides that a new pesticide will be registered if it is "identical or substantially similar **in composition and labeling** to a currently-registered pesticide." (Emphasis added.) Labeling must include, among other things, ingredient statements, warning statements, and directions for use. 40 CFR §156.10.

The me-too label must be "identical or substantially similar to" the original label. Additionally, the provision allows for me-too applications for certain pesticides that "differ in composition and labeling from such currently-registered pesticide only in ways that would not significantly increase the risk of unreasonable adverse effects on the environment." 7 U.S.C. §136(c)(3)(B)(i)(I). This clause further highlights the purpose of the FIFRA labeling scheme: namely, preventing unreasonable adverse effects on the environment through the safe distribution and use of pesticides.

The statute's emphasis on the effective dissemination of this critical safety information is seen, for example, on provisions covering legibility of print, and clarity of language. 40 CFR §156.10.

Accordingly, "substantial similarity" in FIFRA labeling should be understood in the context of the me-too applicant's labeling effectively communicating the same critical information about a pesticide and its use as that contained in the original labeling.

In contrast, the standard for copyright infringement is whether "the defendant's work is 'substantially similar' to the **protected material**." *Lyons P'ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 801 (4th Cir. 2001) (citing *Towler v. Sayles*, 76 F.3d 579 (4th Cir 1996)) (emphasis added). The comparison is not to the work as a whole. *See id.; Harney v. Sony Pictures TV, Inc*., 704 F.3d 173, 179 (1st Cir. 2013). The District Court's conclusion that a "substantially similar" label must infringe was in error, because it did not consider what, if any, FIFRA mandatory material was in the original protectable expression of the original registrant. In practice, protectable material likely will be *de minimis*, because of limiting doctrines in copyright law.

The Copyright Act expressly excludes copyright protection for "any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied." 17 U.S.C. §102. The exclusion of protection for this subject matter is extended by caselaw in several ways relevant here.

As an initial matter, the exclusion from copyright protection of "discovery" is understood to cover scientific facts. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991) Thus, the underlying data relating to, for example, efficacy of a pesticide, will ordinarily not be protectable.

While the particular language used to express a given fact or data point may be protectable, this will not always be the case. Because the implementing regulations mandate or suggest a significant portion of the content of the labeling, such material is unlikely to be original to the first registrant. Moreover, the limiting doctrines of *scenes a faire* and merger can serve to deprive a work of copyright protection entirely, or, at a minimum, ratchet up the standard for infringement from "substantial similarity" to "virtually identical." *Scenes a faire* permits copying of standard phrases and stock expressions. The merger doctrine permits copying when there are limited ways to express a given idea, such that the idea and its expression "merge." (Moreover, where there are at most a handful of linguistic possibilities, there is likely little originality in the adoption of particular wording.) As such, an expression such as "Workers Should Wear Protective Gloves," can be freely copied. *See, e.g.*, *Ets-Hokin v. Sky Spirits, Inc.*, 323 F.3d 763 (9th Cir. 2003) (no infringement where photographs are not virtually identical); *Morrissey v. Procter and Gamble*, 372 F.2d 675 (1st Cir. 1967) (no infringement of sweepstakes

rules); *Nat'l Nonwovens, Inc. v. Consumer Prods. Enters.*, 397 F. Supp. 2d 245 (D. Mass. 2005) (no infringement of instructions for boiling wool felt).

While a combination of facts can merit protection if their selection and arrangement is sufficiently original, here FIFRA and the EPA implementing regulations dictate what must be included. The me-too applicant is mandated to express the enumerated categories of information, in clear and legible fashion.

Accordingly, much of the content that is mandated to appear in an original label, as well as the content of a me-too label, will likely primarily consist of material that is either not eligible for copyright protection, or entitled only to a "thin" copyright that will be susceptible to infringement in limited circumstances. It is thus error to say that a FIFRA-compliant label will be *per se* infringing (and further error to infer preclusion from that).

However, while perhaps commercially unlikely, given the works in question here, which are 50-page product inserts for pesticides, it is possible that an original label might contain some copyrightable material. The statute does not appear to bar, for example, the use of photographs or illustrations in a label, which may be used in such labels for decorative purposes. Moreover, to the extent that the language in the labels reflects creative choice, that, too, would be protectable. *FMC Corp. v. Control Sol'ns., Inc.*, 369 F. Supp. 2d 539, 546 n.8 (E.D. Pa. 2005) (finding pesticide labels to have necessary "creative spark" to qualify for copyright

protection). Such material is entitled to some level of protection if it is sufficiently creative and not constrained by *scenes a faire* or merger.

There are multiple (and thus potentially copyrightable) methods of illustrating the toxicity of pesticides on insects. For example, this excerpt of the label from Raid® Max Ant and Roach pesticide spray,[5] depicts a lightning bolt killing an ant and a roach:



Additional illustrations of dead bugs can be found:[6]

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[5] Raid® Max Ant & Roach pesticide spray is presently offered for sale on the Amazon.com site, at https://www.amazon.com/dp/B003AOA3HS?aaxitk=q-M3O0BpfQrrYe.o7bxW9Q&pd_rd_i=B003AOA3HS&pf_rd_m=ATVPDKIKX0DER&pf_rd_p=5582544217303223519&pf_rd_s=desktop-sx-top-slot&pf_rd_t=301&pf_rd_i=raid&hsa_cr_id=4429999630601, last accessed on May 4, 2018.

[6] Presented is a partial screenshot of the first results of a search performed on the Google Image search engine, using the search term "dead bug cartoons," at:



Thus, it is plausible under the statute that a FIFRA-compliant original label may contain some copyrightable material, which material was not required by the EPA for approval. Given that the statute does not require me-too labels to be identical to the original label, the copying of such copyrightable material by the me-too registrant would not be mandated, and such copying could conceivably be infringing, as the "substantial similarity" standard of the Copyright Act is applied to the protected materials of the original work, not to the work as a whole.

The compatibility of the two statutes may be understood as follows: FIFRA requires that the me-too registrant's label be substantially similar to the unprotected material in the original registrant's label, while the Copyright Act

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https://www.google.pl/search?biw=1536&bih=686&tbm=isch&sa=1&ei=pnfsWujQJYmY_QaWyJrABA&q=dead+bug+cartoons&oq=dead+bug+cartoons&gs_l=psy-ab.3...5413.7225.0.7457.10.7.0.3.3.0.128.535.5j2.7.0....0...1c.1.64.psy-ab..0.9.499...0j0i67k1j0i30k1j0i8i30k1.0.MHeE1t5kQVA, last accessed at May 4, 2018.

prohibits the me-too registrant's label from using a label that is substantially similar (or virtually identical) to the protected material.

Thus, FIFRA and the Copyright Act could be said to be complementary (and not irreconcilable). It is therefore error to hold that FIFRA precludes suits by original registrants under the Copyright Act.

III. CONCLUSION

For the foregoing reasons, the portions of the decision of the District Court which are addressed herein should be vacated.[7]

Respectfully submitted this 4th day of May, 2018.

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[7] NYIPLA takes no position on the merits of this case under the patent and copyright law issues as properly applied.

United States Court of Appeals
for the Federal Circuit
SYNGENTA CROP PROTECTION, LLC., V. WILLOWOOD, LLC. et al., 2018-1614

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I, Julian Hadiz, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

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