

IP Practice: White & Case

Law 360, New York (July 29, 2008) — As technology evolves, intellectual property law is becoming increasingly important in shaping the future global economy, according to Dimitrios T. Drivas, chair of White & Case LLP's global intellectual property practice.

That observation was evident in a recent case in which White & Case represented the American Society of Composers, Authors and Publishers.

In the U.S. District Court for the Southern District of New York case, ASCAP, Time Warner Inc., RealNetworks Inc. and Yahoo Inc. agreed to allow the court to set royalty rates under which the Internet service providers could provide music online for ASCAP's artists.

Judge William C. Conner set a rate of 2.5% of the providers' music revenue, which ASCAP said translated to a \$100 million payment.

"The very favorable decision set the stage for the type of license which could have an impact on other media and other technology for license fees on the Internet," Drivas said.

"As the economy evolves and becomes more global, the transfer and security of information and what people pay is more critical," Drivas said. "Information is so much easier to steal than traditional forms such as a chemical plant. How we pay and enforce rights is important to the future and how we operate on a global basis."

White & Case's acumen for such ground-breaking cases was developed through some of the IP group's first cases.

White & Case's IP group first started in 1985, with Drivas joining the group as the firm's second patent attorney during an expansion in 1989. He said when he first joined, the firm was focused on financial service work, but the firm gradually learned the importance of IP.

"Firm management had a vision to be a leading international firm and to do that, we had to have an IP practice," Drivas said. "It is certainly true that we were one of the pioneers and everyone was following us."

Among the major patent battles that helped shape the firm's reputation were the first suits in the biotechnology industry over genetically-engineered corn in the 1990s.

Drivas said that, around the same time, companies such as the Monsanto Co., Sandoz AG and Syngenta AG had all invented corn engineered to be an insecticide that prevented caterpillars from destroying crops. White & Case represented Syngenta AG.

The battle over patent rights included several different teams of lawyers and 15 pending cases, including three that went to trial within a five month period in 1998, according to Drivas.

“It was a whole industry convulsed by litigation in a battle over the first product in biotech,” he said. “Those were important years as far as establishing our practice.”

Today, the practice includes more than 150 practitioners in 27 offices in 16 countries. The firm’s clients include Novartis Pharmaceuticals Corp., Pfizer Inc., AstraZeneca Pharmaceuticals LP, Facebook, Marvell Semiconductor Inc. and Lucasfilms Ltd.

Drivas said the group works very closely with other practices such as antitrust and international trade to staff cases in different forums.

“What is different with us is we are a full-service practice and we are not focused on just one aspect, whether its patents, copyrights, trademarks or trade secrets,” Drivas said.

He said litigation and dispute resolution was the “bread and butter” of the practice, while counseling and procurement were smaller parts of the practice.

Drivas said White & Case’s IP practice differs from other firms in its ability to handle cases economically, its experienced trial lawyers and their ability to think outside the box.

“We like to find a way to serve our clients’ best interests and the rules of law, even if that means thinking about things differently and doing things that other people think sound crazy,” Drivas said.

Drivas said firm attorneys’ creative thinking was best displayed in a patent case involving Teva Pharmaceuticals USA Inc. and Pfizer, White & Case’s client.

In the case, Teva filed an abbreviated new drug application with the U.S. Food and Drug Administration to market a generic version of Pfizer’s Zoloft drug, used as an antidepressant and to treat anxiety.

Teva had previously reached a settlement with Ivax Pharmaceuticals USA Inc., which was the first company to file an ANDA for generic Zoloft. Under the deal, the parties agreed to a royalty-bearing license on the patent until its expiration in 2010.

As the first ANDA filer, Ivax was entitled to a 180-day generic market exclusivity period triggered by the company’s first day of marketing or a court decision holding the patent invalid or not infringed.

In its ANDA, Teva claimed that Pfizer’s patent was invalid and not infringed by its proposed generic. Under provisions of the Hatch-Waxman Act, Pfizer had 45 days to sue Teva for patent infringement, which was the normal course of action for a patent-holder in such a case.

However, under White & Case’s advisement, Pfizer decided not to file the suit and Teva filed a declaratory judgment action that Pfizer’s patent was invalid and/or noninfringed.

Pfizer then won its motion to toss the suit for lack of jurisdiction, winning its claim that there was no controversy, since the company did not intend to sue Teva for infringement because it would risk triggering Ivax's exclusivity period. The U.S. Court of Appeals for the Federal Circuit later affirmed the ruling, and the U.S. Supreme Court refused to review that decision.

"It changed the landscape of how these things are litigated," Drivas said. "It is something we took on and I think everybody who understood the law didn't think we had a chance of success and we did it," Drivas said.

As for the future, Drivas sees a shift in intellectual property disputes away from litigation. He said the rising costs and time-consuming nature of IP litigation are leading many companies to abandon lawsuits in lieu of arbitration.

"I see a trend, especially in non-U.S. companies, in their agreement to go to arbitration instead of litigation even though U.S. companies don't favor arbitration," said Drivas, who is a member of the firm's executive committee.

Drivas said that while litigation in non-U.S. companies costs only a fraction of what it costs in the U.S., companies still fear U.S.-type litigation in other countries and are seeking neutral forums to resolve disputes.

— *By Ron Zapata*