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Firm helps schools sell themselves

North Central signs licensing deal; others expected to follow
Sat. August 23 - 2008
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IBJ staff

A local firm thinks it has a way to raise thousands of dollars for Indiana high schools-without raising property taxes. Continental Enterprises, an intellectual property consulting firm, launched a service this summer to help area high schools register their logos, names and mascots as trademarks and establish licensing programs, assuring that schools will get a cut of all merchandise sales bearing their mark.

This month, North Central High School, one of the state's largest, signed with Continental, and six to eight more schools are expected to follow suit within 60 days.

"A school's intellectual property is just as much an asset as a computer or a building," said Karl Manders, 56, who founded Continental in 1988. "We think this is a way to give high schools a structure to capitalize on their intellectual property and create another revenue stream in an economically difficult time."

Manders' 24-employee firm does licensing work internationally for companies ranging from automotive manufacturers to beer and energy-drink makers. Manders thinks he can use lessons he's learned in the licensing and intellectual property arena to help schools.

"In our experience, there is no program like this in the country," he said. "Indiana is going to be at the forefront."

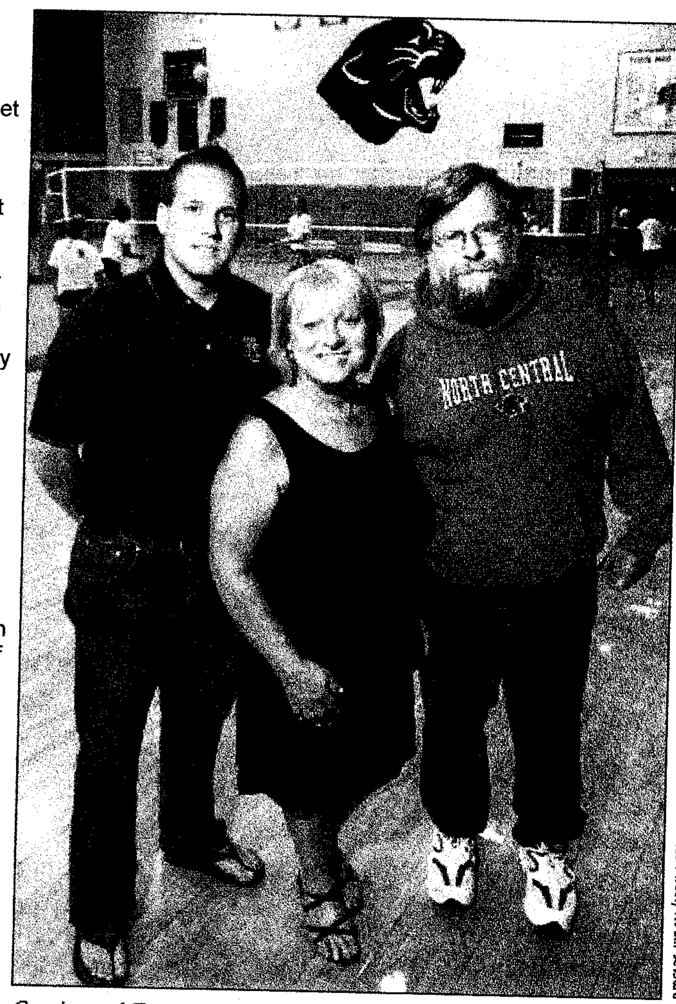
Richard Sheehan, a University of Notre Dame economist and former South Bend Community School Corp. board member, said he has never heard of such a broad-based program for high schools. But the alliance between Continental and North Central doesn't surprise him.

"Fifteen or so years ago, this movement swept through colleges and universities across the country," said Sheehan, who authored, "Keeping Score: The Economics of Big-Time Sports." "With a more intense local, regional and even national focus on high school athletics and its athletes these days, this makes some sense."

Stars equal cash

Star athletes are bringing their high schools considerable attention, and that spotlight has the potential to be monetized, Sheehan said.

North Central graduate Eric Gordon, who this summer was drafted by the National Basketball Association's Los Angeles Clippers, has brought his alma matter such attention.



IBJ Photo/Robin Jerstad

Continental Enterprises' attorney, Ryan Strup, left, trademark specialist Kristine Myers and President Karl Manders think an initiative to trademark high schools' logos and mascots will grow nationally. They recently signed a deal with North Central.

"The situation with Eric Gordon has brought this into focus for us," said North Central Athletic Director Chuck Jones. "We do think that brings an opportunity to sell replica jerseys and other apparel."

In most cases, a high school would have to work out a deal with a former player to use his or her name or likeness to sell merchandise, trademark attorneys said. North Central officials said they have had conversations with Gordon.

Colleges and universities nationwide have rung up seven-figure annual sums in licensed goods sales. For schools with established sports programs like the universities of Nebraska and Southern California, licensed goods sales bring in $3 million to $5 million annually, according to the Atlanta-based Collegiate Licensing Co. Even small colleges like Butler University can bring in $250,000 annually.

While no one expects high schools to bring in that kind of cash, Sheehan said it's not unreasonable for a large school like North Central to bring in $20,000 to $30,000 a year.

North Central Principal C.E. Quandt thinks those figures might be a bit optimistic. But he said whatever comes in is sorely needed.

"This money would be very important to the school's athletic department," Quandt said. "It would go toward things like uniforms, equipment, transportation and upkeep of facilities."

With school budgets tightening, Manders thinks more schools will sign deals with his firm. Continental officials think they could have more than a dozen deals done with Indiana schools by year's end. Then they plan to take the initiative national.

Continental Enterprises

Service: intellectual-property consulting firm
Address: 1292 E. 91st St.
Founded: 1988
Founder/owner: Karl D.L. Manders
Other principals: Jeremiah Pastrick, vice president; Ryan Strup, general counsel; Kristine Myers, trademark licensing specialist
Clients: gun manufacturers, automotive firms, restaurants, manufacturers of alcoholic beverages and energy drinks, clothing and apparel makers, colleges
Employees: 24
Web site: www.ce-ip.com

Source: Continental Enterprises

"Schools are tired of seeing thousands of items being sold in neighborhood grocery stores, drug stores and other outlets, and none of the money coming back to the school," Manders said. "The ones really getting hurt by these unlicensed, unauthorized sales are the students."

Tracking knock-offs

Continental makes its money by helping schools recoup a percentage of unauthorized sales. If a company is selling an unlicensed North Central product, and Continental negotiates a settlement, Continental will get a cut, Quandt said. Continental also could get a cut of overall sales in some cases.

"There really is no risk to the schools," said Continental Vice President Jeremiah Pastrick. "There's no upfront payment."

An organized licensing program sometimes piques the interest of vendors wanting to sell themed items, Manders said.

"Licensing helps get legitimate merchandise into the hands of more people," Manders said.

As the public's appetite for high school items increases, enforcement becomes an increasing concern, said Cliff Browning, a trademark attorney and partner with Indianapolis law firm Krieg DeVault.

"Obtaining a trademark is one thing, but pursuing trademark infringement is another thing entirely," Browning said. "Chasing down vendors and suppliers of unlicensed goods can really be challenging."

Before launching the firm, Manders worked as Marion County's deputy coroner, where he often handled investigative work.

His sister, Kristine Myers, who works as a trademark and licensing specialist for Continental, has 35 years' experience as a teacher and administrator for Indianapolis Public Schools, Washington Township Schools and Park Tudor High School.

Enforcement is Continental's strong suit, Manders said.

Initially, Manders' firm handled routine private investigative work, including cases involving Worker's Compensation and insurance fraud, divorce and child custody, and personal injury. The company was originally called Manders Detective Agency, but fearing the company's name would blow his and his agents' cover, he changed it to something more generic.

"I thought Continental Enterprises sounded more like a food service company or something like that," Manders said. "I wanted a name that blended into the background."

A Warner Bros. representative in New York found Manders' firm through his Yellow Pages listing, and asked him to help Warner investigate a T-shirt maker that had set up shop on Massachusetts Avenue. The shop, which is no longer in business, was printing unauthorized Batman T-shirts, capitalizing on the Warner Bros. movie released in the late 1980s, Manders said.

After word spread of Manders' success on that case, he was able to sign intellectual-property-rights investigation deals with the likes of Guess Jeans and the PellePelle clothing line, among others. Now the firm does almost entirely intellectual property and trademark cases, Manders said.

Though Continental is used to cracking down on offenders, Manders doesn't intend to use a heavy hand with the school programs.

EXHIBIT C

INDIANA STATE BAR ASSOCIATION
LEGAL ETHICS COMMITTEE

OPINION NO. 7 OF 1991

FACTS

Company RDC is a research and development company incorporated under Indiana law. Company RDC is a wholly-owned subsidiary of a parent corporation ("Parent Company") which controls several companies which are sister corporations ("Sister Companies") of Company RDC.

Some of Sister Companies have minority shareholders who are officers and employees of Sister Companies. All remaining stock of Sister Companies is held by Parent Company. Parent Company, RDC, and Sister Companies file a consolidated financial statement and a consolidated tax return.

Corporate counsel for Company RDC ("RDC Counsel"), who is a full-time salaried employee, is admitted to the practice of law in the State of Indiana and also admitted to practice before the United States Patent and Trademark Office in patent cases. His duties include the consideration of intellectual property issues.

Company RDC performs a variety of research and development services for Sister Companies for which it charges them three times the hourly salaried rate of its employees performing the services, plus expenses and a nominal "handling fee."

ISSUES

The following inquiries, as consolidated and restyled, have been represented to the Committee:

1. May Company RDC receive reimbursement from Sister Companies at three times the hourly salaried rate of RDC Counsel, plus expenses and a nominal handling fee for his time devoted to preparing and prosecuting patent applications, rendering legal opinions, conducting intellectual property searches and studies, providing legal consultation and providing business consultations?

2. Would the above conduct constitute the unauthorized practice of law?

3. Would the answers to Issues 1 or 2 be different if RDC Counsel were instead an employee of Parent Company and rendering services to Sister Companies?

CONCLUSIONS

1. As to Issue One: Yes, provided that confidentiality and conflict of interest concerns are addressed by RDC Counsel and provided that RDC Counsel exercises independent professional judgment.

2. As to Issue Two: No, the conduct would not constitute the unauthorized practice of law.

3. As to Issue Three: No, the answers to 1 or 2 would not change if the counsel for RDC Company were, instead, counsel for Parent Company.

DISCUSSION

Rule 5.4 of the Indiana Rules of Professional Conduct provides as follows:

"(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer."

The Comment to Rule 5.4 reads as follows:

"The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment."

Rule 5.5(b) provides as follows:

"A lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."

The rationale for the prohibition against fee splitting with a non-lawyer is the possibility of control by a lay person who is interested in profit, rather than the client's interests, and control by a person who is unregulated by the profession. The prohibition precludes the possibility of a non-lawyer's interference with a lawyer's professional judgment and the charging of an unreasonably high fee. See ABA/BNA Lawyers' Manual on Professional Conduct 41:801-808.

A number of arrangements have been found to violate the provisions against sharing fees with a non-lawyer or assisting a person in the unauthorized practice of law. See National Treasury Employees Union v. United States Department of Treasury, 656 F. 2d 848 (D.C. Cir. 1981) (recovery by union which provided counsel to union members of attorneys' fees exceeding the cost to the union of supplying legal services, would constitute the unauthorized splitting of fees with a non-lawyer); ABA Standing Committee on Ethics and Professional Responsibility, Informal Opinion No. 86-1519 (1986) (rationale for fee-sharing prohibition with non-lawyers is that clients are best represented by lawyers who are members of a regulated profession and who are not subject to conflicting interests or divided loyalties; it is assisting the unauthorized practice of law for a lawyer to enter into a contractual relationship under which a corporation provides a lawyer with legal research services in exchange for a percentage of contingent fees); Ethics Committee of the Massachusetts Bar Association, Opinion No. 84-1 (1984) (improper division of fees with a non-lawyer when bank charged mortgagor an amount in excess of the bank's actual cost for the staff attorney, but no opinion as to whether the arrangement would constitute the unauthorized practice of law because such issue was beyond the authority of the Ethics Committee to determine); Standing Committee on Legal Ethics for the Virginia State Bar, Opinion No. 835 (1986) (lawyer who was president and manager of a retail sales corporation who represented the corporation in collection cases may not remit any fees to the corporation).

On the other hand, other arrangements have been held not to constitute the unauthorized practice of law with a non-lawyer or unauthorized fee splitting with a non-lawyer: See Virginia State Bar Standing Committee on Legal Ethics, Opinion No. 480 (1983) (in-house counsel may render services to subsidiary in-house counsel if he receives fees or amount charged is direct reimbursement for the cost to the parent company). See also Legal Ethics Committee of the Dallas Bar Association, Opinion No. 1982-3 (1982) (attorney employed by corporation may provide legal services for the corporation, individual shareholder and another corporation so long as the corporation does not reap a benefit, reward or profit from the attorney's legal services to third parties); New York State Bar Association Committee on Professional Ethics, Opinion No. 618 (1991) (in-house corporate counsel also serving as attorney for corporation's pension plan may remit compensation as plan's counsel only to the extent it constitutes reimbursement for allocated portion of salary and overhead expenses); New York County Lawyers' Association Committee of Professional Ethics, Opinion No. 670 (1989) (permissible for lending institution to charge borrower a proportionate share of lawyer's salary and overhead proportionate to the lender's expenses in making the loan, noting that one proper method of determining the proportionate salary would be to divide the attorney's salary by the average number of hours per year the attorneys are expected to work and thereby determine an hourly billing rate, and noting that overhead would include salary of secretaries and clerk, rent, heat, utilities, library, depreciation on the building, furnishings and similar expenses).

Given that the rationale for the prohibition against fee splitting with a non-lawyer is the concern of control by an unregulated lay person who is interested in profit, rather than the client's interests, the rationale would not be served by concluding that the conduct proposed by RDC Counsel is impermissible. The fact that Company RDC is a research and development company performing services for the group of companies as a whole, suggests that the arrangement has as its purpose efficiencies and conveniences which serve the general interests of a group of companies. To the extent the attorney's salary and other expenses are understood to constitute no more than reimbursement of attorneys' fees and expenses (including overhead, and so forth) of Company RDC, there would more clearly be no ethical prohibition.

To the extent the amount charged by Company RDC to Sister Companies exceeds what can reasonably be understood to be reimbursement, there would seem no harm in the arrangement inasmuch as the arrangement constitutes an efficient mechanism for sharing an expense common to the group of companies and presumably reflects no more than the market value of RDC Counsel's services. It may well be that RDC Counsel's services are more valuable to Sister Companies than the direct cost to Company RDC because of RDC Counsel's expertise and working knowledge of Sister Companies' business which would make RDC Counsel more efficient in providing services. In other words, it could be far more expensive for Sister Companies to obtain like services elsewhere.

RDC Counsel must be wary of any conflicts of interest and confidentiality concerns which may arise during the representation and exercise independent professional judgment in advising Sister Companies. RDC Counsel should not continue the arrangement if a shareholder objects to the arrangement or if the amount charged appears to unreasonably exceed direct expense inasmuch as it may then be that Parent Company is unfairly attempting to maximize profit of Company RDC to the prejudice of minority shareholders in Sister Companies.

EXHIBIT D

FILED

2006 JUN 28 AM 9:19

CLERK, HAMILTON COUNTY COURTS

STATE OF INDIANA) HAMILTON COUNTY SUPERIOR COURT
) SS: ROOM NO. ___
COUNTY OF HAMILTON) CAUSE NUMBER: 29 D 01 0606 PL 614

HEINEKEN USA, INC.)
)
Plaintiff,)
)
)
v.)
)
GONZALES ENTERPRISES, INC.)
D/B/A FIFTH SUN;)
HUB DISTRIBUTING, INC. D/B/A ANCHOR BLUE;) 24/284
RAZZ, INC. and)
MAUI NIX, INC.,)
)
Defendants.)

COMPLAINT

For this Complaint against Gonzales Enterprises d/b/a Fifth Sun ("Fifth Sun"); Hub Distributing, Inc. d/b/a Anchor Blue ("Anchor Blue"); Razz, Inc. ("Razz"); and Maui Nix, Inc. ("Maui Nix"), collectively referred to as "Defendants", Plaintiff, Heineken USA, Inc. ("Heineken") hereby alleges as follows:

SUBSTANCE OF THE ACTION

1. This case involves infringement upon the distinctive and world-famous Heineken trademarks used by Heineken in connection with the sale and promotion of its products. Defendants' infringement arises out of the unauthorized use of the Heineken trademarks on clothing items bearing the Heineken marks (infringing items").
2. Defendants' use of the Heineken marks on the infringing items violates Heineken's rights under federal trademark law, common law and Indiana state law. Heineken asserts claims for federal trademark infringement, federal trademark dilution, false designation

DEMAND FOR TRIAL JURY

Heineken hereby respectfully requests a trial by jury in this cause, and for all other relief just and proper in the premises.

Respectfully submitted,

Darlene R. Seymour
Attorney # 23133-49

By:______________________

Continental Enterprises
9135 N. Meridian St.
Suite A-1
Indianapolis, IN 46260

FILED

STATE OF INDIANA) HAMILTON COUNTY SUPERIOR COURT
) 2006 OCT 12 PM 3:59 ROOM NO.
) SS: 29 D 0 1 0610 PL 999
COUNTY OF HAMILTON CLERK, HAMILTON COUNTY CAUSE NUMBER:

JUST BORN, INC.)
)
Plaintiff,)
)
)
v.)
)
DAVID & GOLIATH, INC.,)
)
Defendant.) 24 | 362

COMPLAINT

For this Complaint against Defendant, David & Goliath, Inc. ("D&G"), Plaintiff, Just Born, Inc. ("JBI") hereby alleges as follows:

SUBSTANCE OF THE ACTION

1. This case involves infringement upon the distinctive and famous trademarks used by JBI in connection with the sale and promotion of its "Peeps" confectionary products. Defendant's infringement arises out of the unauthorized use of the "Peeps" trademarks on clothing items bearing reproductions of the famous "Peeps" marks ("infringing items").
2. Defendant's use of the "Peeps" marks on the infringing items violates JBI's rights under federal trademark law, common law and Indiana state law. JBI asserts claims for federal trademark infringement, federal trademark dilution, false designation of origin or sponsorship, false advertising, and trade dress infringement pursuant to the Lanham Act, as well as common law trademark infringement, unfair competition, conversion, forgery, counterfeiting, and deception. JBI seeks a permanent injunction preventing Defendant from using the distinctive "Peeps" trademarks, along with an award of damages, treble

Case 1:06-cv-01585-DEB-JMS Document 1-2 Filed 10/30/2006 Page 13 of 13

DEMAND FOR TRIAL JURY

JBI hereby respectfully request a trial by jury in this cause, and for all other relief just and proper in the premises.

Respectfully submitted,

Darlene R. Seymour
Attorney # 23133-49

By: ______________________

Continental Enterprises
9135 N. Meridian St.
Suite A-1
Indianapolis, IN 46260

STATE OF INDIANA) HAMILTON COUNTY SUPERIOR COURT
) ROOM NO. 1
) SS:
COUNTY OF HAMILTON) CAUSE NUMBER: 29D01-0707-PL- 763

DANIEL D. WHITNEY)
)
Plaintiff,)
)
)
v.)
)
BIG DOG HOLDINGS, INC.)
)
Defendant.)

2007 JUL 13 PM 12:25

FILED

COMPLAINT

For this Complaint against Defendant, Big Dog Holdings, Inc. ("Big Dog"), Plaintiff, Daniel D. Whitney ("Whitney") hereby alleges as follows:

SUBSTANCE OF THE ACTION

1. This case involves infringement upon the distinctive and famous GIT-R-DONE® trademark used by Whitney in his comedic act and in connection with promotional merchandise sold by Whitney's licensing agent. Defendant's infringement arises out of the unauthorized use of the GIT-R-DONE® trademark on clothing items bearing reproductions of the famous GIT-R-DONE® mark ("infringing items").
2. Defendant's use of the GIT-R-DONE® mark on the infringing items violates Whitney's rights as the owner of the mark. Whitney asserts claims for federal trademark infringement, federal trademark dilution, false designation of origin or sponsorship, false advertising, and trade dress infringement pursuant to the Lanham Act, as well as common law trademark infringement, unfair competition, conversion, forgery, counterfeiting, and deception. Whitney seeks a permanent injunction preventing Defendant from using the