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Implied Professional Obligation Of Confidentiality Sufficient To Overcome Public Use Defense To A Claim Of Patent Infringement? *Bernhardt v. Collezione* - The Federal Circuit Court of Appeals' Surprising Recent Announcement on the Public Use Bar.

By

Nancy S. Paik*

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As most patent attorneys are aware, obtaining a patent from the U.S. Patent & Trademark Office (“USPTO”) does not *secure* ownership to an invention or design. Consider this: an inventor creates a puzzle, which she demonstrates at a party to 20 close friends. She informs the party guests that it is her invention, that she believes it will change the world of in-house entertainment, but she fails to mention that she is disclosing her invention in strict confidence. A flurry of excitement is generated by the demonstration of the puzzle, but one guest comments that it lacks interactivity, an essential feature in today’s attention-deficit society. Believing this is sound advice, the inventor incorporates an interactive component to the puzzle. Thirteen months later, she files a patent application with the USPTO. The patent issues in her name. Then, to her horror, she discovers that someone is distributing her invention or some embodiment of it without permission, and sues for patent infringement. The inventor (and her attorney) will be sorely disappointed to find out that what she believed was an innocuous demonstration of her invention to close friends has rendered her patent invalid under the prevailing law. Such an unfortunate turn of events is caused by what is known as the “public use” bar.

While the inventor in the hypothetical above is unlikely to prevail in an action for patent infringement if the defendant-infringer asserts a public use “defense” based on the demonstration of the invention at the party, an October 2004 decision by the Federal Circuit Court of Appeals,¹ *Bernhardt, L.L.C. v. Collezione Europa U.S. Inc.*,² ironically protects the inventor who discloses an invention without a confidentiality agreement in situations with far more exposure of the invention, but where an industry standard of confidentiality is observed. Those situations include, of all places, trade shows attended by industry insiders.

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¹ The Federal Circuit Court of Appeals is unique among the thirteen Circuit Courts of Appeals as the only federal appellate court with nationwide jurisdiction in certain areas of federal jurisdiction, such as patents. It is the only federal appellate court which hears matters from all the federal district courts. The court was created in 1982, by the merging of the U.S. Court of Claims and the U.S. Court of Customs and Patent Appeals. It was established to promote greater uniformity in areas of federal jurisdiction, particularly patents, and to relieve docket congestion in the regional courts of appeals.

² 386 F.3d 1371, 72 U.S.P.Q.2d 1901 (Fed. Cir. 2004).

The federal patent statute provides that a patent may be deemed invalid if a party can show by clear and convincing evidence that the subject of the patent was in “public use or on sale” in the United States more than one year before the filing of the patent application.³ The date one year before the filing date is aptly referred to as the “critical date.”⁴ “Public use” of the invention before the critical date invalidates the patent or can disqualify the inventor from obtaining a patent entirely.

Public use includes “any use of that invention by a person other than the inventor who is under no limitation, restriction or obligation of secrecy to the inventor.”⁵ However, whether a third party is under a “limitation, restriction or obligation of secrecy to the inventor” is not always clear. Not surprisingly, much litigation has centered on the existence of an implied obligation of confidentiality in the absence of an express agreement. Decisions analyzing the public use doctrine are largely fact-based, and courts have characterized the case law as one “marked by confusion and inconsistency.”⁶

*Bernhardt v. Collezione*⁷ may help clarify some of this confusion. In *Bernhardt*, the Federal Circuit recognized an implied obligation of confidentiality even though the patented designs were displayed at an exhibition attended by approximately 70 industry insiders, including potential customers.⁸ While the notion that an obligation of confidentiality can be implied from the circumstances to defeat a public use challenge is not new, *Bernhardt*⁹ is the first Federal Circuit opinion to expressly recognize an implied professional obligation of confidentiality despite such extensive (and arguably commercial) public disclosure. As such, the decision is a critical one for patent holders confronted with a public use challenge in infringement actions.

General Principles Of The Public Use Bar

In determining whether an invalidating “public use” has occurred, courts consider a totality of the circumstances in accordance with the policies underlying the public use bar.¹⁰ Those policies include preventing the public’s detrimental reliance on inventions which the

³ 35 U.S.C. § 102(b) (2004).

⁴ *Sys. Mgmt. Arts Inc. v. Avesta Technologies Inc.*, 87 F. Supp. 2d 258, 264, 54 U.S.P.Q.2d 1239, 1243-44 (S.D.N.Y. 2000).

⁵ *In re Smith*, 714 F.2d 1127, 1134, 218 U.S.P.Q. 976 (Fed. Cir. 1983).

⁶ *TP Laboratories, Inc. v. Professional Positioners Inc.*, 724 F.2d 965, 968, 220 U.S.P.Q. 577, 580 (Fed. Cir. 1984).

⁷ *Supra* note 2.

⁸ *Id.* at 1379.

⁹ *Id.*

¹⁰ *Baxter Int’l, Inc. v. COBE Laboratories, Inc.*, 88 F.3d 1054, 1058, 39 U.S.P.Q.2d 1437 (Fed. Cir. 1996); *see also* *Harrington Mfg. Co. v. Powell Mfg. Co.*, 815 F.2d 1478, 1480-81, 2 U.S.P.Q.2d 1364 (Fed. Cir. 1986).

public has reasonably come to believe are freely available because of their open use.¹¹ The public use bar also prevents inventors from sleeping on their rights by encouraging them to apply for patents promptly, thereby encouraging widespread disclosure of new and useful information.¹² Finally, it prevents inventors from commercially exploiting the exclusivity of their inventions beyond the period authorized under the statute.¹³

Conversely, it is also recognized that there is a public interest in allowing an inventor time to perfect his invention through public testing and experimentation, without having to fear that such activity will render the patent invalid or disqualify him from obtaining a patent entirely.¹⁴ Accordingly, in some cases, no invalidating public use will be found if the patent holder can make a satisfactory showing that the alleged public use was merely experimental.¹⁵

For the most part, the public use analysis turns on the totality of the circumstances. These include the nature of the activity that occurred in public, the extent to which the inventor retained control over the invention and the dissemination of information concerning it, the number of people to whom the information is disclosed, the extent to which the disclosure is made for commercial purposes, the extent of the public's access to and knowledge of the use, whether the public provided any feedback on the invention and whether the inventor applied that information to the invention, and whether any confidentiality obligation has been imposed on persons who have been exposed to the use.¹⁶

Bernhardt v. Collezione: Recent Federal Circuit Decision Recognizing An Implied Duty of Confidentiality Based on Professional Standards

Bernhardt v. Collezione,¹⁷ decided in October 2004, has created promising precedent for patent holders confronting a public use challenge in infringement actions. In *Bernhardt*, the Federal Circuit reversed a North Carolina district court decision finding that a plaintiff furniture manufacturer's display of its patented designs at an exhibition attended by industry insiders one month before the critical date constituted an invalidating public use.¹⁸

¹¹ *Manville Sales Corp. v. Paramount Sys., Inc.* 917 F.2d 544, 550, 16 U.S.P.Q. 2D 1587, 1591 (Fed. Cir. 1990) (quoting *King Instrument Corp. v. Otari Corp.*, 767 F.2d 853, 860, 226 U.S.P.Q. 402, 406 (Fed. Cir. 1985) (“The overriding focus of section 102(b) is preventing inventors from reaping the benefits of the patent system beyond the statutory term.”))

¹² *RCA Corp. v. Data Gen Corp.*, 887 F.2d 1056, 1062, 12 U.S.P.Q. 2d 11449, 1454 (Fed. Cir. 1989).

¹³ *Id.*

¹⁴ *Supra* note 6, at 968.

¹⁵ *Supra* note 11.

¹⁶ *Allied Colloids Inc. v. American Cyanamid Co.*, 64 F.3d 1570, 1574, 35 U.S.P.Q.2d 1840, 1843 (Fed. Cir. 1995) (citing *Baker Oil Tools, Inc. v. Geo Vann, Inc.*, 828 F.2d 1558, 1564, 4 U.S.P.Q.2d 1210, 1214 (Fed. Cir. 1987))

¹⁷ *Supra* note 2.

¹⁸ *Id.* at 1381.

The exhibition (“Pre-Market”) occurred prior to a major semiannual furniture marketing event, and featured designs under development.¹⁹ At least sixty-nine customers and industry newspaper reporters attended Pre-Market, none of whom were required to sign confidentiality agreements.²⁰ Attendees were, however, all industry insiders whose access to the exhibition was tightly controlled.²¹ Attendees were required to show identification throughout their visit, no photographs or sketches of the designs were permitted, no handouts were provided, and attendees were escorted by security personnel from the time they entered until they arrived at the showroom.²²

Defendant, a competitor and accused infringer, asserted that plaintiff’s patent should be invalidated on grounds that plaintiff’s designs were in public use as it was viewed by numerous people, including customers at Pre-Market and that plaintiff’s purpose in exhibiting at Pre-Market was commercial.²³ Defendant proffered evidence that plaintiff’s representatives at Pre-Market discussed prices with customers, sought customer feedback, used that feedback to determine whether its designs would be successful, and used Pre-Market to induce customers to attend the later semiannual marketing event.²⁴

The Federal Circuit rejected the defendant’s arguments, finding that an implied duty of confidentiality existed among industry insiders and that attendees who breached such confidence risked professional ruin.²⁵ At trial, plaintiff’s general manager testified that by breaching confidentiality, attendees risked termination of their relationship with plaintiff and a loss of reputation and trust among other furniture manufacturers.²⁶ In the circumstances, the court found that written confidentiality agreements were unnecessary due to the “industry-wide understanding” that designs featured at Pre-Market were confidential.²⁷ The court found that the district court’s analysis was “misdirected” and “incomplete” and failed to consider the totality of circumstances, including the professional obligations of confidentiality imposed on attendees.²⁸

Departure From Prior Case Law: A More Forgiving Interpretation

¹⁹ Id. at 1374.

²⁰ Id. at 1379.

²¹ Id. at 1380.

²² Id.

²³ Id.

²⁴ Id. at 1381.

²⁵ Id. at 1380.

²⁶ Id. at 1382.

²⁷ Id.

²⁸ Id.

The *Bernhardt*²⁹ decision marks a departure from prior case law by upholding the validity of a patent despite the commercial nature of the disclosure and the exposure of the invention to a large number of people, including customers. The decision is also significant for its clear and unequivocal finding of an implied obligation of confidentiality based on professional custom and the deleterious consequences of disclosure on industry insiders.

Earlier decisions indicated that disclosure based on comparable or less extensive publicity than that in *Bernhardt* invalidated the patents at issue. For instance, *Electro-Nucleonics, Inc. v. Mossinghoff*,³⁰ involved the demonstration of a blood analysis device at a trade show to, among others, prospective users. The court held that such “marketing ‘experiments’ to test the buying potential of the invention” qualify as an invalidating public use.³¹ Similarly, in *Whistler Corp. v. Dynascan Corp.*,³² a model of a radar detector was demonstrated to independent sales representatives the night before it was displayed at a trade show. While denying defendant’s summary judgment motion because of conflicting evidence as to whether the device had in fact been displayed at the sales meeting, the court added, “the use may be deemed public where the invention is exposed to persons other than the inventor, including customers and salesmen, who are under no obligation of secrecy and where no attempt is made to keep the device from the knowledge of the public.”³³ In *Nordberg v. Telsmith*,³⁴ the court found an invalidating public use where field tests of plaintiff patent holder’s rock crusher were conducted at a quarry owned by a separate company (“company”) prior to the critical date. The court ruled that the absence of any confidentiality agreement between plaintiff and the company, plaintiff’s lack of control over the company, and the “wide open” geography of the quarry – which could be freely visited by company employees (although there was no showing that there were any actual visitors) -- prompted a finding of an invalidating public use.³⁵ Despite a provision in the initial testing agreement discouraging third-party visits by limiting such visits to only those mutually agreed upon by the plaintiff and the company, the court found that the fact that a handful of sales dealers were shown the device prior to the critical date constituted an invalidating public use.³⁶

Decisions Leading To *Bernhardt v. Collezione*

²⁹ *Supra* note 2.

³⁰ 593 F. Supp. 125, 224 U.S.P.Q. 435 (D.D.C. 1984).

³¹ *Id.* at 128.

³² 1989 U.S. Dist. Lexis 8535, 12 U.S.P.Q.2d 1647 (N.D. Ill. 1989), *aff’d*, 925 F.2d 1480 (Fed. Cir. 1991).

³³ *Id.* at *4

³⁴ 881 F. Supp. 1252, 1288-1290, 36 U.S.P.Q.2d 1577 (E.D.Wis. 1995), *affirmed* in 38 U.S.P.Q.2d 1593 (Fed. Cir. 1996).

³⁵ *Id.* at 1289.

³⁶ *Id.*

Decisions finding an implied agreement of confidentiality in the public use context often turn on the relationship between the patent holder and the disclosee(s). The relationship determines the amount of control retained by the patent holder over the disclosee and over the dissemination of information about the invention. In *TP Laboratories, Inc. v. Professional Positioners, Inc.*,³⁷ the Federal Circuit reversed a Wisconsin District Court's ruling invalidating a patent for a dental implant device developed collectively by several dentists. The dentist-inventors' used the device on patients in three instances before the critical date.³⁸ The court found that an implied confidential relationship existed between the dentists and patients, such that the dentists had control over the patients at all times and over the dissemination of information about the device.³⁹ Furthermore, the defendants could not prove commercialization of the device, since the patients' medical records did not reflect any specific charge for the use of the device.⁴⁰

The Federal Circuit determined that the mere use of the device on the inventors' patients did not render the device publicly available and that the doctor-patient relationship alone satisfied the duty of confidentiality: "[i]n the circumstances of use by orthodontal patients, we attach no importance to the fact that the doctor did not ask a patient to swear to secrecy: a pledge of confidentiality is indicative of the inventor's continued control which here is established inherently by the dentist-patient relationship of the parties."⁴¹ The court reasoned that although the inventors had expressed no indication that the device should be kept a secret and the patients did not otherwise have reason to believe that the device was used confidentially, the relationship between the parties and the nature of the device was such that there were sufficient protections against disclosure: "testing of the device had to be public to some extent and it is beyond reasonable probability that a patient would show the device to others who would understand the function of the [device] or would want to duplicate the device. One [device] is all that is needed and, if lost or broken, the patient would expect it to be replaced by the treating dentist."⁴²

Two years later, in *Moleculon Research Corporation v. CBS, Inc.*,⁴³ the Federal Circuit upheld a Delaware District Court's ruling that demonstration and display of an invention to several people did not constitute an invalidating public use due to the close relationships of the inventor to the disclosees and the implied confidentiality stemming from such relations. The accused infringing invention was the popular Rubik's Cube.⁴⁴ Two potentially invalidating

³⁷ *Supra* note 6.

³⁸ *Id.*

³⁹ *Id.* at 972.

⁴⁰ *Id.* at 973.

⁴¹ *Id.* at 972.

⁴² *Id.*

⁴³ 793 F.2d 1261, 229 U.S.P.Q. 805 (Fed. Cir. 1986) (vacated on other grounds).

⁴⁴ *Id.* at 1264.

events were at issue.⁴⁵ First, several years before the filing of the patent application, the inventor demonstrated his puzzle model to his university roommates and department colleagues without any mention of secrecy.⁴⁶ Later, while the inventor was working at Moleculon, the president of the company approached him after seeing the model displayed in the inventor's office.⁴⁷ The inventor agreed to transfer the rights to Moleculon, which thereafter attempted to commercialize the puzzle but did not succeed in marketing it. Subsequently, Rubik's Cube was popularized by another toy company – one of those to which Moleculon had unsuccessfully earlier attempted to market the puzzle.⁴⁸

Echoing *TP Laboratories*,⁴⁹ the Federal Circuit stated, “the presence or absence of [an express written confidentiality agreement] is not determinative of the public use issue.”⁵⁰ The court found that a colleague's inquiry of a game manufacturer as to how to submit a puzzle for the manufacturer's consideration, without disclosure of the nature of the puzzle or how it worked, did not show commercialization.⁵¹ The court reasoned that as in *TP Laboratories*, the inventor's close relationships with the people to whom he disclosed the invention conferred the requisite control over the puzzle's use and information concerning it: “[w]hile it is true that [the inventor] explained his puzzle to a few close colleagues who inquired about it and allowed [the president of Moleculon] to in fact use it, the *personal relationships* and other surrounding circumstances were such that [the inventor] at all times retained control over its use as well as over the distribution of information concerning it. He never used the puzzle or permitted it used in a place or at a time when he did not have a legitimate expectation of privacy and of confidentiality.”⁵²

Inventor's Lack Of Control Over Disclosee(s) And The Dissemination Of Information Is More Likely To Render Patent Invalid

The Federal Circuit found an invalidating public use seven years after *TP Laboratories*,⁵³ based on similar yet distinguishable facts in *Beachcombers, Int'l Inc. v. WildeWood Creative Products Inc.*⁵⁴ The invention at issue in *Beachcombers* was an enhancement to a

⁴⁵ Id. at 1265.

⁴⁶ Id. at 1266.

⁴⁷ Id.

⁴⁸ Id.

⁴⁹ *Supra* note 6.

⁵⁰ Moleculon, *supra* note 44, at 1266 (citing *TP Laboratories*, *supra* note 6, at 972).

⁵¹ Id.

⁵² Id. at 1266 (emphasis added).

⁵³ *Supra* note 6.

⁵⁴ 31 F.3d 1154, 31 U.S.P.Q.2d 1653 (Fed. Cir. 1994).

kaleidoscope.⁵⁵ The alleged invalidating public use was the demonstration of the invention at a party hosted by the invention's designer, in which 20 to 30 guests observed, touched, and gave feedback on the invention one month prior to the critical date.⁵⁶

The Federal Circuit acknowledged its decision in *Moleculon*,⁵⁷ but nonetheless affirmed the California district court jury decision invalidating the patent based on the events at the party and the testimony of the designer of the invention/party host and a party guest.⁵⁸ Both had testified that no efforts were made to conceal the device or otherwise keep the invention confidential.⁵⁹ The court distinguished *Moleculon*⁶⁰ on grounds that despite "the closeness and ongoing nature of [the designer/party host's] relationship with her guests," the designer in *Beachcombers* lacked the degree of control that the inventor in *Moleculon*⁶¹ had over the discloses and the dissemination of information.⁶² The court based its ruling on the designer's testimony that the purpose of showing the device was to generate discussion and feedback.⁶³ A key distinction may have been that the invention was exhibited to 20-30 guests in *Beachcombers*⁶⁴ whereas only a handful observed the invention in *Moleculon*.⁶⁵

Ethical Obligation Of Confidentiality Observed In Professional Context

As in *Bernhardt*,⁶⁶ the Southern District of New York expressly recognized an implied obligation of confidentiality based on professional obligations in *Xerox Corp. v. 3Com Corp.*⁶⁷ The invention at issue was the Palm Pilot.⁶⁸ The alleged invalidating public use was the inventor's submission of a paper and videotape demonstrating the device to the chairman of an

⁵⁵ Id.

⁵⁶ Id. at 1160.

⁵⁷ *Supra* note 6.

⁵⁸ *Supra* note 55.

⁵⁹ Id.

⁶⁰ *Supra* note 44.

⁶¹ Id. .

⁶² *Supra* note 55, at 1160..

⁶³ Id.

⁶⁴ Id..

⁶⁵ *Supra* note 44.

⁶⁶ *Supra* note 2.

⁶⁷ 26 F. Supp. 2d 492, 49 U.S.P.Q.2d 1772 (S.D.N.Y. 1998).

⁶⁸ Id.

industry conference in an effort to have the invention presented at the conference.⁶⁹ Neither the tape nor the paper indicated that the disclosure was made in confidence.⁷⁰

The court found that those submissions did not constitute an invalidating public use because an implied professional obligation prevented conference personnel from disclosing the information: “[a]s a matter of formal policy and procedure as well as professional courtesy and practice, SIGCHI review committees treat every submission confidentially, as a draft, at all times prior to publication of the final version of the paper, videotape, or other category of submission at the conference.”⁷¹ The court concluded, “[a]lthough there was no express contractual confidentiality agreement between Dr. Goldberg and the INTERCHI '93 review committee, the INTERCHI reviewer was under a professional ethical obligation to treat the material as confidential. There is no evidence that any reviewer accepted Dr. Goldberg's submission other than under circumstances protecting confidentiality.”⁷²

The court rejected defendant's argument that the submission of the tape served commercial purposes, i.e., publicity of the invention.⁷³ The court found instead that the conference served a more honorable purpose than mere commercial promotion, stating that finding an invalidating public use under these circumstances “would no doubt have a chilling effect on scientific and academic submissions in future cases.”⁷⁴ It concluded: “the policy favoring prompt and widespread disclosure of inventions is admirably served by events like the INTERCHI '93 Conference.”⁷⁵

However, disclosures made in the professional context to employees, who presumably owe a duty of confidentiality to employers, are not always protected. In *Minnesota Mining and Mfg. Co. v. Appleton Papers, Inc.*,⁷⁶ the court ruled that in-house distribution to employees of paper incorporating patented technology for use by employees constituted an invalidating public use. Ten thousand sample sheets were distributed to an unknown number of 3M employees, who were unaware that the paper was created with the new technology.⁷⁷ 3M had not indicated that the employees were to use the invention in confidence.⁷⁸ The court flatly rejected 3M's

⁶⁹ Id.

⁷⁰ Id.

⁷¹ Id. at 496.

⁷² Id.

⁷³ Id.

⁷⁴ Id. at 497.

⁷⁵ Id.

⁷⁶ 35 F. Supp. 2d 1138, 50 U.S.P.Q. 2d 1091 (D. Minn. 1999).

⁷⁷ Id. at 1148.

⁷⁸ Id. at 1149.

argument that an invention distributed to employees of the patentee company is nonpublic use as a matter of law merely because employees have an implied duty not to disclose confidential business information.⁷⁹

Conclusion

Patent holders confronted with a public use challenge to the validity of their patents stand on stronger ground in light of *Bernhardt v. Collezione*.⁸⁰ The decision expressly recognizes an implied professional obligation of confidentiality deriving from professional courtesy, ethical concerns, and the detrimental effects on the careers of those who disclose information in breach of confidence. However, it is of critical value to the patent holder's case to have available the declaration or testimony of the discloser or an expert witness stating that such an obligation is indeed imposed on industry insiders and the potential risks at stake if the information was disclosed in breach of the implied professional obligation of confidentiality.

Additionally, counsel should argue that finding an implied professional ethical obligation of confidentiality in appropriate cases is in accord with the policies underlying the public use bar. One such policy is to prevent detrimental public reliance on an invention that the public reasonably believes is freely available. If a discloser is under an implied obligation of confidentiality, she is restricted from disclosing the information. Information about the invention is then unlikely to leak into the public domain, and no detrimental public reliance can result. Furthermore, it can be argued that experimental use of the invention serves the public interest, and finding an invalidating public use based on disclosure to industry insiders would no doubt have a chilling effect on an inventor's ability to test and share valuable new information with colleagues. Such a limitation on development would come at a tremendous cost to the public.

Perhaps the best advice of all, though, would obviate the need for litigation or at least limit it to a great extent: advise the patent-holder client to execute a nondisclosure agreement with anyone to whom information about the invention is disclosed, whenever such information is disclosed. If that is impractical, the inventor (or her successors) should at least orally express the intent to keep the information confidential and ask the discloses not to disclose it, and create some record of that exchange.

⁷⁹ Id. at 1151.

⁸⁰ *Supra* note 2.