

DECEPTION IS STILL KING

Apple, iPad, And The Still Murky World Of Negotiation Ethics



By Michael D. Young *

Apple forms a dummy corporation, uses negotiators with fake names, engages in intentional deception, and possibly even lies, all to buy the *iPad* trademark for cheap. Is this cloak and dagger stuff just clever negotiating? Or are there limits to what even negotiating parties can do when trying to cut the best possible deal?

For the negotiating geeks among us, we may find out if the Santa Clara Superior Court case of *Proview Electronics Co. v. Apple* makes its way to trial. (Of course, the complaint in this action sets forth allegations only; who knows if they are true. And it remains to be seen whether there is a dispositive defense for Apple. But if we take the allegations at face value, the issues raised by the complaint are worthy of exploration. So let's treat the following as a bar exam hypothetical, and see where it leads us.)

THE "iPAD" TRADEMARK LAWSUIT

Here's what's alleged: Proview, according to the complaint, is a Taiwanese company that manufactured computer monitors. In 2000, with the help of National Semiconductor, Proview began developing an "all-in-one internet terminal with a built-in 15-inch color monitor" called, cleverly enough, the iPad. Being both clever and thorough, Proview registered the "iPad" trademark in various countries, including China, the European Union, Mexico, and various Asian countries.

From 2000 on, nothing much came of Proview's iPad. And then 2008 struck ... with a vengeance. The bottom fell out of the world economy and we are all still swimming in the muck trying to reach the shore. Proview lost its two biggest customers, Circuit City and Polaroid, and fell on hard times. It was desperate for cash.

Now the story gets interesting. According to the complaint, Apple was working on its latest revolutionary "must-have" overpriced electronic device, the tablet computer. Apple even had a clever name all picked out. Unfortunately, what it didn't have was the trademark for that clever name in China, the EU, Mexico, and various Asian countries. It needed to acquire the trademark for "iPad" from Proview.

One can imagine the leverage Proview would have enjoyed had Apple come knocking on its door saying "Hello there. We have invented the next revolutionary technological gadget that tens of millions of people around the world will have to buy at inflated prices, and we want to call it the 'iPad.' We'd like to buy the trademark from you. How much will you charge us for the rights?"

How many zeros are there in a gajillion?

So clearly, Apple needed a different negotiating strategy, preferably one that did not involve "Apple," "next it gadget," or very many zeros. It needed to hide its negative leverage.

And so, according to the complaint, raising our first ethical question, Apple created a dummy British corporation called IP Application Development Ltd., with the amazingly coincidental initials of "IPAD." Apple then invented a fake person by the name of "Jonathan Hargreaves," and had "Mr. Hargreaves" contact Proview to open discussions for the purchase of the iPad trademark rights.

Proview wasn't about to sell its trademark to just anyone; and was particularly concerned about selling it to a competitor. So it asked "Mr. Hargreaves" to describe IP Application Development Ltd., and explain why the company wanted the trademark.

Raising our second ethical question, the mysterious Mr. H was cagey. In reply he stated the company was new, but intended to be "in the computer field." However, Mr. H continued, "since we have only just incorporated, it is premature to disclose more than that." Nonetheless, Mr. H did go out of his way to reassure Proview that "we will not be competing with your company."

Pushing the ethics envelope a little farther, Apple's fictitious Mr. Hargreaves is alleged to have next written in an email (copied in the complaint) that the company wanted the trademark *because "IPAD is an abbreviation for the company name IP Application Development Limited.* This is a newly formed company, and I'm sure you can understand that we are not yet ready to publicize what the company's business is, since we have not yet made any public announcements." The magnanimous Mr. H then again affirmed that the company "will not compete with Proview."

To create a little positive leverage of its own, the now not-so-magnanimous Mr. H allegedly took advantage of Proview's financial destitution and "threatened to initiate legal action to cancel Proview's trademarks...if Proview did not agree to sell them."

Proview eventually sold the *iPad* trademark for all of £35,000 (or about \$55,000).

THE MYSTERIOUS MR. HARGREAVES REVEALED

According to the complaint, Apple later revealed in a Hong Kong affidavit that "Jonathan Hargreaves" was an "alias" for someone named Graham Robinson. ("Alias," "pretexting," "lying," it's all in

the spin.) A quick Google search turned up a Graham Robinson at the national law firm of Wilmer and Hale, where Mr. Robinson is listed as the head of the firm's Corporate practice. Without saying that this is Apple's Mr. Robinson/Hargreaves, by a remarkable coincidence Wilmer and Hale, according to its website, just happens to have done significant IP work for Apple, including obtaining "a significant win for Apple in an ITC action in which Nokia had accused Apple's iPhone, iPad, iPod and MacBook products of infringing seven Nokia patents."

ABOUT THE ETHICS

So, again, assuming these allegations to be true for purposes of analysis, what's wrong, if anything, with the way Apple negotiated? Well, let's look at it in smaller bites.

1) The Undisclosed Principal

As noted, Apple wanted to buy the iPad trademark, and knew that if it was open and honest about it ("Hi, I'm Apple, and I would like to buy your trademark for our next Big Thing"), the seller would have held out for an exorbitant sum. Thus, Apple looked for a way to buy the trademark without identifying the fact that Apple was the buyer.

Apple could have simply utilized an agent to buy the mark for it. And if asked, the agent could have truthfully stated: "I'm sorry, I can't identify the principal I'm working for." This probably would have made the seller suspicious, and possibly even increased the sales price, but it would have been an honest transaction.

Indeed, there is a long history of lawyers negotiating deals on behalf of undisclosed principals for the very reason at issue here – that if the seller knew the true identity of the buyer, the seller could increase the price and the buyer would have to pay more to get what it wanted. Apparently, it's common in real estate deals where developers want to buy up numerous parcels, but don't want the last seller to hold out for an inflated price. For instance, Disney used dummy corporations to buy up much of Orlando, Florida. Or in our own state, Los Angeles used agents to purchase water rights under the guise that it was for cattle operations. (Remember the movie *Chinatown*?)

In fact, it is such a recognized negotiation tactic that the ABA Model Rules of Professional Conduct seem to condone it. For instance, ABA Model Rule 4.1 forbids attorneys from making false statements of material facts. However, the Comments to the Rule then clarify that "[u]nder generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact," such as "*the existence of an undisclosed principal* except where nondisclosure of the principal would constitute fraud."

2) The Shill Corporation

But even accepting that one can, under non-fraudulent circumstances, negotiate on behalf of an undisclosed principal, is that what is alleged to have happened here? Did Mr. Robinson,

assuming he is a U.S. attorney, merely negotiate on behalf of an undisclosed principal? Or did he and Apple go further?

Allegedly they went further. According to the complaint, Apple formed a shill British company and had the British company purchase the trademark.

So what? Is this really any different than the "undisclosed principal" situation where the agent says "I can't disclose who I'm buying this mark for?" Actually, yes! Setting up a dummy company is hiding the very existence of the principal. By deceiving the seller into thinking there is no hidden principal, the true principal is making an effort to avoid even the moderate increase in price that would likely be associated with a purchase by an agent of a known, but unidentified, principal.

Looked at another way, if "Apple" is the buyer, the sales price for the trademark will be astronomical. If "an undisclosed principal" is the buyer, the sales price may not be astronomical, but may still be high to reflect the possibility that a mysterious large company is buying the mark. However, if there is no undisclosed principal at all, and the buyer is by all appearances a small startup computer company with a coincidental acronym, then the sales price might be relatively low. Hiding the existence of a principal by using a dummy buyer is the first step in the deception of the seller designed to lower the sales price.

And yet, no untruth has been uttered. Deception? Yes, since the eventual owner of the mark, and the entity allegedly orchestrating the entire operation, is Apple. But untruthful? No. The shill company with the convenient name was in fact buying the trademark.

Was the company obligated to affirmatively inform the seller that it intended to assign the mark to Apple once the transaction was done? Not according to the standards of ethics governing U.S. attorneys. According to Comment 1 to ABA Model Rule 4.1, "A lawyer ... generally has no affirmative duty to inform an opposing party of relevant facts." So being silent seems to be o.k., placing the burden of investigation and education squarely on the shoulders of the seller.

3) The Fake Negotiator

Again assuming the facts in the complaint are true, Apple didn't stop with simply setting up the dummy company. According to the complaint, Apple then had its negotiator, Mr. Robinson, create a fictitious identity, "Jonathan Hargreaves," to further the subterfuge, just in case Proview thought to run a Google search on the individual. Is there anything wrong with negotiating under a pseudonym? Well, assuming the negotiator's name is not a material fact, then maybe not. Indeed, anonymous free speech has a storied history in this country (remember the Federalist Papers?), and has been sanctioned by the U.S. Supreme Court. (See, e.g., *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 357 (1995).)

On the other hand, ABA Model Rule 4.3 does forbid a member of the bar from dealing with unrepresented parties under certain circumstances: "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. *When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.*"

Mr. Robinson (assuming he is a U.S. attorney) may argue he was not acting as a lawyer when he was negotiating for the British company in England with a non-attorney in China, and hence these Rules of Professional Conduct won't apply to him. It's a running debate among attorneys working in a business capacity, but does he really want to rely on that defense in front of a judge in a U.S. court?

4) The Affirmative Representation

Assuming the allegations are true, maybe Apple could have set up the shell, utilized the alias, and hidden its role as ultimate buyer of the trademark and still remained above the amorphous ethical line. But, according to the complaint, Apple went one step farther still.

It was alleged that Hargreaves/Robinson represented that the British company was new, but intended to be "in the computer field." This does not appear to be true. In fact, if the complaint is to be believed, the company intended to be in the "acquire the iPad trademark to assign to Apple" field.

But more than this, when asked why the shell company wanted to acquire the trademark, Hargreaves/Robinson allegedly represented in writing (with underlines, just in case the sellers were a tad slow) that it was because *"IPAD is an abbreviation for the company name IP Application Development Limited."*

Hargreaves/Robinson didn't say "we choose not to respond to that question," or "we reserve the right to use it for any lawful purpose. We don't want to limit ourselves at this time." He didn't remain silent. He didn't redirect the question. Instead, he responded with what appears to this untrained eye to be an affirmative misrepresentation. (Again, these are allegations. There are likely more facts and documents that put all of this into context. But why ruin a good hypothetical with reality).

The fact that "iPad" was the abbreviation for the shell company was not the real reason Hargreaves/Robinson/IP Application Development/Apple wanted the trademark. They were not looking to trademark the abbreviation for the company; rather, *it seems clear they selected the company name to match the trademark they wanted.*

But is this the kind of lie (assuming it was made at all) that crosses the line and renders the negotiation unethical? Or is this one of those lies, like the negotiator's name, that is not material? Looked at another way, is the buyer's intended use of the IP a material fact?

Clearly Proview will say it is. And they will point to the great lengths Apple went to in order to avoid disclosing what its true intent was. If Apple's identity wasn't material, why the subterfuge? Indeed, it seems clear that the buyer's intended use had an impact on the price.

But that doesn't seem to be the test of "materiality." The buyer's purpose in buying the mark would have an impact on price *only because Apple was going to invest untold zillions in creating a product that would have a worldwide demand.* So it would be Apple's investment and efforts in creating the product, and linking that "must have" product to the "iPad" mark, that would make the mark valuable. *Why should the Proview, who provided no value to the mark, and who merely had the good fortune of having trademarked a name that someone else wanted to leverage, get to capitalize on any of that effort?* Apple's desire for the mark is negative leverage in the negotiation, and why shouldn't Apple be able to conceal its negative leverage?

It can. But can it *lie* in order to conceal that leverage? Ultimately, assuming the allegations are true, this might be the key question.

In the long run, regardless of whether the conduct was ethical or not, after the dust of the Chinese and U.S. lawsuits and legal fees have settled, might it not have been cheaper to negotiate at a little higher ethical altitude? When one plays at the cutting edge of the ethical line, one is bound to get cut now and again.

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