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An action for declaratory judgment provides a party with the unique opportunity to obtain a preventative, binding ruling on "a case of actual controversy." Crucially, if a declaratory judgment action does not involve an actual "case or controversy", the matter will be summarily dismissed for a lack of subject matter jurisdiction.

Declaratory relief is typically intended 'to relieve potential defendants from the Damoclean threat threat of impending litigation which a harassing adversary might brandish, while initiating suit at his leisure—or never.' Accordingly, it is unfortunately no surprise that declaratory judgment actions are fairly common occurrences in intellectual property law, where litigious threats by such "harassing adversar[ies]" and disputes over the use and/or ownership of intellectual property rights are routine. Moreover, since the Supreme Court's *MedImmune v. Gementech* decision in 2007—which noticeably relaxed the "case or controversy" requirement for declaratory judgment suits—declaratory judgment suits over intellectual property rights have become even more prevalent, at least in the fields of patent and trademark.

A considerable portion of the patent and trademark legal community has criticized *MedImmune* for its noticeable impact on cease–and–desist letter drafting practices. However, as this somewhat controversial standard now circles the waters of copyright law, there is good reason to believe that *MedImmune* may be uniquely welcome in certain niche areas of the field—and in particular, media and entertainment.

MedImmune Redefines the "Case or Controversy" Requirement

Prior to 2007, the federal circuit followed a two–pronged standard—commonly referred to as the "reasonable apprehension" test—to determine whether an action for declaratory relief was sufficiently real and immediate to constitute an actual, justiciable "case or controversy" (as opposed to a hypothetical, abstract instance). The reasonable apprehension test examined whether: (1) the defendant's conduct "created a real and reasonable apprehension of liability on the part of plaintiff" and (2) the plaintiff "engaged in a course of conduct [that] brought it into adversarial conflict with the defendant."

However, the United States Supreme Court rejected the "reasonable apprehension" test in *MedImmune* by an 8–1 majority. In its place, the Court re–characterized the "case or

controversy" standard for declaratory judgment actions in broader terms, explaining that courts need only consider 'whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.' Critically, this new standard notably lowered the "case or controversy" threshold for declaratory judgment actions by eliminating the "reasonable apprehension of suit" requirement, increasing the likelihood that such claims would be actionable.

Impact on Patent Law

The *MedImmune* decision was much–maligned by patent practitioners because of its striking impact on the landscape of cease–and–desist letter drafting in the field (a key element of both patent enforcement and license negotiation) as well as its tendency to disincentivize the out–of–court resolution of disputes (stymieing well-settled public policy). Specifically, under *MedImmune*, a licensee has greater freedom to bring suit against a patent owner for a declaration of its rights in lieu of negotiating with the patent owner at a disadvantaged position. This change in incentives greatly increases the expected costs associated with license negotiation and patent enforcement, and in turn, demands a higher degree of tact and care in the drafting of cease–and–desist letters.

MedImmune's Expansion into Trademark

Although *MedImmune* centered on a patent dispute, the same principles that control patent-related declaratory judgment cases are also applicable to copyright or trademark disputes. Indeed, the Federal Circuit readily abandoned the "reasonable apprehension" test and began incorporating the *MedImmune* standard into trademark almost immediately after its indoctrination in patent. Unsurprisingly, the trademark community reacted to *MedImmune* in much the same fashion as patent practitioners (if not with a bit more color), calling the ruling a "minefield [that is] now a risk for trademark owners."

Testing the Waters of Copyright

The expansion of *MedImmune* is now intensifying in the copyright realm. Indeed, while the "reasonable apprehension" test is still alive and well in copyright, *MedImmune* has been picking up steam and receiving increased deference. Curiously though, the federal courts in New York and California (arguably the most prolific states in copyright, and certainly at least with regard to arts and entertainment) appear hesitant to fully embrace *MedImmune* in copyright, as there are currently no copyright cases in those jurisdictions that relied on *MedImmune* to find an actionable "case or controversy." This is particularly interesting for New York, which was the first state to embrace *MedImmune* in both patent and trademark. Several other states have, however, relied on *MedImmune* to identify justiciable cases and controversies arising under copyright.

As most patent and trademark owners (and their lawyers) tend to share at least a mild distaste for the more permissive *MedImmune* standard, one might assume—now that *MedImmune* is being integrated into copyright—that copyright owners would follow suit and begin gathering en masse with torches. However, unique differences in industry dynamics suggest that *MedImmune* might actually be welcomed in certain circles of copyright law—particularly in the film and television industry—where, distinctively, owners of intellectual property rights are quite often the recipients, not the drafters, of cease–and–desist letters.
