



MEMORANDUM

Via E-Mail

DATE: May 27, 2005

TO: Firm Clients and Friends

FROM: Bergeson & Campbell, P.C.

RE: District Court Issues Preliminary Injunction Protecting FMC Copyright

On May 16, 2005, the U.S. District Court for the Eastern District of Pennsylvania issued a preliminary injunction in *FMC Corporation v. Control Solutions, Inc.* (appended), where FMC Corporation (FMC) alleges Control Solutions, Inc. (CSI) is willfully violating FMC's copyright on its TalstarOne pesticide product label. CSI is enjoined from selling its generic Bifen I/T pesticide, which "contains the exact ingredients, in the identical proportions as, and is thus functionally equivalent to, FMC's TalstarOne product." The court held an evidentiary hearing and oral argument on April 21-22, 2005, and determined that CSI is willfully violating FMC's copyright and, as a result, is "knowingly and willfully" selling its generic product with an infringing product label.

During the hearing on FMC's motion for preliminary injunction, CSI's Director for Regulatory Affairs testified that he prepared the label by "cop[ying] the content of the other label in the marketplace, in this case the Talstar TC label and copied the content and submitted that to EPA as my label." He further testified that the only changes he made were to the name of the product and the warranty statement.

Although CSI raised several affirmative defenses, the court found that, on the record established thus far, none "is so persuasive as to undermine what appears as FMC's likely success with its claim." CSI argued that a pesticide label's purpose is purely functional; that CSI's copying of the label is protected by the fair use doctrine; and that FMC may not receive the benefits of copyright protection because FMC's claim of copyright infringement is nothing more than copyright misuse and thus FMC comes to the court with unclean hands. FMC countered that while a label includes mandated facts and functional information, creating a label also includes "creativity, time and money." According to the court, "no evidence exists within this record to raise the specter of any improper motive by FMC" in its claims. The court found "that it is sufficiently likely that FMC will succeed on the merits of its claim and that the other necessary elements for issuance of a preliminary injunction are met."



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FMC sought a preliminary injunction ordering CSI, and anyone or any entity acting in concert with CSI,¹ to:

- (1) Stop manufacturing the infringing label or causing the label to be manufactured;
- (2) Halt using the infringing label;
- (3) Stop placing any product that has the infringing label affixed to it into the stream of commerce;
- (4) Recall all products bearing the infringing label that are not already in the hands of an end user;
- (5) Destroy all existing infringing labels; and
- (6) Immediately provide all of Bifen I/T's distributors, customers and sub-registrants with a copy of the preliminary injunction order.

The court's order grants all but subpart (4) and a portion of subpart (6), to "prevent further sales or facilitation of sales of any product utilizing a product label that has been approved by the EPA (or is currently within the EPA review process) based upon a me-too submission by CSI that consists of a product label based on the virtually verbatim copying of the TalstarOne label." A trial on the merits of the claims and defenses "will follow promptly." A pretrial conference is scheduled for **June 6, 2005**, to address the scheduling for a trial on the merits and other appropriate matters.

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We hope this information is helpful. As always, please call if you have any questions.

[Attachment](#)

¹ According to testimony, CSI granted sub-registration rights to Phoenix Environmental Care LLC and Regal Chemical to use a label substantially similar to the label CSI copied from FMC.