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MARCH 2010

WE ARE PLEASED TO ANNOUNCE ADMISSION of **CARA BOYLE** and **LAURA POPP-ROSENBERG** as partners in our International and U.S. Litigation groups, respectively. Congratulations to Cara and Laura!

TWELVE OF OUR ATTORNEYS were listed in the USA section of the 2009 "Guide to the World's Leading Trade Mark Law Practitioners," published by Legal Media Group/Euromoney in association with Managing Intellectual Property. Named were **LAWRENCE E. APOLZON, STEPHEN BIGGER, CARLOS CUCURELLA, MICHAEL I. DAVIS, SUSAN UPTON DOUGLASS, DAVID W. EHRLICH, JANET L. HOFFMAN, NADINE H. JACOBSON, RONALD J. LEHRMAN, RICHARD Z. LEHV, PETER J. SILVERMAN** and **BARBARA A. SOLOMON**.

WE ALSO REPORT the results of the Managing Intellectual Property "World IP Survey 2010." Fross Zelnick was one of the two firms in the top tier nationally for both trademark prosecution and for copyright work and one of the three firms in the first tier of the trademark contentious category for the Northeast Region. We were also highly rated in the national trademarks contentious category.

THE SECOND CIRCUIT, in a summary order, affirmed the district court's award of more than \$2 million for a copyright infringement claim brought on behalf of Kam Hing Enterprises, Inc. *Kam Hing Enterprises, Inc. v. Walmart Stores, Inc., et al.*, Case No. 07 CV 2316. **JOHN MARGIOTTA** and **MICHAEL CHIAPPETTA** represented Kam Hing Enterprises, Inc. Prior to the trial on damages, in what the court noted was a rare instance of granting summary judgment to a plaintiff on liability in a copyright infringement case, the court found the copyrighted works at issue (quilts) strikingly similar, and defendants liable for copyright infringement. On appeal, defendants argued that the court overlooked evidence of defendants' independent creation of its quilt, and that the \$2 million award was excessive. The Second Circuit rejected both arguments, and affirmed the district court in all respects, including the district court's decision to exclude certain testimony offered by Walmart to establish its costs related to selling the quilt at issue. The judgment has now been collected.

BARBARA SOLOMON and **EVAN GOURVITZ** prevailed in an opposition proceeding in favor of client Christopher Brooks, grandson of the legendary musician Cab Calloway. In its precedential decision, the Trademark Trial and Appeal Board clarified prior non-binding and occasionally conflicting opinions concerning the standards for establishing

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prior rights based on the use of trade names and personal names. A full report on the decision appears in the U.S. section of this Information Letter.

ON BEHALF OF CLIENT **CALVIN BROADUS**, the famous musician and entertainer publicly known as Snoop Dogg and Snoop Doggy Dogg, **MICHAEL CHIAPPETTA** successfully opposed an application of Kristyn Kelly Allen dba Passive Devices to register the mark SNOOPTUNES in connection with wireless transceivers that allow transmission of music and data from one mp3 player to another. The Trademark Trial and Appeal Board held that Mr. Broadus owned rights in his registered SNOOP DOGGY DOGG and SNOOP DOGG marks, as well as common law rights in the unregistered shortened form SNOOP, and that all of these marks are strong and famous. The Board further held that, in view of Mr. Broadus' rights and his extensive licensing of his marks in connection with the goods and services of third parties, consumers are likely to be confused into thinking that he is associated with a music transmitting device under the mark SNOOPTUNES and accordingly sustained the opposition.

DAVID DONAHUE AND **MICHAEL CHIAPPETTA** successfully represented Edgar Rice Burroughs, Inc. (ERB)--successor to the famous author of the *Tarzan* and *John Carter of Mars* stories--in overcoming an opposition before the Trademark Trial and Appeal Board (TTAB) of the U.S. Patent and Trademark Office (USPTO) to its application to register the mark JOHN CARTER OF MARS for a variety of toys and games. The opposer, Missing Cougar Company, alleged that when ERB filed the subject application based on its bona fide intention to use the mark it (i) lacked such a bona fide intention to use, and (ii) committed fraud on the USPTO by misrepresenting such intention to use. According to the opposer, ERB acted in bad faith by filing the subject application while ERB's prior application for the same mark for identical goods was still pending. The opposer pointed to language in the legislative history of the Trademark Law Revision Act of 1988 suggesting that the filing of successive applications to register the same mark for identical goods *can* be evidence that the applicant lacks a bona fide intention to use the mark and is instead merely seeking to reserve a valuable mark to the exclusion of others. We filed a motion for summary judgment on ERB's behalf, arguing that ERB had established beyond dispute that it possessed (and still possesses) a bona fide intention to use the mark. The TTAB agreed, and granted summary judgment to ERB, soundly rejecting the opposer's arguments. The TTAB found that there was ample evidence of ERB's bona fide intent, notably including ERB's entry into a major motion picture deal with Disney for the John Carter of Mars property two weeks before filing the application. The TTAB noted that ERB's filing of successive applications was justified by the circumstances of the first application--namely, that the first application was filed on the heels of a prior movie deal with a different major movie studio for the property, but the deal later fell through, causing the rights to revert to ERB. The TTAB thus dismissed the opposition with prejudice.

CRAIG MENDE was quoted in the New York Times on Super Bowl Sunday, February 7, in an article about the National Football League's enforcement of its SUPER BOWL trademark. Craig and **ROB BECKER**, on behalf of nine companies, helped rebuff the

NFL's efforts in 2007 to register THE BIG GAME as a trademark to prevent non-sponsors from even referring to the game in advertisements. In the Times article, Craig is quoted as saying that the NFL was "overreaching."

RICHARD LEHV and **BARBARA SOLOMON** were interviewed on January 7 by NBC Nightly News and CNN, respectively, concerning a large billboard placed in Times Square by a garment manufacturer. The billboard prominently features President Obama standing at the Great Wall of China, wearing the manufacturer's jacket. Richard and Barbara were interviewed as authorities on the right of publicity. Both concluded that the manufacturer had no right to run the billboard. See http://www.msnbc.msn.com/id/3032619/ns/nightly_news#34757351 ("Model in Chief") and <http://www.cnn.com/2010/POLITICS/01/08/obama.billboard/index.html?ref=allsearch>.

RICHARD LEHV was named in a January 2010 survey of corporate counsel for providing exceptional client services. The survey, based on interviews with 240 corporate counsel, was conducted by The BTI Consulting Group, Inc., and lists 165 lawyers, eleven of whom, including Richard, specialize in intellectual property matters. Richard was interviewed for a January 26 story in "IP Law360" concerning the BTI survey. Asked how to foster successful client relations, Richard noted four key factors – "communication, competence, confidence and caring." He said, "Clients are looking for a strong, confident advocate . . . willing to go to bat for them. At the same time, they . . . want to know their chances of winning, to have an accurate estimate of . . . cost, to stay informed about . . . the case, and to be told what's expected of them as a client."

JANET L. HOFFMAN co-authored an article on the waxing and waning of the Russian Federation's bid for accession to the World Trade Organization, "Navigating the Russian legislative maze," which appeared in the February/March 2010 issue of World Trademark Review.

WE WELCOME LESLEY J. MATTY as an associate in our International Group. Lesley comes to us from Gottlieb, Rackman & Reisman, P.C., where she was an associate since September 2007, and clerked from June 2006 to May 2007. Lesley also interned in the Legal Department of The Donna Karan Company LLC (New York) from June 2005 to May 2006. Lesley received her B.A. from Emory University, where she was a member of the Phi Alpha Theta National History Honor Society and the Psi Chi National Undergraduate Honor Society in Psychology, made Deans List from 2001 to 2004 and spent a semester (Spring 2003) studying at the University of New South Wales (Sydney, Australia). Lesley received her JD in 2007 from Benjamin N. Cardozo School of Law, where she was Articles Editor of the Cardozo Journal of International and Comparative Law (2006-2007) and authored *Rock, Paper, Scissors, Trademark? A Comparative Analysis of Motion as a Feature of Trademarks in the United States and Europe* (14 Cardozo J. Intl'l & Comp. L. 557 [2006]).

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Information Letter

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UNITED STATES

TRADEMARK TRIAL AND APPEAL BOARD

- Proving Priority in Opposition Proceedings (CAB CALLOWAY Case)

TRADEMARK DECISION

- Famous Marks Doctrine (COHIBA Case)

Trademark Trial and Appeal Board: Proving Priority in Opposition Proceedings

Christopher Brooks v. Creative Arts by Calloway, LLC

Under the Lanham Act, a party can oppose the registration of a mark based on prior use of a personal name or trade name. 15 U.S.C. §1052(d). There have been numerous conflicting and non-precedential decisions by the Trademark Trial and Appeal Board (“TTAB”) addressing whether a party asserting prior rights in a trade name or a personal name had to prove secondary meaning in order to prevail. In the precedential case *Christopher Brooks v. Creative Arts by Calloway, LLC*, Opposition No. 91/160,266, the TTAB appears to have answered that question.

In the opposition, Christopher Brooks, the grandson of Cab Calloway and the leader of the group The Cab Calloway Orchestra, opposed registration of the mark CAB CALLOWAY by Applicant for a variety of services including retail store services featuring compact discs,

records, videotapes; distribution of video and audio discs; and entertainment services. The parties stipulated to all facts except one, namely whether Mr. Brooks had acquired rights in the name THE CAB CALLOWAY ORCHESTRA prior to the filing date of the opposed application and left it to the TTAB to determine whether Opposer’s use of THE CAB CALLOWAY ORCHESTRA was of a sufficient nature to establish the prior rights needed to preclude registration. While there was no dispute that Opposer used the phrase THE CAB CALLOWAY ORCHESTRA in connection with live musical performances before Applicant’s filing date, the parties disputed the legal issue of whether such use created proprietary rights.

Applicant argued that to be protected as a trademark, personal names such as Cab Calloway must have secondary meaning. Federal courts have previously held in infringement cases that personal names are not protected as trademarks until they acquire secondary meaning. However, this rule is based on law, not statutory doctrine. All that the Lanham Act states about personal names is that a mark that is primarily merely a surname is not

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registrable in the absence of secondary meaning. However, the consistent policy of the Patent and Trademark Office is that personal name marks that are not primarily merely a surname are registrable on the Principal Register without a showing of secondary meaning and are thus deemed to be inherently distinctive. The TTAB found no logical basis for holding that a personal name mark which is inherently distinctive for registration purposes must be shown to have acquired secondary meaning before it can be relied upon by an Opposer in an opposition proceeding. To rule otherwise, the TTAB said, “would be in direct conflict with the basic underpinning of trademark law in the United States which is that rights are obtained through use and not by being the first to file an application.” If two different standards were imposed in connection with personal names, one foregoing secondary meaning for registration purposes and one requiring secondary meaning for opposition purposes, “it would judicially create a first to file system for personal names.” Thus the TTAB held that when a plaintiff is asserting prior rights based on a personal name that is not primarily merely a surname, the personal name trademark is inherently distinctive.

Trade name use also is a basis for opposing. An organization need only to have used a name or acronym in a manner that identifies the company in order to establish rights. However, for opposition purposes a party asserting trade name rights must prove that the trade name creates superior proprietary rights. That is to say, the trade name must either be inherently distinctive or have acquired secondary meaning. A trade name that is an apt or common descriptive term cannot be the basis for establishing prior rights since to do so would put trade name rights on a higher pedestal of protection than trademark rights.

In the CAB CALLOWAY opposition proceeding, the TTAB found that Opposer’s mark THE CAB CALLOWAY ORCHESTRA taken in its entirety is inherently distinctive because Cab Calloway as a personal name is inherently distinctive. As there was uncontroverted evidence that the mark THE

CAB CALLOWAY ORCHESTRA was used in connection with live musical performances prior to Applicant’s filing date, the opposition was sustained. Further, the TTAB found that Opposer had developed a trade identity in the name THE CAB CALLOWAY ORCHESTRA through his use of the term as a trade name. Superior proprietary rights were found by virtue of the fact that the trade name consisted of a personal name, Cab Calloway, and the personal name was inherently distinctive.

The lesson to be learned is that there are other paths to oppositions than the use of a mark as a trademark or service mark. The use of personal names and trade names should always be considered as a basis for opposing.

- BAS

Trademark Decision: Famous Marks Doctrine

Empresa Cubana del Tabaco v. Culbro Corp., No. 97 Civ. 8399 (RWS), 2009 WL 4790410 (S.D.N.Y. December 14, 2009)

Priority of use and the territoriality principle generally govern trademark rights in the United States. In other words, the first to use a mark on a given product in a given territory in the U.S. usually obtains the exclusive right to use the mark on the product in that territory. The “famous marks doctrine” provides a potentially powerful exception to this rule.

Under the famous marks doctrine (also known as the “well known marks doctrine”), the owner of a foreign mark so famous that its reputation has reached the U.S. market even without use in the U.S. may be found to have priority over a party who attempts to adopt the mark in the U.S. The existence and extent of the famous marks doctrine has been the subject of much debate in recent U.S. jurisprudence. A representative scenario outlining the uncertainties and conflicts in this area of the law is a more-than-a-decade-long dispute concerning the rights to the famous COHIBA Cuban cigar.

The plaintiff, a Cuban company known as Cubatabaco, alleged that it has sold cigars under the COHIBA mark in Cuba since 1969 and throughout the world since 1982, excluding the

U.S. due to the trade embargo. Cubatabaco brought suit in the United States District Court for the Southern District of New York against General Cigar Co., a U.S. company, alleging, among other claims, trademark infringement under the U.S. Trademark (Lanham) Act and unfair competition by misappropriation under New York common law. Despite the fact that Cubatabaco had never sold a single COHIBA cigar in the U.S., it sought cancellation of General Cigar's U.S. trademark registration for COHIBA for cigars and a permanent injunction against General Cigar's sale of cigars under the COHIBA mark in the U.S.

For its defense, General Cigar claimed, among other things, that it had priority of use of the COHIBA mark for cigars in the U.S. because General Cigar sold cigars under the mark in the U.S. since 1992, whereas Cubatabaco has never sold its COHIBA cigars in the U.S. due to the trade embargo, and that the famous marks doctrine relied upon by Cubatabaco was not recognized under U.S. law.

After the first trial of the case in 2004, the district court rejected General Cigar's defenses and held that Cubatabaco owned the COHIBA trademark in the U.S. under the famous marks doctrine. On the basis of that holding, the court found for Cubatabaco on its claim for trademark infringement under the Lanham Act, enjoined General Cigar's use of COHIBA mark, and ordered cancellation of its trademark registration. At the same time, the court dismissed Cubatabaco's unfair competition claim under New York State law, finding that plaintiff failed to prove "bad faith" by General Cigar in selecting the COHIBA mark—an element that the district court interpreted prior New York State court decisions to require.

On appeal, the U.S. Court of Appeals for the Second Circuit reversed the district court's judgment with respect to the Lanham Act claim, holding that the trade embargo regulations prevented Cubatabaco from acquiring a formal or constructive trademark right in the U.S. because it would constitute ownership of (intellectual) property. The Second Circuit agreed with the dismissal of New York State unfair competition claim on the merits, so it did

not need to consider whether the embargo regulations were applicable to claims under New York State common law.

After the Second Circuit's decision in the COHIBA case, two significant developments concerning the famous marks doctrine took place, each in the context of litigation concerning the BUKHARA mark for restaurants. First, in *ITC Ltd. v. Punchgini, Inc.*, 482 F. 3d 135 (2d Cir. 2007), the Second Circuit held that the famous marks doctrine is not recognized under the Lanham Act, but certified a series of questions to the highest court in the State of New York—the New York State Court of Appeals—to determine whether the doctrine was available under New York State common law. Second, in *ITC Limited v. Punchgini, Inc.*, 880 N.E.2d 852 (2007), the New York State Court of Appeals held that while there is no stand-alone famous marks doctrine under New York State law, the owner of a foreign mark that has a reputation in New York State can, under certain conditions, prevent a user from adopting the mark in New York State. (The Second Circuit's and New York State Court of Appeals' decisions in the BUKHARA litigation were previously discussed in our June 2007 and March 2008 Information Letters, respectively). Specifically, the Court of Appeals established a two-prong test for a party to prevail on the claim of unfair competition by misappropriation of a famous foreign mark. A plaintiff must establish that (1) the defendant "deliberately copied" the plaintiff's mark; and (2) "consumers of the good or service provided under a certain mark by a defendant in New York must primarily associate the mark with a foreign plaintiff." Notably, however, the Court of Appeals did not mention any "bad faith" requirement.

Seizing upon the Court of Appeals' ruling, Cubatabaco moved for relief from the district court's judgment dismissing its New York State unfair competition claim. Cubatabaco argued that the district court's dismissal of the claim was in error, since it was based on the failure to prove bad faith, while the New York Court of Appeals' silence on the bad faith element would tend to suggest that bad faith is not required. The district court agreed, and granted

Cubatabaco's motion. Upon review of Cubatabaco's unfair competition by misappropriation claim under the *Punchgini* test, the court found that Cubatabaco presented sufficient evidence during the first trial "to establish that General Cigar 'intentionally copied' the COHIBA mark" and that the COHIBA mark was "uniquely associated" with the Cuban product in the U.S. The court also noted that "[a]fter [*Punchgini*], whatever additional evidence this Court determined was necessary to establish 'bad faith' in the context of the famous marks doctrine is no longer necessary." Finally, the district court held that the unfair competition claim was not barred by the trade embargo regulations, because it did not concern a "transfer of property rights" but instead had to do with compensating the foreign party for "the unauthorized use of 'commercial advantage.'" As a result, the court entered a judgment in favor of Cubatabaco on its New York misappropriation claim.

Although the district court entered a judgment in favor of Cubatabaco, it did not specify any relief to be granted. Consequently, Cubatabaco moved to amend the court's judgment to provide for a permanent injunction. The district court agreed. In yet another opinion, Judge Sweet held that "[t]he mere fact that Plaintiff does not sell in the United States does not prevent the court from granting an injunction, where, as here, an ongoing misappropriation results in the continuing devaluation of Plaintiff's product." The court granted the motion for a permanent injunction against General Cigar, but stayed the injunction pending appeal. The reasoning for the stay was that "since the Court's [previous opinion], several courts have concluded that bad faith remains a required element of New York unfair competition law."

So, as things stand, is there any certainty as to the application of the famous marks doctrine in New York? Close, but no cigar.

Only one thing is clear: a party banned from owning property in the U.S. cannot rely on the famous marks doctrine under the Lanham Act in federal courts located within the Second Circuit. New York State common law is far less settled, however. Although a foreign party may claim to

be injured under the law of unfair competition by misappropriation in New York, even if it is banned from selling its products in the U.S., such party may have to prove not only that its mark was deliberately copied and that the U.S. consumers associate the mark with its foreign owner (already a tough threshold to meet), but also that the defendant appropriated the mark in bad faith. On that final issue, stay tuned for an all but certain appeal by General Cigar to the Second Circuit and, quite possibly, another round of questions certified to the New York State Court of Appeals.

- ALG

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INTERNATIONAL

BELARUS

- New Law on Trademarks

CANADA

- Limitation on Extensions of Time for Trademark Prosecution

EUROPEAN COURT OF JUSTICE

- Vorsprung durch Technik – Promotional Formula or Indication of Commercial Origin

Belarus:

A new Law on Trademarks and Service Marks entered into force in Belarus on January 25, 2010. The new law is intended to harmonize the law of Belarus with that of the European Union. Among other things, the law includes a section on the protection of well-known marks, providing a definition of well-known marks and setting out the procedure for securing such protection. In addition, the non-use period has been reduced from five years to three years. Notably, the license recordal requirement appears to have been supplanted with a requirement to notify the Patent and Trademark Office of the existence, amendment or termination of such licenses. The new law retains the requirement that license agreements contain language to the effect that the quality of the goods/services of the licensee not be lower than the quality of the goods/services of the licensor. Applications filed prior to the effective date of the new law will be governed by prior legislation.

- JLH

Canada: LIMITATION ON EXTENSIONS OF TIME FOR TRADEMARK PROSECUTION

On March 11, 2010, the Canadian Trade-marks Office will institute a practice which will substantially limit the number of extensions of time to reply to Office Actions in trademark prosecution matters. Previously, extensions have been liberally granted. Under the new practice, extensions beyond a single, six-month extension to reply to an Office Action are not likely to be granted. An additional extension of six-months may be granted if exceptional circumstances exist or delay is occasioned by circumstances beyond an applicant's control (e.g., issuance of a foreign registration, etc.). It is unclear whether this new rule will be applied to extensions to file Declarations of Use. (Court of Justice Case C-398/08 P)

- JLH

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European Court of Justice:

VORSPRUNG DURCH TECHNIK – PROMOTIONAL FORMULA OR INDICATION OF COMMERCIAL ORIGIN

An important decision was recently handed down in the matter of *Audi AG v. OHIM*, where the Court of Justice of the European Union overruled the rejection of the term “Vorsprung durch Technik” [meaning, among other things, “advance or advantage through technology”] as a Community Trademark by the OHIM (the Community Trademark Office).

The matter came before the Court of Justice by way of an Appeal from the Lower European Court now styled the “General Court,” but previously called the “Court of First Instance.”

In its analysis, the Court of Justice found that the Lower Court had incorrectly perceived the term “Vorsprung durch Technik” as a promotional formula, and not as an indication of commercial origin. Moreover, the Court of Justice emphasized that the fact that the mark was used as an advertising slogan did not detract from its ability to function as an indication of origin, stating “As regards marks made up of signs or indications that are also used as advertising slogans, indications of quality or incitements to purchase the goods or services covered by those marks, registration of such marks is not excluded as such by virtue of such use.”

On the contrary, the Court of Justice found that “such a mark can be perceived by the relevant public both as a promotional formula and as an indication of commercial origin of goods or services. It follows that, insofar as the public perceives that mark as an indication of that origin, the fact that the mark is at the same time understood – perhaps even primarily understood – as a promotional formula has no bearing on its distinctive character.” The court also stated that “[e]ven if it were to be supposed that the slogan ‘Vorsprung durch Technik’ conveys an objective message to the effect that technological superiority enables the manufacture and supply of better goods and services, that fact would not support the conclusion that the mark applied for is devoid of any inherently distinctive character.” The court went on to say that

“however simple such a message may be, it cannot be categorized as ordinary to the point of excluding, from the outset and without further analysis, the possibility that that mark is capable of indicating to the consumer the commercial origin of the goods or services in question”.

It seems that this decision may well be of assistance to parties who have struggled with the over zealous conduct of certain Examiners in the Community Trademark Office in rejecting marks which have fanciful qualities on the basis that these are descriptive or “banal.”

- MID

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