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EDITOR: KAREN LIM

DECEMBER 2017

BEST LAW FIRMS 2018 ranked Fross Zelnick in National Tier 1 for Copyright and Trademark Law, and Metropolitan Tier 1 in New York City for Copyright, Litigation - Intellectual Property, and Trademark Law.

NEW YORK METRO SUPER LAWYERS 2017 recognized Fross Zelnick attorneys [LAWRENCE APOLZON](#), [DAVID DONAHUE](#), [SUSAN DOUGLASS](#), [DAVID EHRLICH](#), [LYDIA GOBENA](#), [NADINE JACOBSON](#), [RICHARD LEHV](#), [JOHN MARGIOTTA](#), [CRAIG MENDE](#), [BARBARA SOLOMON](#), [JAMES WEINBERGER](#), and [ROGER ZISSU](#). 2017 Rising Stars included [AMANDA AGATI](#), [HINDY DYM](#), [JENNIFER INSLEY-PRUITT](#), [JASON JONES](#), [LEO KITTAY](#), [EMILY WEISS](#), and [CELADON WHITEHURST](#). *SuperLawyers New York Women's Edition 2017* named [SUSAN DOUGLASS](#), [JANET HOFFMAN](#), [NADINE JACOBSON](#) and [BARBARA SOLOMON](#), and *New York Women's Edition 2017*—Rising Stars named [AMANDA AGATI](#), [HINDY DYM](#), [JENNIFER INSLEY-PRUITT](#), [EMILY WEISS](#), and [CELADON WHITEHURST](#).

WHO'S WHO LEGAL 2017 distinguished Fross Zelnick as a “leading firm” and [SUSAN DOUGLASS](#) as a “thought leader” in North America. Also noted as experts were [LAWRENCE APOLZON](#), [ROBERT BECKER](#), [STEPHEN BIGGER](#), [CARA BOYLE](#), [CARLOS CUCURELLA](#), [DAVID DONAHUE](#), [DAVID EHRLICH](#), [LYDIA GOBENA](#), [JANET HOFFMAN](#), [NADINE JACOBSON](#), [RONALD LEHRMAN](#), [PETER SILVERMAN](#), [BARBARA SOLOMON](#), [ALLISON STRICKLAND RICKETTS](#), [CHARLES WEIGELL](#), [JAMES WEINBERGER](#), and [ROGER ZISSU](#).

WOMEN IN BUSINESS LAW 2017 nominated [SUSAN DOUGLASS](#), [JANET HOFFMAN](#), [NADINE JACOBSON](#), and [BARBARA SOLOMON](#).

KAREN LIM, [ERICA GOULD](#), and [KATHERINE LYON DAYTON](#) recently obtained “well-known mark” declarations in two actions before the Trademark Review and Adjudication Board in China on behalf of our client, a global professional services firm. Well-known mark declarations are rarely issued in China, especially for marks owned by non-Chinese entities. The declarations were based on evidence of media articles from a National Library search, printouts from the client’s website and other Internet sources, the client’s worldwide registrations, and the applicant’s bad faith.

FROSS ZELNICK LEHRMAN & ZISSU, P.C.

Information Letter

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UNITED STATES

TRADEMARK TRIAL AND APPEAL BOARD

- Trademark Licensee Cannot Establish Priority Based On Use By Licensor

Julie A. Moreno v. Pro Boxing Supplies

U.S. COPYRIGHT

- December 31, 2017 Deadline to Avoid Loss of Safe Harbor Protection under the Digital Millennium Copyright Act

U.S. DESIGN PATENTS

- Protecting New Fashion Designs Through U.S. Design Patent Rights

TRADEMARK MANUAL OF EXAMINING PROCEDURE

- Can We Really Do That? Little-Known Provisions of the TMEP

Trademark Trial and Appeal Board:

TRADEMARK LICENSEE CANNOT ESTABLISH PRIORITY BASED ON USE BY LICENSOR

Julie A. Moreno v. Pro Boxing Supplies, Opp. Nos. 91214580, 91214877, Canc. No. 92058878 (T.T.A.B. Sept. 8, 2017)

In a recent precedential case, the Trademark Trial and Appeal Board ("TTAB") found that use of a mark by a licensor does not inure to the benefit of a licensee for the purpose of establishing priority.

Deportes Casanova, a Mexican producer of boxing gloves and related equipment, claimed use of the mark CASANOVA in the United States since at least 1972. Notably, CASANOVA gloves were worn by Rocky

Balboa in the first Rocky movie in 1976. However, Deportes Casanova never applied to register CASANOVA in the United States.

Pro Boxing Supplies ("Pro Boxing") started using the CASANOVA mark in approximately 1987, when it purchased CASANOVA boxing gloves made in Mexico through a vendor and sold the gloves in the United States. When, a few years later, the vendor could no longer acquire the gloves, Pro Boxing began to manufacture and sell CASANOVA gloves on its own. Pro Boxing owns a registration for the mark CASANOVA (issuing from an application filed on October 22, 2012) and two pending applications filed in March 2013 to register the same mark in design form, all in connection with boxing equipment.

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In July 2013, Julie Moreno entered into a license agreement with Deportes Casanova that granted her exclusive rights in the United States to sell Deportes Casanova products produced by the licensor and to use the CASANOVA mark. The license agreement specified that Moreno had no ownership interest in Deportes Casanova's intellectual property, but named Moreno as Deportes Casanova's "representative" in the United States for the purpose of protecting the licensor's rights.

In January 2014, Moreno petitioned to cancel Pro Boxing's registration and opposed its applications on the basis of Deportes Casanova's alleged prior common law rights in the CASANOVA mark in the United States dating from many years prior to Pro Boxing's priority dates. Pro Boxing first challenged Moreno's standing, claiming that her license agreement with Deportes Casanova was invalid, including because it allegedly lacked a quality-control provision. The TTAB disregarded that claim, noting that Moreno was a reseller, not a manufacturer, and finding that the quality control was therefore inherent in the license itself.

However, the TTAB found of its own accord that Moreno, as a mere licensee, could not establish priority based on Deportes Casanova's claimed common law use of the CASANOVA mark. The Board noted that use of a mark by a licensee inures to the benefit of a licensor, but found that this is because the licensor is the entity that controls the quality of the goods or services sold under the mark. Ultimately, the Board held that "[a]llowing a licensee to claim priority for itself in an inter partes proceeding based on the licensor's use of the mark (whether through the license or otherwise), could result in a licensee being able to claim de facto ownership of the licensed mark." Slip Op. at 18. Given that the license explicitly did not grant Moreno any ownership interest in the CASANOVA mark, she did not inherit

the licensor's pre-existing rights. Therefore, even though Moreno had standing to enforce Deportes Casanova's rights as exclusive licensee of the CASANOVA mark, she could not rely on the licensor's use to prove priority of rights over Pro Boxing and could not prevail in the dispute.

This decision may present a conflict with the Federal Circuit's *Jewelers Vigilance* rulings, which held that, in order to bring an opposition based on prior rights in a mark, "someone must have proprietary rights in the [mark], but such rights need not reside in the opposer if the opposer otherwise has standing to bring the opposition." *Jewelers Vigilance Committee, Inc., Appellant, v. Ullenberg Corp.*, 853 F.2d 888, 893 (Fed. Cir. 1988). Here, contrary to *Jewelers Vigilance*, the TTAB seems to have required that the opposer own rights in the mark in order to succeed in an opposition. Given that Moreno was able to establish standing, it seems under the logic of *Jewelers Vigilance* that she should have been able to rely on Deportes Casanova's use to prove priority and therefore to enforce the licensor's rights in CASANOVA.

Deportes Casanova may still assert its rights in CASANOVA by bringing a new proceeding in its own name against Pro Boxing. In the future, however, exclusive licensees seeking to enforce the rights of a licensor must bear in mind that while they may have standing to enforce those rights without involving the licensor in the proceeding, they must name the licensor as a co-plaintiff in order to get the benefit of the licensor's priority.

-JIP

U.S. Copyright: DECEMBER 31, 2017
DEADLINE TO AVOID LOSS OF SAFE HARBOR
PROTECTION UNDER THE DIGITAL
MILLENNIUM COPYRIGHT ACT

The Digital Millennium Copyright Act ("DMCA") provides internet service

providers (“ISPs”) with an important safe harbor from copyright infringement liability based on infringing material residing on their systems or networks at the direction of internet users. Among other requirements for safe harbor eligibility, each ISP must designate an agent to receive notifications of claimed infringement and provide information concerning the agent to the U.S. Copyright Office, which keeps a directory of such agents on its website.

Until now, the Copyright Office accepted paper submissions from ISPs concerning their designated agents. This year, however, the Copyright Office switched to a mandatory electronic-only filing system for designation of DMCA agents. Under the new system, DMCA agents have until **December 31, 2017** to submit their agent designations to the Copyright Office electronically through the Copyright Office’s online application system, which can be accessed [here](#). This requirement applies to all ISPs, including those who had previously submitted designations on paper under the prior system.

*Thus, to avoid a loss of safe harbor protection under the DMCA, all ISPs must submit designated agent information to the Copyright Office electronically no later than **December 31, 2017**. For more information, please see the Copyright Office’s [website](#) or contact [Craig Mende](#) or [David Donahue](#).*

-DD

U.S. Design Patents: PROTECTING NEW FASHION DESIGNS THROUGH U.S. DESIGN PATENT RIGHTS

Protections available for new fashion designs in the U.S. appear more limited than in certain other countries and jurisdictions. There is no unregistered design right. Copyright laws tend not to apply to utilitarian articles like footwear and bags. Moreover, developing trademark and trade dress rights usually requires extensive prior use

sufficient to demonstrate acquired distinctiveness or secondary meaning in the particular article to establish source-indicating significance among consumers.

Many fashion creations can, however, benefit from protections offered by design patents. A design patent is often easier to obtain than a trademark registration for trade dress. Given that there is no requirement to show consumer recognition of the design or configuration as a source indicator, design patents are also potentially available for a wider range of product designs and configurations, even those not yet launched in the marketplace. However, a design patent application must be timely filed or the applicant risks losing these rights.

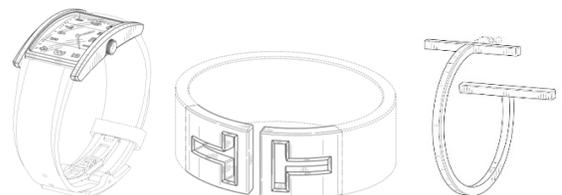
We have filed many design patent applications covering fashion articles. Examples include the following shoe designs:



- And the following handbag designs:



Our filings also include numerous watch and jewelry items, which also lend themselves well to design patent protections:



Pendency Time for Design Patent Applications

Pendency time for design patent applications from filing to examination will tend to be much longer than trademark applications due to backlog at the United States Patent and Trademark Office (“USPTO”). However, design patent applications can be expedited by filing brief petitions requesting such. The applicant must submit the results of a recent and thorough USPTO design patent search, and pay a further USPTO fee. Upon acceptance of the petition and all required submissions, the time to examination and first action can be cut substantially.

Requirements of Design Patent Applications

The contents of a design patent application also differ substantially from trademark applications. A trademark application usually shows only one view of the design or configuration, while most design patent applications include multiple views of the design—usually between six and seven figures (or more)—to satisfy the requirement for a complete and clear disclosure of the design. As the USPTO is typically very strict in evaluating illustrations in a design patent application, examiners prefer to see the design illustrated with pen and ink drawings prepared by a draftsman. Photographic drawings can be submitted, but these will be rejected if they are unclear or show obscured views or background material. Photographic illustrations of the design may also include many insignificant details that narrow the claim scope. Because the design claimed is strictly construed from the application illustrations, including too much detail can make it easier for an infringer to design around a resulting patent.

There can be significant differences between US design patents and design registrations obtained in other countries. For instance, unlike with registered Community designs in Europe, the USPTO is usually

restricted to one embodiment of the design. Thus, variations of a single design often must be excluded, unless these exhibit only very minor differences. Where multiple designs or design embodiments appear in an application, the USPTO will usually require the owner to restrict the application to one design or design embodiment; non-elected designs must then be pursued in separately-filed divisional applications. Those familiar with continuation and divisional application practice in U.S. utility patent applications will note that analogous procedures apply also in design patent practice.

Unless an application is filed in the U.S. through the Hague International Design system, design patent applications are not published before issuance and are typically not available to the public until such time as a patent issues. In addition to confidentiality of applications, much of the same statutory provisions governing patentability in utility patent contexts also apply to designs. These include Section 112 of the Patent Act governing adequacy and definiteness in how the design is disclosed, as well as novelty and obviousness under Sections 102 and 103 and their prior art definitions. However, in practice, these statutory provisions can be applied quite differently to design patents.

Given novelty requirements, patent laws everywhere tend to encourage prompt filing of applications after public use, publication, or disclosure of the design. Failure to file within the prescribed time period can result in a loss of rights. The United States is no different in this regard, and although the laws here allow for a one year “grace period” to file after the first offer for sale or public disclosure, it can be difficult to precisely measure this time period, and intervening applications from third parties may still bar patenting. These considerations make it important to file applications as soon as possible.

The Choice: Design Patent, Trademark Registration, or Both?

Assuming that a given design is not eligible for copyright protection, and the time period to obtain a patent has not expired, right holders may feel that they must choose whether to pursue protection under the trademark or design patent laws. But, generally speaking, despite general references in some cases to a freedom to copy formerly patented material (such as in the “shredded wheat” case, *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111 (1938) where in a case involving an expired utility patent, the Court commented that the right to make a patented article passes to the public), there are no specific policy or legal prohibitions against obtaining both a trademark registration and a design patent for the same product design. Trademark protections can also be sought and maintained even after a design patent expires.

Design patents and trademark registrations covering the same design can co-exist because they each have different purposes. Design patents protect an inventor who creates an ornamental design, for a limited time. The trademark laws protect a trademark owner and the public from confusion, mistake and deception, so long as the design in question is not functional and is shown to have become recognized as a trademark. These purposes do not conflict or negate the respective eligibility of the design to be patented or to be registered as a trademark.

In contrast, utility patents cover novel features of how a product functions. Thus, the existence of a utility patent that covers a certain design is evidence that the design is functional, and thus ineligible for trademark or trade dress protections. In fact, the existence of a design patent can be evidence that a design is non-functional. So, while the existence of a design patent cannot establish that the design has

achieved distinctiveness as a trademark, it is not evidence that the design is ineligible to be protected or registered as a trademark.

Given this, a potential strategy for effective design protection can involve filing a design patent application in the United States early, preferably in advance of any public disclosure or publication (or with a priority claim that pre-dates such disclosures). Once a design patent issues, and the product design is on the market, right holders can continue to develop their trademark and trade dress rights, and eventually seek trademark registrations. Of course, much depends on whether the design is registrable, and whether there is adequate evidence of acquired distinctiveness (for instance, significant sales and advertising expenditures attributable to the design, advertising that features and touts the design specifically, coverage of the design in the media, and consumer correspondence or even design awards that reflect recognition of the design).

Thus, right holders can obtain and use design patents to protect their designs as they develop trademark significance over time. They could eventually then file trademark applications that have reasonable chances of achieving registration. In the meantime, right holders can consider adding claims based on common law trade dress rights to any enforcement action based on the design patent.

Crafting and Enforcing the Design Patent Claim

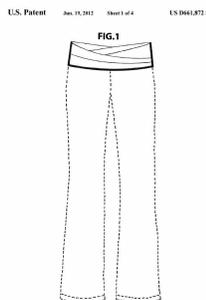
A design patent can often allow an applicant to broaden the scope of protections, insofar as it is permitted by the scope of similar prior art designs. For instance, lining in the application drawings can conform the claim to cover smaller features of a larger product. Solid lining is used to delineate the elements

of the article being claimed. Broken lines are used for other features of an article that the applicant wishes to exclude from the claim.

To illustrate, in the case of *Lululemon Athletica Canada, Ltd v Calvin Klein, Inc* (Civil Action No 1:12-cv-01034-UNA, in the U.S. District Court for the District of Delaware), Lululemon asserted multiple patents for yoga pants with a particular waistband design. One patent asserted (D645,644) uses solid lines to show and claim the waistband as well as the pant legs.



Through the issuance of a later-filed continuation application based on the original application that matured into the D645,644 patent, Lululemon obtained a broader claim to the waistband alone in its asserted D661,872 patent. This patent illustrates the same design as the earlier one, but illustrates the pant legs in broken lines (and adds a statement indicating that these features are not part of the design claim).



The D661,872 patent could then ostensibly be applied to other clothing articles with a similar waistband, regardless of the lengths or dimensions of the article below the waistband.

However, this broadening strategy also carries potential risks. Given the expanded claim, a prior art clothing design with the same waistband (for instance, on a pair of shorts), could threaten the validity of the D661,872 patent claim. The presence of prior art designs will therefore limit how far a design claim can be broadened and yet remain enforceable.

By using a similar broadening strategy, two or more patents can cover the same product design and vary the scope of coverage. This flexibility distinguishes design patents from most trademark registrations that cover product designs or configurations. Trademark applications in the U.S. can also utilize broken lines to exclude features of a product as not part of the trademark. However, a trademark registration must cover the actual trademark or trade dress that consumers recognize as distinctive and source indicating. Therefore, while it is theoretically possible to use broken lines to create different protective scopes for product designs and configurations in a succession of trademark applications, showing evidence of acquired distinctiveness that highlights only a specific portion of a product can be very difficult. Conversely, the USPTO may reject evidence directed to the entire article.

Conclusion

Determining the best available protection will depend on specific circumstances, including the nature of the designs to be protected, the timing of their use and launch, and the types of infringement right holders expect to encounter. We routinely assist clients in strategizing and selecting the best forms of product design protections. We recognize that the best forms of IP rights

often overlap and strengthen protections. Design patent and trademark rights can be very effective when used in tandem, as their protections are complementary and not mutually exclusive. As brand identity and design often coalesce in the same article, these forms of protections should be seen as cooperating to maintain the integrity and reach of rights holders' iconic products and designs.

[-CTJW](#)

Trademark Manual of Examining Procedure: CAN WE REALLY DO THAT? LITTLE-KNOWN PROVISIONS OF THE TMEP

The Trademark Manual of Examining Procedure ("TMEP") is the official manual of the United States Patent and Trademark Office governing how the Office handles trademark applications and registrations. Some of its provisions are frustratingly restrictive for trademark owners, such as prohibitions against accepting advertising materials as specimens of use for marks for goods. However, the TMEP also contains some quite liberal provisions, helpful to trademark owners, that are little known.

Amending an Application for Goods to Add Additional Media of Delivery of the Goods (TMEP §1402.07(c))

This section states "that if the goods are of a type that are available in more than one medium, and the applicant does not specify the medium in the identification of goods, the applicant will be allowed to amend to add any medium, even if one of the mediums is classified as a service." An example in that section is that "computer anti-virus software" in Class 9 can be amended to add "providing temporary use of non-downloadable computer anti-virus software," which is a service in Class 42. Similarly, an applicant might file an application for a mark for the name of a computer game. The original application might cover "computer game software" in

Class 9 if the applicant thought that the software would be delivered only in disc or downloadable form. The applicant might later decide that it will also render the service of making non-downloadable game software available online, a service in Class 41. The Class 9 application could be amended to add the Class 41 service. Such amendments would require payment of an additional class fee and, if the application is based on use, new use dates and a new specimen for the added class would be necessary.

Amending a Mark in a Pending Application to Add an Already-Registered Mark (TMEP § 807.14(b))

The usual rule is that the mark in an application can be amended only if the amended mark is not a "material alteration" of the initial mark. Such amendments include deleting minor, non-distinctive matter in a word mark (such as the word "the" or punctuation), or making minor design changes in a logo. An interesting exception to this rule is stated in TMEP § 807.14(b). That provision allows the mark in a pending application to be amended by adding a mark already registered for the same goods or services by the same applicant. Such an addition is deemed not a material alteration.

In a case cited with approval in that section, an application for the mark ELAN was amended to add the previously-registered mark 4711. This kind of amendment may allow an applicant to overcome objections that otherwise could cause an application to become abandoned. If the mark of the application is a descriptive term, amending to add a previously-registered mark could make the whole mark inherently registrable, with the descriptive term disclaimed. For a surname mark in an application, adding the previously registered non-surname mark could make the whole mark not "primarily merely a surname" and, therefore, inherently

registrable. If the application is blocked by a prior mark, the cells“ amended mark might be different enough to remove the blocking citation.

Unacceptable Specimens Made Acceptable (TMEP § 904.03(k) & TMEP 904.03(i))

In applications for marks for goods, only a narrow range of specimens is usually acceptable, such as labels, packaging, and point-of-sale displays. The TMEP states two very useful exceptions to that rule, however.

For products sold only in bulk, such as liquid chemicals sold in tanker trucks, TMEP § 904.03(k) says that an invoice, bill of lading, or shipping document showing the mark is an acceptable specimen. Also, for products sold online, TMEP § 904.03(i) states that an online retail store webpage that displays the product can be an acceptable specimen as a point-of-sale display, under certain limited circumstances, including that the webpage display a means for ordering the goods. Subsections of that section contain many examples, including online retail store webpages that have been held acceptable or unacceptable as specimens. This section is especially useful to allow registration for slogans or taglines that are typically not added to labels or packaging, but that do appear in online retail store pages.

Extending an International Registration to the U.S. for Specific, but Misclassified, Goods or Services (TMEP § 1402.01(c))

USPTO examiners usually carefully examine lists of goods and services in applications (including U.S. extensions of international registrations) to make sure that the goods and services are both sufficiently specific under USPTO guidelines, and classified in the correct international class under the international classification system. The USPTO sometimes requires more specificity in the identification of goods and services than those in the WIPO official identifications manual for the international classification

system. As a result, when the USPTO examines an international registration extension to the U.S., the Examiner will sometimes object that the goods or services in the international registration are too vague and/or in the wrong class.

Under the above TMEP section, there are two different rules for handling the situation. One is extremely strict and the other is quite liberal. The extremely strict rule is that a vague identification of goods or services, which is also classified in the wrong class in the International Registration and, therefore, in the U.S. extension, cannot be clarified and must be deleted. However, the liberal rule is that sufficiently specific goods can remain in the U.S. extension without amendment of the class, even if they are misclassified. There are sometimes classification ambiguities or examination errors that result in an international registration covering specific goods or services that fall in what the USPTO considers the wrong class. For example, the terms “solar cells,” “photovoltaic cells” and “solar panels for production of electricity” are approved terms in Class 9 in the USPTO online ID manual. The term “solar collectors,” however, is classified in Class 11 in the USPTO. If, by error, the international registration covered “solar cells” in Class 11, then the U.S. examiner would be obligated to accept those goods in Class 11 in the U.S. extension because “solar cells” is a specific approved term in the USPTO ID manual, albeit in Class 9. On the other hand, if the international registration covered the vague term “solar panels” in Class 11, and the applicant really meant to cover “solar panels for production of electricity” in Class 9, then the U.S. examiner would require the goods to be deleted. They could not be amended to “solar cells” in Class 9 or to a more specific Class 9 term that includes the phrase “solar panels,” that is, “solar panels for production of electricity.”

The takeaway from this rule is that applicants who want to extend an international registration to the U.S., and to be sure that it will protect particular goods or services of interest, must make sure that those goods and services of interest are either covered in the correct class (by USPTO standards) in the home application or registration that forms the basis for the international registration, or are covered in the wrong class, but are specific enough by USPTO standards.

Assigning a Part of an Application or a Registration (TMEP § 501.06 & TMEP § 1615)

In sales of businesses, the business owner may retain part of the business and sell part of the business. Existing trademark applications or registrations, especially for the house mark of the business, may include all the goods or services of the business. In that situation, TMEP § 501.06 allows the applicant to divide the application into two applications, each covering different goods or services, and to assign the child application to the buyer. Similarly, TMEP § 1615 allows a registration to be divided and the child registration to be assigned to the buyer. Also, a new registration certificate for the child registration can be issued to the new owner. Keep in mind that the whole or partial assignment of an intent-to-use application presents some special issues beyond the scope of this short discussion. Also, divided ownership of a mark presents some business and legal issues that are also beyond the scope of this short discussion.

-DWE

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Information Letter

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International

China

- Beijing High Court Recognizes Unregistered Trademark Rights *Guangzhou KuGou Networks Ltd v. Shantou Lifeng Electric Appliances Ltd*

European Union

- Certification Mark Registration Now Possible
- Court of Justice of the European Union (“CJEU”) Decisions on Unitary EU Law

Myanmar

- New Trademark Law To Be Implemented

United Kingdom

- New “Unjustified Threats” Legislation

China: BEIJING HIGH COURT RECOGNIZES UNREGISTERED TRADEMARK RIGHTS

Guangzhou KuGou Networks Ltd v. Shantou Lifeng Electric Appliances Ltd, Beijing High Court (March 13, 2017)

A recent decision of the Beijing High Court granted full protection to an unregistered trademark in a dispute against the owner of a later registration for the mark. In awarding protection to the unregistered mark, the High Court also clarified some of the standards for evaluating likelihood of confusion and attaining coveted “well-known status” recognition in China.

Background

Guangzhou KuGou Networks Ltd (“KuGou”) was established in 2004 and offers a music streaming and download service in China,

under the mark “KuGou”. KuGou’s service is the largest online music service in China, and is available at the website www.kugou.com.

In 2009, Shantou Lifeng Electric Appliances Ltd. (“Lifeng”) filed a trademark application with the China Trademark Office for “酷狗 & KuGou” (KuGou in Chinese and English Characters), for services in Class 41. The application registered in 2011.

In 2014, KuGou filed an invalidation action against Lifeng’s registration with China’s Trademark Review and Adjudication Board (“TRAB”).

TRAB Decision

In deciding KuGou’s invalidation action on the basis of KuGou’s unregistered rights, the TRAB applied Articles 13.1 and 31 of

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the 2001 Trademark Law of the People's Republic of China ("Trademark Law"). These articles have been re-numbered as Article 13.2 and Article 32, per the 2014 revisions to the Trademark Law. However, the TRAB applied the 2001 version to this matter involving Lifeng's 2011 registration.

Article 13.1 requires the complainant to establish (i) the well-known status of the unregistered mark; and (ii) that the junior mark is likely to lead to confusion.

Article 31 requires proof that the unregistered senior trademark had been (i) previously used in China; (ii) acquired a certain influence as of the filing of the junior mark; and (iii) the filing of the junior mark was improper.

The TRAB held in KuGou's favor under both articles, finding that “酷狗” is a well-known trademark for “providing online music service (not for downloading)”, and the registration of Lifeng's mark for “entertainment, providing karaoke services, etc.” was likely to cause confusion in violation of Article 13.1. The TRAB also noted that KuGou had been using “酷狗” as its trade name before the filing of Lifeng's mark, and had attained reputation in the online music industry. The TRAB concluded that registration of Lifeng's mark also violated Article 31.

Appeal to Beijing IP Court

Lifeng appealed to the Beijing IP Court, which partially confirmed the TRAB's decision under Article 31. Specifically, the Beijing IP Court held that certain of Lifeng's designated services were not similar to KuGou's services, and that Article 13.1 did not apply to these services since it only protects unregistered well-known marks with respect to similar goods and services. Under this logic, the Beijing IP Court confirmed the invalidation of Lifeng's mark with respect to “arrangement and organization of concerts, program production, providing karaoke services;

night club and entertainment” but maintained the registration for “fitness club, mobile library, training; book publishing; modeling for artists.”

Appeal to Beijing High Court

Both parties appealed the IP Court's decision to the Beijing High Court, which confirmed the invalidation of all of Lifeng's designated services, under both Articles 13.1 and 31. The High Court held that, in assessing likelihood of confusion under Article 13.1, the court should consider the extent of the prior mark's reputation, the level of similarity of the goods/services, and the level of similarity between the marks. The higher the reputation of the prior mark, the lower the similarity of the marks and goods/services that is required.

The High Court further noted that the purpose of Article 31 is to protect the prior trademark owner's interests arising from its trademark use, while Article 13.1 aims to prevent confusion in the marketplace. The High Court agreed with KuGou that, with respect to the services designated by Lifeng's mark, for which KuGou could not establish prior use, Article 13.1 should apply. Under Article 13.1, a likelihood of confusion arose from the reputation of KuGou's mark and the degree of similarity of the parties' marks and services, fully considered together.

Additionally, the High Court found that KuGou's evidence, which included taxes paid, advertising and promotional materials, contracts, invoices, and press/media coverage, was sufficient to establish that the “酷狗” mark was well-known before the filing date of Lifeng's mark. Notably, KuGou's evidence excluded revenues and advertising expenditures, evidence which has been traditionally required to establish well-known status.

Conclusion

This decision signals a more flexible approach by the Beijing High Court in evaluating likelihood of confusion under Article 13.1/13.2, as well as the evidence sufficient to establish well-known status. Whether this approach will be applied more uniformly, in administrative cases before the China Trademark Office and TRAB, is yet to be seen.

Further, notwithstanding this significant achievement for an unregistered prior mark, rights owners are best advised to file for their marks in China as early as possible, so as to avoid a costly legal battle to prove reputation and likelihood of confusion.

[-KLD](#)

European Union: CERTIFICATION MARK REGISTRATION NOW POSSIBLE

Trade associations, government bodies, technical institutes, and other public and private entities that certify that goods and services meet certain quality standards are now able to register their certification marks in the EU.

The EU certification mark, available as of October 1, 2017, is defined in the implementing regulation as a mark that is “capable of distinguishing goods or services which are certified by the proprietor of the mark in respect of material, mode of manufacture of goods or performance of services, quality, accuracy or other characteristics, with the exception of geographical origin, from goods and services which are not so certified.”

The EU certification mark is used to indicate that the goods and services protected by the mark comply with certain supervised quality standards, which must be set out in a document called “regulations governing use” filed within two months after the application. The certification mark is available to any public

or private entity or natural person who is certified to ensure that the goods and services comply with the relevant quality standards. The owner of the EU certification mark must not, however, carry on a business involving the supply of goods and services of the kind covered by the mark, and must file a declaration that it complies with this requirement when it applies to register the certification mark.

The EU certification mark adds a third type of trademark to the marks available in the EU, along with the individual trademark and the EU collective mark. The certification mark has a significant functional difference from both of these other kinds of marks. While an individual mark and a collective mark each indicates the source of goods and services covered by the mark (an individual person or entity in the case of an individual mark, and the members of an association in the case of a collective mark), the certification mark does not indicate the origin of goods and services. Instead, the certification mark distinguishes goods and services certified by the mark’s owner from non-certified goods and services. A key requirement in the EU is that the certification mark owner must not be the supplier of the goods and services. Put another way, the EU certification mark communicates that the goods and services have been certified by the mark owner, not that they originate with the mark owner. Thus, in contrast to individual and collective marks, the certification mark is not used by the mark owner, the certifying entity. Rather the certification mark may be used by companies and individuals that comply with the standards defined by the owner of the certification mark.

Each EU certification mark is defined in the “regulations of use,” which must be filed within two months after the application and must set out the characteristics of the goods or services to be certified, the conditions governing the use of the certification mark, and the testing and

supervision measures to be applied by the certification mark owner.

The EU Intellectual Property Office (EUIPO) has set out specific grounds for refusal of applications to register certification marks. For example, the EUIPO will refuse an EU certification mark application if the public is liable to be misled as to the character of the mark, in particular if it is likely to be perceived as something other than a certification mark. As another example, the EUIPO will refuse a certification mark if the sign indicates a quality that is different from or contradicts the subject of the quality standard as stated in the regulations of use. For example, ABC TEST PURE ORANGE JUICE, where the regulations of use certify that the covered goods contain juice made of apples, would not be allowed. Further, the EUIPO will refuse a certification mark application if the regulations of use do not clearly indicate whether use of the certification mark is authorized for any person who meets the required standard, or whether only a specific category of persons may use it (a set of objective criteria must be applied to define the permitted category).

Although certification mark registration is new in the EUIPO, certification marks have existed for years in some member states of the EU, such as the United Kingdom and France (where certification marks are regulated as part of the collective mark system). Certification marks may also be registered in the United States, Canada, and Australia, among other jurisdictions. Companies and individuals who wish to register or use a certification mark should be attentive to the possibility of inconsistencies in the requirements of different jurisdictions. For example, in the United States, a certification mark may be used to indicate geographic origin, but in the EU this is not allowed. As another example, Australia and Malaysia allow certification mark owners to certify their own

goods or services, but in the EU and the United States this is not permitted.

Since the EU certification mark system went into effect on October 1, 2017, there have been over thirty applications to the EUIPO to register certification marks. These include GLOBAL ORGANIC TEXTILE



STANDARD GOTS & Design by
Global Standard gemeinnützige GmbH;

ECOVIN



ECOVIN & Design, by Ecovin
GmbH; and CFA CHARTERED FINANCIAL



ANALYST & Design, by CFA
Institute. All applications for an EU
certification mark are currently under
examination.

The filing fees for an EU certification mark when filed online are EUR 1,500 for the first class, EUR 50 for the second class, and EUR 150 for each subsequent class.

[-AL](#)

European Union: COURT OF JUSTICE OF THE EUROPEAN UNION (“CJEU”) DECISIONS ON UNITARY EU LAW CERTIFICATION MARK REGISTRATION NOW POSSIBLE

A. National Laws do not Supplant EU law on GIs

Instituto dos Vinhos do Douro e do Porto v. EU Intellectual Property Office (EUIPO) (Case C-56/16 P) (September 14, 2017) .

On October 27, 2006, Bruichladdich Distillery Co. Ltd. (“Bruichladdich”) applied to register PORT CHARLOTTE in Class 33 for “alcoholic beverages.” Registration issued on October 18, 2007 and the mark was published later that month. On April 7,

2011, Instituto dos Vinhos do Douro e do Porto (“Instituto”) brought an invalidity action against this mark, based on its PORTO and PORT appellations of origin that were protected in the EU and Portugal (“A/Os”). In response, Bruichladdich limited its coverage to “whisky.” The invalidity action proceeded, however, and was rejected by the Cancellation Division on April 30, 2013. Instituto’s subsequent appeal to the Fourth Board of Appeal was dismissed.

Of importance is that in its invalidity action, Instituto claimed that its PORTO and PORT A/Os were protected in all Member States based on (i) Article 53(1)(c) of Regulation No. 207/2009, read in conjunction with Article 8(4) thereof (together, protecting against registration of marks conflicting with prior rights in a Member State (here, the Portuguese A/Os)), and (ii) EU Regulation No [1234/2007] which, put simply, protects designations of origin for “wines.” The Board of Appeal rejected (i) on the ground that protection for designations of origin for wines is governed exclusively by EU Regulation No. [1234/2007] and not national law. And, as to (ii), since the subject mark at that point only covered “whisky,” EU Regulation No. [234/2007] did not apply. And, to the extent that Instituto relied on “reputation,” the Board of Appeal did not find that PORT CHARLOTTE “evoke[d]” PORTO or PORT, so it was not necessary to determine whether these terms had a reputation. For these reasons, among others, the appeal was rejected.

Instituto then appealed to the EU General Court (Fourth Chamber) (Case T-659/14), which, on November 19, 2015, ruled in Instituto’s favor. The most significant aspect of the General Court’s decision was its rejection of the Board of Appeal’s conclusion that protection of designations of origin for wines was governed exclusively by EU Regulation No. 1234/2007. This result constituted an apparent departure from prior EU

jurisprudence, seemingly settled by the *Budějovický Budvar* case in 2009 (C 478/07) (also referenced below).

On further appeal, the EU Court of Justice (Second Chamber) (“CJEU”) reversed, agreeing with the traditional view expressed by the Board of Appeal, that the law on geographical indications for wines is governed exclusively by EU law. The CJEU reasoned, in relevant part, that “[t]he risk of thus undermining the main objective of Regulation No 1234/2007, which is that of guaranteeing the quality of the agricultural products concerned, is particularly high because, unlike in the case of trade marks, no measure harmonising any national systems of protection for geographical indications has to date been adopted by the EU legislature (see, by analogy, judgment of 8 September 2009, *Budějovický Budvar*, C 478/07, EU:C:2009:521, paragraph 113).” (CJEU decision, Par. 84). In the meantime, The Board of Appeal itself had issued a decision in another case, in effect rejecting the General Court’s ruling on this point in PORT CHARLOTTE. See *Porto PGI v. Portobello Road EUTM*, Case R 1105/2015-4, in which the Fourth Board of Appeal commented that “[t]here is no double protection of one and the same geographical indication for wine through national law on the one hand and through EU law on the other hand ... the national protection is only available for geographical indications which are not protected or protectable at EU level, but these judgments are absolutely clear in emphasizing the prevalence of EU Law to the extent the European legislator has exercised its competence ... The Board cannot see any convincing argument of law in the judgment of 18.11.2015, T-659/14, “PORT CHARLOTTE”, that would challenge that conclusion.” (Case R 1105/2015-4, June 15, 2016, Pars 35, 37).

B. Preliminary Rulings Facilitate EU-wide Injunction

Nintendo Co. Ltd. v. BigBen Interactive GmbH, BigBen Interactive SA (EUIPO) (Joined Cases C-24/16 and C-25/16) (September 27, 2017)

By way of relevant background (as detailed in the CJEU decision), Nintendo Co. Ltd. ("Nintendo") produces and sells video games and video game consoles, including the Wii video games console and accessories, among them remote-control devices. BigBen France manufactures remote controls and other accessories compatible with the Wii video games console and sells them through its website to consumers located in France, Belgium, and Luxembourg, among other locations, and to its German subsidiary, BigBen Germany. BigBen Germany sells these goods through its website to consumers in Germany and Austria.

In 2016, Nintendo sued BigBen Interactive SA ("BigBen France") and BigBen Interactive GmbH ("BigBen Germany") in the Landgericht Dusseldorf (Regional Court, Dusseldorf, Germany) based on their sale and image display of Wii accessories/goods allegedly infringing certain of Nintendo's registered Community designs, seeking a declaration of infringement as well as relief on a number of supplementary claims. The court ruled in Nintendo's favor on the infringement, but dismissed the claims relating to use of images of the goods corresponding to the infringed designs. BigBen Germany was ordered to cease use of the designs throughout the EU. The court also granted relief on the supplementary claims, including, without territorial limitation, damages and destruction or recall of the subject goods, plus attorneys' fees. With respect to BigBen France, the court ruled that it had international jurisdiction and issued a pan-European injunction as well. As to the supplementary claims, the court

limited the scope of the judgment to BigBen France's supply of goods to BigBen Germany, though without limiting the territorial scope of its judgment, and applied the law as that of the place of infringement (German, Austrian and French law).

All parties Appealed. BigBen France claimed that the German courts lacked jurisdiction to grant an EU-wide injunction against it. Nintendo objected to the injunction being limited to the goods within the supply chain between BigBen France and BigBen Germany, and argued that the injunction should have been extended to images of the goods as well. Nintendo also argued that the law to be applied should have been German law and French law, with respect to BigBen France and BigBen Germany, respectively. As a preliminary matter, the Dusseldorf court referred three questions to the CJEU. These are detailed below, as quoted from Official Journal of the European Union (25.4.2016 C145/16), with the CJEU answers included below each question, and our comments below those.

(1) In a Community design infringement case, can the court of a Member State whose jurisdiction over a defendant is based only on Art. 79(1) of [Regulation No.6/2002] in conjunction with Art. 6(1) of [Regulation No 44/2001], grant EU-wide relief, on the ground that the defendant, domiciled in another Member State, supplied the defendant domiciled in the pertinent member State with allegedly infringing goods?

CJEU: YES, noting the unitary character of the registered Community design, enforceable throughout the EU, including by injunction as well as remedies such as damages, costs, provision of information and documents and accounts, etc.

Comment: This result appears to significantly strengthen the enforcement

capability of the owner of a unitary IP right in the EU.

- (2) Does Art. 20(1)(c) of [Regulation No 6/2002] mean that a third party may use images of a Community design for commercial purposes if it intends to sell accessories for the right holder's goods corresponding to the Community design? If so, what are criteria to be applied? (Text of Art. 20(1)(c) is below)

CJEU: The court held that "a third party that lawfully sells goods intended to be used with specific goods corresponding to Community designs and reproduces the latter in order to explain or demonstrate the joint use of the goods it sells and a product corresponding to a protected design carries out an act of reproduction for the purpose of making 'citations' within the meaning of Article 20(1)(c) of Regulation No 6/2002." The court imposed three "cumulative conditions" on such uses, "namely the compatibility of the acts of reproduction with fair trade practice, the absence of undue prejudice to the normal exploitation of the design on account of such acts, and mention of the source."

Comment: This interpretation of 20(1)(c) could be seen as giving too much license to unauthorized third parties to take a free ride on the right owner's intellectual property, putting the right holder to the task of demonstrating that an objectionable "citation" was not for the purpose of explaining or demonstrating, as here, the joint use, as well as a defendant's failure to comply with the "cumulative conditions."

- (3) For purposes of Art. 8(2) of Regulation (EC) No. 864/2007, how is the place "in which the act of infringement was committed" to be determined when the infringer (a) offers goods infringing a Community design on a website and that website is also directed at Member States other than that in which the

plaintiff is domiciled, and/or (b) ships the infringing goods to a Member State other than the one in which it is domiciled? Do Art. 15(a) and (g) of Reg. No. 864/2007 mean that the law determined in this matter also applies to participatory acts of other persons? [We note that Reg. No. 6/2002 was subsequently replaced by Reg. No. 1215/2012.]

CJEU: The court concluded "that Article 8(2) of Regulation 864/2007 must be interpreted as meaning that the 'country in which the act of infringement was committed' ...refers to the country where the event giving rise to the damage occurred. Where the same defendant is accused of various acts of infringement committed in various Member States, the correct approach for identifying the event giving rise to the damage is not to refer to each alleged act of infringement, but to make an overall assessment of that defendant's conduct in order to determine the place where the initial act of infringement at the origin of that conduct was committed or threatened by it."

Comment: This portion of the court's ruling will likely make enforcement of supplemental claims subject to national laws (such as damages) against multi-state infringers easier by allowing for application of the law of a single member state, rather than multiple states.

-JLH

Myanmar: NEW TRADEMARK LAW TO BE IMPLEMENTED

Myanmar's first formal trademark law is expected to take effect in late 2017 or early 2018, and the Myanmar Intellectual Property Office will be established under the Ministry of Education. The new law will modernize Myanmar's trademark system and align it with international standards.

Notably, marks that are recorded under the current system will not be automatically re-registered, and no procedures will be available to address any conflicts between marks currently recorded and/or used in Myanmar, and those that will be registered under the new law. In order for their marks to be protected, therefore, trademark owners must re-file, and all marks will be examined under the new law.

The draft law, currently under review by the Draft Law Committee of the Myanmar Parliament, includes the following salient features:

- A first-to-file system will replace the current first-to-use system.
- Trademarks, service marks, collective, and certification marks will be registrable.
- Well-known marks will be recognized.
- Geographical indications will be protected.
- Opposition and cancellation actions will be available.
- Specialized intellectual property courts will be established.
- Administrative (customs), civil, and criminal remedies will be available for trademark infringement.

[-KL](#)

United Kingdom: NEW “UNJUSTIFIED THREATS” LEGISLATION

The Intellectual Property (Unjustified Threats) Act 2017

The new Act on “unjustified threats” came into force in the United Kingdom on October 1, 2017 following a long vetting process and much public commentary by European practitioners. The concept of a remedy for “unjustified threats” in intellectual property matters in the U.K.

goes back many years and well prior to the current legislation and its predecessor embodied in Section 21 of the Trademarks Act of 1994. The prior legislation was deemed inconsistent and confusing as to exactly what constituted an “unjustified threat” communication. Basically, the legislation provides a remedy to a party receiving the threat of an infringement proceeding based on a registered trademark claim where the threat is unjustified, and provides remedies to the threatened party in the form of a declaration of non-infringement, an injunction against further threats, and an award of damages. The basic purpose of the legislation is to provide a protective measure against unjustified threats made against a retailer or distributor or other business that does not make or import the allegedly infringing goods since this could damage or destroy the legitimate business of innocent traders who are not responsible for the manufacture or importation of the goods. Unjustified threats provisions are also found in separate U.K. legislation on patents, designs, and copyright (although the provisions have not been consistent with each other up to now). Further the unjustified threats legislation applicable to trademarks does not include any claims based on unregistered trademark rights (known as “passing off” in the U.K.).

The new Act covers all registered trademark rights extending to the U.K. (whether U.K. or EU or international registrations designating the U.K. or the EU) and therefore provides a more uniform regime. The definition of a threat has also been broadened to include a threat to bring action outside of the U.K. for an act done or to be done in the U.K., as for example where the right relied on is an EU trademark registration and the threat is of a proceeding in a different EU member state court. The new Act maintains the two-fold test of the prior legislation as to whether a communication (which can be written or

oral or otherwise) contains a “threat of infringement proceedings” from which a “reasonable person” will understand that some claim of an intellectual property right was being made against them and that the person sending the message intends to file infringement proceedings in respect of the relevant rights via legal action in the U.K. Notification of the existence of a registered trademark is not considered an actionable threat and therefore writing to a retailer or secondary party selling the goods to inform them of the existence of a registered trademark right and inquiring as to the source of the goods so that action can be taken against the manufacturer or importer (i.e. the primary parties) would not constitute an actionable threat.

The Act also provides a new “safe harbor” for an IP rights holder communicating with a possibly infringing party without incurring liability for an unjustified threat by way of a “permitted communication.” Such a communication is two-fold in nature, namely, (i) for a permitted purpose (such as noting the existence of an IP right) and (ii) limited only to the scope of the threat necessary for the immediate purpose and provided that the person making the claim believes all the information to be true.

Defenses under the Act are also available where the threat was justified because there was in fact an infringement and the threat was sent to a secondary party because the primary party could not be found and the rights holder had taken reasonable steps to first try and identify the primary party.

There is also a new provision protecting professional advisors against an unjustified threat claim provided they are acting on the instructions of their client (who should be specifically identified in the communication). Previously, the recipient of an unjustified threat could sue not only the party claiming the intellectual property right but also their professional counsel or

attorney making the claim, and this had the unfortunate result of encouraging a litigation strategy of “sue first and talk later” in order to avoid a threats claim against the professional advisor which could then drive a wedge between the advisor and their client.

Although the new Act is apparently being welcomed by many U.K. practitioners for providing some clarification and consistency with respect to unjustified threats litigation, it has not been met with universal praise by practitioners in other European jurisdictions, some of whom view the legislation as unnecessarily complicated or cumbersome.

Unjustified threats provisions are limited in the European Community to the United Kingdom and Ireland, but they also extend to other countries with a similar British law tradition including Australia, which has protective measures against unjustified threats (known locally as “groundless threats”) in their legislation on trademarks, patents, and copyrights. There is draft legislation pending in Australia that will harmonize the different types of intellectual property in this area. The current Australian provisions seem to be clearer and simpler in some respects. For example, under the Australian legislation, the “safe harbor” provision for professional advisors simply states:

“This section does not make a lawyer, registered trade marks attorney or patent attorney liable to an action for an act done in a professional capacity on behalf of a client.”

In contrast, the equivalent U.K. provision includes five sub-sections dealing with who may be considered a professional advisor and their capacities which seems unnecessarily complicated.

Prior to the enactment of the new U.K. legislation, the best professional advice was to always seek the opinion of local

counsel in the U.K. before sending out a cease and desist or infringement claim letter. In spite of the improvements reflected in the new Act, this is still the best advice. In the past, U.S. and other foreign counsel have in some cases sent out demand letters to local parties in the U.K., only to be faced with a counter attack under the local unjustified threats legislation, resulting in not only an injunction and declaration of non-infringement, but also a substantial award of damages in favor of the threatened party where the infringement claim was overly broad and not justified.

[-SB](#)

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