

THE COMING OF AGE OF THE GLOBAL TRADEMARK: THE EFFECT OF TRIPS ON THE WELL-KNOWN MARKS EXCEPTION TO THE PRINCIPLE OF TERRITORIALITY

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INTRODUCTION

The last two decades have seen a tremendous increase in the growth and vigor of legal protection for intellectual property on a global scale. This is primarily due to the unprecedented inclusion of intellectual property protection in global trade negotiations and the resulting TRIPS Agreement.² As a result, through the World Trade Organization, intellectual property protection has transformed from a statutory rule that nations established at their discretion into an international legal regime that each country must adhere to if they wish to be accepted (or remain) as part of the global economy.

Some of the major beneficiaries of the TRIPS Agreement are the holders of global brands that are marketed throughout the world. Most local brand names are protected on a country-by-country basis through individual trademark registrations under a principle known as “territoriality,” which provides that a trademark has a separate existence in each sovereign territory where it is registered (or otherwise legally recognized).³ Under the territoriality principle, the use or registration of a mark in one country would have no bearing on the ability, or inability, of the trademark owner to protect the same trademark in another country. However, many global brand names are entitled to a much broader scope of protection under TRIPS, which expanded the international application and substance of an exception to the territoriality principle for marks that are considered well known. Under the well-known marks doctrine a trademark is protected in a country even if the mark is not used or registered in that country.⁴ This doctrine was included in the TRIPS Agreement, with the result that all WTO members acknowledged that well-known marks are entitled to protection as an exception to the territoriality principle. Additionally, TRIPS included provisions for determining when a well-known mark exists and expanded the protection of well-known marks to help the trademark owner prevent the unauthorized use of the trademark on goods and services that are different from the goods and services provided by the owner of the well-known trademark.

This paper reviews the application of the well-known marks doctrine. First, it will present a hypothetical story to help frame the legal issues in real terms that are faced by consumers and trademark holders around the world when third parties sell products bearing famous brands without the

2. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1125 (1994) [hereinafter TRIPS].

3. See 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 29:1 (4th ed. 2011).

4. *Id.* § 29:61.

authorization of the owner of the well-known mark. Second, it will review two of the significant international agreements that deal with well-known marks. Finally, it will review cases in several jurisdictions that have applied the well-known marks doctrine.

I. A CAUTIONARY TALE OF UNAUTHORIZED USE OF WELL-KNOWN TRADEMARKS

Imagine that you are finishing up an exhausting trip in a foreign country that we will call EestLandzing. You have a four hour drive back to the airport and need continuous jolts of caffeine to make sure you will stay awake during the drive. As you walk down the street to your car, you see a CATERPILLAR® outlet store, where they sell thermoses. You happen to have shopped at a CATERPILLAR store in the United States and noticed that the U.S. store sold a similar thermos. The EestLandzing store looks remarkably similar to the U.S. store. You buy a thermos and walk across the street to a STARBUCKS® coffee shop, fill the thermos up to the brim, and drink coffee all the way to the airport. There's a little bit of coffee left in the thermos, so you seal it up and throw it in your suitcase. About halfway through the flight home you start to feel sick. You manage to get home, but still feel quite ill. As you unpack, you find that thermos, and out of curiosity you send it to a friend at the local university food sciences lab and ask for it to be analyzed. A few days later, the friend calls back and tells you that they have bad news and worse news. The bad news is that the coating inside the thermos has trace elements of lead. The worse news is that there was Giardia in coffee, which is a parasite that must have been in the water used for the coffee. You need to go to the doctor and get treated right away.

As you are sitting in the doctor's office waiting area experiencing waves of stomach cramps, you recall meeting the trademark attorneys for Caterpillar and Starbucks at a recent International Trademark Association (INTA) conference.⁵ You write them both nasty emails, describing in great detail your experience and your discomfort that has been caused by their products. A few days later and ten pounds lighter, but assured by blood tests that your lead levels are still within a safe range and the Giardia are no longer running amok in your intestinal tract, you get notes back from both attorneys. The Starbucks attorney expresses sorrow at your discomfort, but informs you that they do not have any stores in EestLandzing, and, in fact,

5. INTA is an association of trademark owners, trademark attorneys and academics dedicated to the support and advancement of trademarks and other intellectual property. INTA's membership consists of 5,700 trademark owners, professionals and academics from more than 190 countries. See the INTA website at <http://www.inta.org>. INTA has been described as the largest organization of trademark owners worldwide. See Xuan-Thao Nguyen, *The Other Famous Marks Doctrine*, 17 *TRANSNAT'L L. & CONTEMP. PROBS.* 757, 772 (2008).

that they do not own the STARBUCKS trademark in EestLanzing. The Caterpillar attorney writes back, indicating that although they own the CATERPILLAR trademark for the tractors and farm equipment they sell in the country, they do not operate or authorize outlet stores there and do not sell, or own a trademark for, thermoses in EestLanzing. Upon further inquiries that you make through your friends in EestLanzing, you discover that both the STARBUCKS store and the CATERPILLAR store are run by third parties who are not related to, or authorized by, the global corporations that you know as Starbucks and Caterpillar.⁶ Both the Starbucks attorney and the Caterpillar attorney indicate that they aggressively protect their trademark rights around the world and try to protect consumers from the problems you experienced; however, a few countries still do not recognize the right of holders of well-known trademarks to prevent unauthorized local third parties from using these globally recognized brands in the manner that you just experienced. They each finally conclude their notes by informing you that the United States is one of those countries that has failed to amend its trademark law to recognize well-known trademarks (that foreign companies that have a globally recognized brand that is not used in the United States do not have a clear right under the federal statute know as the Lanham Act to protect against unauthorized third parties from using the global brand).

You have just painfully discovered why well-known trademarks need to be protected. Trademarks often serve as a measure of consumer protection. Because the CATERPILLAR and STARBUCKS trademark were not protected in EestLanzing, and were actually being used by a third party, you did not receive the quality you expected from the products bearing the trademark.

The historical policy reasons for protecting trademarks are quite different from most other types of intellectual property. Where patents and copyrights grew out of a desire to provide an economic incentive for creativity and innovation, trademarks originated from the need to protect consumers from goods that did not originate from the trademark owner. Patents and copyrights are intended to provide a direct economic benefit to the creator of a copyrightable work or invention. The policy basis for protection of trademarks, on the other hand, is focused on protecting the consumer. The purpose of a trademark is to indicate to the consumer the source or origin of the goods. It assures consumers that quality of goods are the same as they have come to expect from products and services bearing that mark.⁷ This

6. For a real life example of fake stores, see Louise Watt, *iFraud: Entire Apple Stores Being Faked in China*, ASSOCIATED PRESS, July 21, 2011, available at <http://news.yahoo.com/ifraud-entire-apple-stores-being-faked-china-165243322.html>.

7. See MCCARTHY, *supra* note 3, §§ 3:1-3:10. Trademarks also protect the goodwill that the owner of the mark has created in the brand. So, for example, goodwill allows Starbucks to charge US \$4.00 for a cup of STARBUCKS brand coffee that might be less for a similar beverage at a different coffee shop. This concept of trademark protection being

policy is one of the reasons that well-known trademarks have, over the past several years, received an expanded scope of protection.

II. THE GENERAL RULE OF TRADEMARK PROTECTION – LIMITED TO CLASS AND SPECIFIC COUNTRY

In order to obtain trademark protection, the trademark owner must file an application to register the trademark with the trademark office in each particular country. In general, trademark protection is limited to each particular country where the trademark is registered and the particular class of goods for which the trademark has been registered.⁸

There are 45 classes of goods and services for which a trademark may be registered.⁹ For a variety of reasons, trademark owners often are only able to register their trademark in the specific classes that match the goods and services on which the trademark is used. So, for example, the CATERPILLAR trademark may be registered and protected in Class 7 for machinery and farm implements, but the owner of the mark in that class may not have a registration for Class 21, which covers such goods as housewares and glass.¹⁰

Additionally, trademark rights are territorial – the protection of the trademark only applies in the particular country where the registration has been granted. So, normally when you file a trademark in a particular country, you are only getting territorial protection in that specific country in a specific class.

III. THE ISSUES FOR WELL-KNOWN TRADEMARKS

Two problems exist with the territorial and class approach of protecting trademarks. First, a trademark might be famous around the world (such as COCA COLA®), but if it is not registered and/or used in a country, the

based on the economic investment of the trademark owner has grown over the past few decades, but the original policy basis for trademarks was based on consumer protection and not on an economic policy to protect the investment of brand owners to create goodwill in the brand. *See id.* at § 2:4.

8. Many common law countries will also protect trademarks based on use without registration. However, the same limited protection applies for these “common law trademarks” – the scope of protection only applies to particular goods or services on which the trademark has been used and the protection is limited to the extent to which the trademark has been used in that particular country (no recognition in one country is given based on use in another country).

9. *See* WIPO, International Classification of Goods and Services for the Purposes of the Registration of Marks Under the Nice Agreement, v, vi (9th ed. 2006,) *available at* <http://www.wipo.int/classifications/nice/en/classifications.html>.

10. The result of separate class registrations is that two completely different entities may have registration for the same word. For example, Dove is a registered U.S. trademark of Mars, Incorporated for chocolates. DOVE, Registration No. 2,012,056. Dove is also a registered U.S. trademark of Unilever for soap. DOVE, Registration No. 2,534,236.

trademark owner may have no right to prevent third parties from using the trademark in that country despite the fact that local consumers are well aware of the mark and may expect the products bearing the mark to be authorized by the owner of the well-known-mark. This problem is illustrated in the hypothetical: STARBUCKS may have been well-known in EestLanzing by a certain sector of the public, but it was not protected there.

The second problem is that even if a well-known trademark is registered in a particular country, the trademark owner will have difficulty in preventing a third party from using the trademark on products in a different class of goods. In the hypothetical, Caterpillar had a registration for farm implements, but not for thermoses. How do we make sure that consumers are not misled?

IV. THE DEVELOPMENT OF INTERNATIONAL LAW PROTECTING WELL-KNOWN TRADEMARKS

The answers to these questions first began to be addressed in the Paris Convention for the Protection of Industrial Property.¹¹ The original version of the Paris Convention set forth in Article 6 the general principle of territoriality for the protection of trademarks, which is that a trademark has a separate existence in each country. In essence, the territoriality principle is the idea that ownership of a trademark in one country does not confer to the owner the right to the use and protection of the mark in another country. Once the registration of a mark is obtained in a contracting state, it is independent of its possible registration in any other country, including the country of origin.¹²

In 1925, the members of the convention agreed to an exception to the territoriality principle for trademarks. The members agreed to add Article 6*bis* to the convention, which provided for member countries to cancel

11. Paris Convention for the Protection of Industrial Property, March 20, 1883, 21 U.S.T. 1583 828 U.N.T.S. 305 (as revised at Stockholm on July 14, 1967) [hereinafter Paris Convention], <http://www.wipo.int/treaties/en/ip/paris/>. The first version of the Paris Convention became effective in July 7, 1884. By the end of the 19th century the Paris Convention only had 19 signatories, which included Belgium, Brazil, El Salvador, Ecuador, France, Great Britain, Guatemala, Italy, the Netherlands, Portugal, Tunisia, Serbia, Spain, Switzerland and the United States. After World War II membership in the Paris Convention increased significantly. A current list of members to the convention can be found at http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=ALL&start_year=ANY&end_year=ANY.

12. See WIPO, *Summary of the Paris Convention for the Protection of Industrial Property (1883)*, http://www.wipo.int/treaties/en/ip/paris/summary_paris.html (last visited Sept. 30, 2011).

registrations and prohibit the use by third parties of marks that are already well-known in that country.¹³ Article *6bis* provides as follows:

The countries of the Union undertake, ex officio if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well-known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods.¹⁴

Article *6bis* provides an exception to the territoriality principle for well-known marks: if a trademark is well-known in a member country, it is entitled to protection even though the mark is not registered or used in that country. The protection of the well-known trademark results not from the registration or use in the country in question, but from the mere fact of its reputation.¹⁵ The rationale for protection of well-known trademarks is based on the idea that the use of a trademark that is the same or similar to a well-known trademark would amount to an act of unfair competition and be prejudicial to the interests of the public, who would be misled by the use of a conflicting trademark.¹⁶

Under the Paris Convention, what constitutes a well-known mark, and the degree of proof required to show that the mark has achieved sufficient notoriety, is up to the trademark office and the courts of each member country according to their domestic laws and regulations. Additionally, the question of protecting a well-known mark outside its class of goods was not addressed in the Paris Convention.

Then came the TRIPS Agreement which imposed the rules of the Paris Convention on all WTO member states, established a principle for the determination of when a trademark has become well-known, and required members to provide further protection for well-known marks outside the class of goods for which the well-know mark is registered.

13. See MCCARTHY, *supra* note 3, § 29:62 (referring to Article *6bis* as “the cornerstone of on international protection of “well-known” marks”).

14. *Id.*

15. WIPO INTELLECTUAL PROPERTY HANDBOOK: POLICY, LAW AND USE § 5.82 (2d ed. 2004), available at <http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch5.pdf#paris/> [hereinafter WIPO HANDBOOK].

16. *Id.* § 5.83.

V. THE TRIPS AGREEMENT EXPANDED PROTECTION OF WELL-KNOWN MARKS

TRIPS created a set of global principles for the protection of well-known marks. Unlike previous international instruments for IP protection, TRIPS is linked to the global trading system. As a result, countries that might otherwise have chosen to continue with the general rule of territoriality for trademarks without the exception for well-known marks were coerced into accepting the rules for the protection of well-known marks or risked losing access to essential markets for goods and services that they export. Furthermore, the provisions of the TRIPS Agreement have real teeth: a Member that fails to comply will be subject to the enforcement provisions of the WTO agreement.¹⁷

So what did TRIPS do? First, it forced all WTO members to comply with the Paris Convention, including Article 6 for the protection of trademarks and Article *6bis* for the protection of well-known trademarks.¹⁸ TRIPS then went further and significantly expanded the protection of well-known trademarks under Article 16 of the Agreement, which reads as follows:

Rights Conferred

1. The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use.

2. Article *6bis* of the Paris Convention (1967) shall apply, *mutatis mutandis*, to services. In determining whether a trademark is well-known, Members shall take account of the knowledge of the trademark in the relevant sector of the public, including knowledge in the Member concerned which has been obtained as a result of the promotion of the trademark.

17. See Brian Manning & Srividhya Ragavan, *The Dispute Settlement Process Of The WTO: A Normative Structure To Achieve Utilitarian Objectives*, 79 UMKC L. REV. 1, 3 n.12 (2010) (citing J.H. Reichman, *Universal Minimum Standards of Intellectual Property Protection Under the TRIPs Component of the WTO Agreement*, 29 INT'L L.LAW 345 (1995) (discussing how, taken together, the enforcement and dispute-settlement provisions of the TRIPS Agreement put teeth into the pre-existing intellectual property conventions)).

18. TRIPS, *supra* note 2, art. 2.

3. Article 6*bis* of the Paris Convention (1967) shall apply, *mutatis mutandis*, to goods or services which are not similar to those in respect of which a trademark is registered, provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademark and provided that the interests of the owner of the registered trademark are likely to be damaged by such use.¹⁹

Section 2 of Article 16 establishes a basic standard under which a Member States must determine a well-known mark. Importantly, the mark is not required to be known by all members of the public in the member state, but only by “the relevant sector of the public,” and Member States must consider the extent to which the mark has been promoted to such members of the public.

Section 3 of Article 16 expanded the Paris Convention rules on well-known marks to dissimilar goods. Where the Paris convention protected well-known trademarks from other parties who wanted to use the mark on “the same or similar goods,” TRIPS now protects well-known trademarks from a third party’s use of the well-known mark on other classes of goods if (1) the third party’s use of that trademark on dissimilar goods would indicate a connection between those goods or services, and (2) the interests of the owner of the well-known trademark are likely to be damaged by such use. Note, however, that section 3 of Article 16 refers to trademarks that are registered in the country in question. So, in our hypothetical, CATERPILLAR was a registered trademark for tractors in the country of EestLandzing. If the mark was deemed well-known by relevant consumers, the owner of the mark under TRIPS might be able to prevent a third party from using CATERPILLAR on thermoses since you, as a consumer, were confused and thought the thermos was made or authorized by the well-known mark owner, and the owner’s interest in maintaining the well-known mark as a symbol of quality was damaged by the third party’s use.

TRIPS had the effect of moving the protection of intellectual property, including the protection of well-known marks, out of the rarified atmosphere of normal treaty law and pushing it aggressively into the global trading system.²⁰ Countries that want to join, or remain, as members of the

19. TRIPS, *supra* note 2, art. 16.

20. The Paris Convention is administered by WIPO, which had not been very successful in achieving a harmonized standard for intellectual property protection. See Edward Kwakwa, *Some Comments on Rulemaking at the World Intellectual Property Organization*, 12 DUKE J. COMP. & INT’L L. 179 (2002) (discussing the difficulty of creating harmonized rules for intellectual property through the WIPO process of negotiating international treaties). The author states that, “[i]nternational intellectual property regulation and oversight requires a system of norm-creation that is flexible enough to adapt to a dynamic, fast-paced, and technologically driven area of law. This fundamentally conflicts with the primary historical structure and means of rulemaking in international law – the multilateral treaty-making process. WIPO has traditionally used the multilateral treaty-

WTO are required to recognize the intellectual property rules established by TRIPS. As a result, significant case law has developed around the world that has established protection of well-known trademarks.

VI. INTERNATIONAL CASE LAW PROTECTING WELL-KNOWN TRADEMARKS THAT ARE NOT REGISTERED

TRIPS has had a profound influence on the international trademark community. The principles set forth in TRIPS for the protection of well-known trademarks have steadily taken hold in the courts of many nations around the world.

A. The MCDONALD'S Case – South Africa

One of the first major cases decided after TRIPS became effective was in South Africa for the MCDONALD'S trademark.²¹ Beginning in 1968, the McDonald's corporation had obtained registrations for twenty seven trademarks that incorporated the word "McDonald" or "McDonald's." However, due to the international boycott of South Africa, they had not used the brand in South Africa.²² As a result, under South African trademark law the marks were subject to possible cancellation for non-use. In 1992, a third party known as Joburgers Drive-Inn began using the name MCDONALD'S, BIG MAC, and the golden arches design on fast food outlets and restaurants.²³ Joburgers then applied to register these marks while also applying to expunge the McDonald's Corporation's trademarks from the register.²⁴ The parties brought suit against each other. The trial court ruled in favor of Joburgers based on a finding that McDonald's Corporation had failed to use its trademark and that the trademark was not eligible for protection as a well-known trademark because there was not sufficient knowledge of the mark through all levels of South African society.²⁵ On appeal, the Appellate Division of the South African Supreme

making process to create rules under its auspices." *Id.* at 181. See also Christopher M. Gacek, *U.S. Goals for Patent Protection in the Gatt Trade Talks*, THE HERITAGE FOUNDATION, October 31, 1991, <http://www.heritage.org/research/reports/1991/10/bg863-us-goals-for-patent-protection-in-the-gatt-trade-talks> (criticizing the WIPO as "a feckless United Nations body" and stating that "WIPO's value is in settling technical issues such as the definition of what can be patented. It is not an instrument, however, for protecting intellectual property"). It was this type of ardent criticism in industrialized nations during the 1980s and early 1990s that pushed for the protection of intellectual property through the global trading system and the TRIPS Agreement.

21. *McDonald's Corp. v. Joburgers Drive-Inn Restaurant (Pty.) Ltd.* 1997 (1) SA 1 (SCA) (S. Afr.).

22. MCCARTHY, *supra* note 3, § 29:62.

23. *McDonald's Corp.*, 1997 (1) SA 1 (SCA) at 4 (S. Afr.).

24. *Id.* at 4-5.

25. MCCARTHY, *supra* note 3, § 29:62.

Court disagreed with the trial court and, in so doing, extensively reviewed a new provision of the South African trademarks act, known as Section 35, that provided for the protection of well-known trademarks. Although the appellate court did not refer to Article 16(2) of the TRIPS agreement, it disagreed with the trial court that a well-known mark must be known throughout the general public.

Section 35 of the new act was intended to provide a practical solution to the problems of foreign businessmen whose marks were known in South Africa but who did not have a business here. The South African population is a diverse one in many respects. There are wide differences in income, education, cultural values, interests, tastes, personal life styles, recreational activities, etc. This was obviously known to the legislature when it passed the new act. If protection is granted only to marks which are known (not to say well-known) to every segment of the population (or even to most segments of the population) there must be very few marks, if any, which could pass the test. The legislation would therefore not achieve its desired purpose. Moreover, there would not appear to be any point in imposing such a rigorous requirement. In argument we were referred as an example to a mark which might be very well-known to all persons interested in golf. Why should it be relevant, when deciding whether or not to protect such a mark, that non-golfers might never have heard of it? I consider therefore that a mark is well-known in the Republic if it is well-known to persons interested in the goods or services to which the mark relates.²⁶

The court then reviewed the evidence that established MCDONALD'S as a well-known trademark to the relevant public.

I turn now to the evidence concerning the extent to which the McDonald's trade marks are known in the Republic. As I have stated earlier, McDonald's is one of the largest, if not the largest, franchiser of fast food restaurants in the world. At the end of 1993 there were 13 993 McDonald's restaurants spread over 70 countries. The annual turnover of McDonald's restaurants amounts to some \$23 587 million. McDonald's trade marks are used extensively in relation to its own restaurants as well as to those that are franchised. The level of advertising and promotion which has been carried out by McDonald's, its subsidiaries, affiliates and franchisees in relation to McDonald's restaurants exceeds the sum of \$900 million annually. Their international marketing campaigns have included sponsorship of the 1984 Los Angeles and 1992 Barcelona Olympics. McDonald's has also been a sponsor of the 1990 soccer World Cup Tournament in Italy and the 1994 World Cup Soccer Tournament in the United States of America. Mr Paul R Duncan, the vice president and general counsel of McDonald's, stated on affidavit that, in view of the vast scale of his organisation's operations, the McDonald's trade marks are in all probability some of the best known trade marks in the world. This was

26. *McDonald's Corp.*, 1997 (1) SA 1 (SCA) at 35-37 (S. Afr.) (emphasis added).

not denied. Although there was no evidence on the extent to which the advertising outside South Africa spilled over into this country through printed publications and television, it must, in all probability, be quite extensive. In addition the McDonald's trade marks would be known to many South Africans who have travelled abroad. This again would not be an insignificant number. [. . . The court then referred to survey evidence of the relevant public showing upwards of 77% of the relevant population were aware of the name MCDONALD'S, and/or the MCDONALD'S logos/trademarks]

. . . .

The evidence adduced by McDonald's leads, in my view, to the inference that its marks, and particularly the mark MCDONALD'S, are well-known amongst the more affluent people in the country. People who travel, watch television, and who read local and foreign publications, are likely to know about it. They would have seen McDonald's outlets in other countries, and seen or heard its advertisements there or its spillover here in foreign journals, television shows, etc.

. . . .

I consider therefore that at least a substantial portion of persons who would be interested in the goods or services provided by McDonald's know its name, which is also its principal trade mark. . . . [T]his mark is in my view well-known for the purposes of sec 35 of the new Act.²⁷

As a result of this case, the South African courts not only implemented the new law protecting well-known marks that are not used in the country, but also embraced the standard of proof set forth in TRIPS for well-known marks based on the knowledge of the mark in the relevant sector of the public rather than the entire population of the country.

B. The WHIRLPOOL Case – India

About the same time as the South African decision, the courts in India were reviewing a well-known trademark case in which the largest appliance manufacturer in the world, U.S. based Whirlpool Corporation, had filed suit against an Indian company that was using WHIRLPOOL for washing machines. Whirlpool Corporation had originally registered the WHIRLPOOL mark in India in the late 1950s but had not renewed the registration since 1977. In 1986, a company known as Chinar Trust filed an application to register the trademark WHIRLPOOL in India, and eventually such application was granted despite Whirlpool Corporation's opposition. Whirlpool Corporation then brought an action in

27. *Id.* at 44-65.

the Delhi High Court, seeking an injunction to prevent Chinar Trust from using the WHIRLPOOL name. At that time, Whirlpool Corporation was selling its appliances in a large number of countries around the world but not directly in India.²⁸ However, Whirlpool Corporation was able to show extensive global sales and advertising of the WHIRLPOOL trademark. Whirlpool Corporation produced significant amounts of evidence to support its claim of a well-known trademark, including market share data for a large number of countries around the world, registration of the WHIRLPOOL trademark in 65 jurisdictions, successful enforcement actions in a number of countries of its WHIRLPOOL trademark, consumer surveys, advertisements going back decades, and sales data going back decades. In addition, the plaintiff was able to provide evidence that it had advertised its WHIRLPOOL brand appliances in magazines having international circulation, including in India. The Delhi High Court found for Whirlpool Corporation and gave the following statement as part of its rationale:

It is not necessary in the context of present day circumstances the free exchange of information and advertising through newspapers, magazines, video television, movies, freedom of travel between various parts of the world to insist that a particular plaintiff must carry on business in a jurisdiction before improper use of its name or mark can be restrained by the court. . . . [T]he main consideration is the likelihood of confusion and consequential injury to the plaintiff and the need to protect the public from deception, where such confusion is prima facie shown to exist, protection should be given by courts to the name or mark.²⁹

On appeal, the Indian Supreme Court upheld the ruling in favor of Whirlpool Corporation.³⁰ As a result, the courts in India have provided further support for the principle that well-known trademarks can be protected in countries where the mark has not been registered and goods bearing the mark have not been sold. The case is particularly known for establishing the concept that significant supporting evidence for a establishing a mark as well-known (and eligible for protection despite the lack of registration and non-use) can be established by showing that advertisements by the trademark owner have reached the relevant public in the country.

C. WIPO Helps Establish Evidentiary Requirements

As the case law on well-known trademarks began to develop, the World Intellectual Property Organization (WIPO) in 1999 provided further

28. Whirlpool Corporation was able to show some sales to the U.S. embassy and US AID in India.

29. Whirlpool Corp. v. N.R. Dongre (1994) 56DLT 304; 1995 (32) DRJ 318 (India).

30. N.R. Dongre v. Whirlpool Corp., 1996 PTC (16) 583 SC (India).

guidance on the evidentiary requirements for well-known marks in a Joint Recommendation concerning the Provisions on the Protection of Well-Known Marks.³¹ The Provisions provided that the following factors should be considered in determining whether a trademark is well-known:

1. the degree of knowledge or recognition of the mark in the relevant sector of the public;
2. the duration, extent and geographical area of any use of the mark;
3. the duration, extent and geographical area of any promotion of the mark, including advertising or publicity and the presentation, at fairs or exhibitions, of the goods and/or services to which the mark applies;
4. the duration and geographical area of any registrations, and/or any applications for registration, of the mark, to the extent that they reflect use or recognition of the mark;
5. the record of successful enforcement of rights in the mark, in particular, the extent to which the mark was recognized as well known by competent authorities;
6. the value associated with the mark.³²

D. The STARBUCKS Case – Russia

One additional case of interest relating to the protection of well-known marks that are not used in a country involves the STARBUCKS mark in Russia. Russia is seeking admission to the WTO. As part of its efforts to join the international trading community, it has begun implementing laws to ensure TRIPS compliance. In 2002, the Russian Federation amended their trademark law to include protection for well-known trademarks.³³

The Seattle-based Starbucks Corporation registered its STARBUCKS trademark in Russia in 1997.³⁴ However, because of the poor economy in Russia at that time, the company did not open any STARBUCKS coffee

31. WIPO & Paris Union for the Protection of Industrial Property, *Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks* WIPO Doc. 833(E) (Sept. 29, 1999), available at http://www.wipo.int/about-ip/en/development_iplaw/pub833.htm.

32. *Id.*

33. Law of Russian Federation # 3520-1 On Trademarks, Service Marks and Appellations of Origin of Goods of September 23, 1992 with changes and amendments introduced by Federal Law No. 166-FL on December 11, 2002, and entering into force on December 27, 2002, *Sobr. Zakonod. RF*, 2002, No.3520-1.

34. Andrew E. Kramer, *Starbucks Opens its First Shop in Russia*, INT'L HERALD TRIB., Sept. 7, 2007, at 10.

shops in Russia, and several years passed after the registration of the mark.³⁵ In 2002, a third party, Sergei A. Zuykov, filed for the cancellation of the Starbucks Corporation's trademark for non-use.³⁶ Upon successfully cancelling the marks, Mr. Zuykov then applied for the STARBUCKS trademark in the name of his company and announced plans to establish a chain of STARBUCKS coffee shops.³⁷ Mr. Zuykov's company then offered to sell his rights in the STARBUCKS mark to Starbucks Corporation for US\$600,000.³⁸ Mr. Zuykov's approach was a common approach for trademark "pirates" in Russia. These pirates had a lucrative business model of registering famous trademarks that were not used in Russia and then selling the rights back to the multinational owner of the mark. However, Starbucks Corporation refused the offer and brought an action in the Russian trademark office to cancel Mr. Zuykov's registration. The trademark office ruled in favor of Starbucks Corporation.³⁹ The decision was upheld on appeal, which allowed Starbucks Corporation to register the STARBUCKS trademarks in its own name and begin opening genuine STARBUCKS coffee shops in Russia.⁴⁰

As the Russian trademark office and the Russian courts have continued to enforce the rights of well-known trademarks, the trademark piracy business that was once flourishing in Russia has dwindled, and it appears to be more difficult for third parties to register well-known marks owned by multinationals.⁴¹

E. The GRUPO GIGANTE and BUKHARA Cases – Split Circuits in the United States

Perhaps the most significant controversy over application of the well-known marks doctrine has occurred in the United States. The 9th Circuit has recognized the protection of well-known marks. However, the 2nd Circuit has refused to acknowledge well-known marks of foreign trademark holders because the TRIPS Agreement is not self-executing, and therefore,

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. MCCARTHY, *supra* note 3, § 29:61.

40. Kramer, *supra* note 34.

41. Telephone Interview with Eugene Arieivich, Partner, Baker & McKenzie (Feb. 2011). Mr. Arieivich is Co-Counsel to the Coalition for Intellectual Property Rights (CIPR) and co-author of CIPR monographs on Well-Known Marks in countries of the former Soviet Union. He is also the co-author of the Russian Federation section of a publication analyzing national and international laws protecting well-known trademarks published by the International trademark association. See Eugene A. Arieivich & Janet L. Hoffman, *Russian Federation*, in *FAMOUS AND WELL-KNOWN MARKS: AN INTERNATIONAL ANALYSIS* 4-293, 4-293 n.* (Frederick W. Mostert ed., INTA 2d ed. Aug. 2009) (2004).

according to the 2nd Circuit, the well-known marks doctrine has not been incorporated into federal trademark law.

In the 9th Circuit case, a Mexican company, Grupo Gigante, operated a chain of grocery stores under the GIGANTE trademark.⁴² Grupo Gigante registered the mark in Mexico in 1963.⁴³ By 1991, the chain had almost 100 stores in Mexico, including two in Tijuana, a city on the Mexican border only a few miles south of San Diego.⁴⁴ In the 1990s, two brothers, Michael and Chris Dallo, opened two stores in San Diego under the name “GIGANTE MARKET.”⁴⁵ When Grupo Gigante expanded into the United States by opening GIGANTE stores in Los Angeles, the Dallo brothers sent Grupo Gigante a cease and desist letter, and litigation ensued.⁴⁶ A number of issues, including laches, affected the ultimate outcome of the case.⁴⁷ However, with respect to the issue of well-known marks, both the federal district court, and on appeal the 9th Circuit, recognized the well-known mark exception (which the court referred to as the “famous mark exception”) to the territoriality principle.⁴⁸ The 9th Circuit decision included the following analysis:

A fundamental principle of trademark law is first in time equals first in right. . . .

Under the principle of first in time equals first in right, priority ordinarily comes with earlier *use* of a mark in commerce. . . . If the first-in-time principle were all that mattered, this case would end there. It is undisputed that Grupo Gigante used the mark in commerce for decades before the Dallos did. But the facts of this case implicate another well-established principle of trademark law, the “territoriality principle.” The territoriality principle, as stated in a treatise, says that “[p]riority of trademark rights in the United States depends solely upon priority of use in the United States, not on priority of use anywhere in the world.” Earlier use in another country usually just does not count. Although we have not had occasion to address this principle, it has been described by our sister circuits as “basic to trademark law,” in large part because “trademark rights exist in each country solely according to that country’s statutory scheme.” While Grupo Gigante used the mark for decades before the Dallos used it, Grupo Gigante’s use was in Mexico, not in the United States. Within the San Diego area, on the northern side of the border, the Dallos were the first users of the “Gigante” mark. Thus, according to the territoriality principle, the Dallos’ rights to use the mark would trump Grupo Gigante’s.

42. Grupo Gigante v. Dallo & Co., 391 F.3d 1088, 1091 (9th Cir. 2004).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 1092.

47. *Id.*

48. Grupo Gigante, 391 F.3d at 1092.

Grupo Gigante does not contest the existence of the territoriality principle. But like the first-in-time, first-in-right principle, it is not absolute. The exception, as Grupo Gigante presents it, is that when foreign use of a mark achieves a certain level of fame for that mark within the United States, the territoriality principle no longer serves to deny priority to the earlier foreign user.

There is no circuit-court authority--from this or any other circuit--applying a famous-mark exception to the territoriality principle. We hold, however, that there is a famous mark exception to the territoriality principle. While the territoriality principle is a long-standing and important doctrine within trademark law, it cannot be absolute. An absolute territoriality rule without a famous-mark exception would promote consumer confusion and fraud. Commerce crosses borders. In this nation of immigrants, so do people. Trademark is, at its core, about protecting against consumer confusion and “palming off.” There can be no justification for using trademark law to fool immigrants into thinking that they are buying from the store they liked back home.⁴⁹

The 2nd Circuit reached the opposite decision in the 2007 case of *ITC Ltd. v. Punchgini, Inc.*⁵⁰ The plaintiff ITC owns and operates the five star ITC Maurya hotel in New Delhi, India.⁵¹ The BUKHARA restaurant inside the hotel is claimed by ITC to be rated among the best 50 restaurants in the world.⁵² ITC has operated the New Delhi restaurant since 1977 and at various times has operated other BUKHARA restaurants in cities such as Hong Kong, Singapore, Bangkok, Bahrain, Kathmandu, Ajman, Chicago, and New York.⁵³ However, the New York restaurant only remained open for five years from 1986-91, and the Chicago restaurant closed after ten years of operation from 1987-97.⁵⁴

A few years after the Chicago restaurant closed, several previous employees of the BUKHARA restaurant in New Delhi formed Punchgini, Inc. for the purpose of opening restaurants in New York, which were named BUKHARA GRILL.⁵⁵ When asked how the name was chosen, one of the Punchgini shareholders admitted that there was at the time “no restaurant Bukhara in New York and we just thought we will take the name.”⁵⁶ In addition to the name, the BUKHARA GRILL restaurants mimicked the ITC BUKHARA’s logos, décor, staff uniforms, wood slab menus, and red

49. *Id.* at 1093-94 (emphasis added).

50. *ITC Ltd. v. Punchgini, Inc.*, 482 F.3d 135 (2d Cir. 2007).

51. *Id.* at 142-43.

52. *See* ITC Hotels web site, <http://www.itcportal.com/itc-business/hotels.aspx> (last visited Sept. 30, 2011).

53. *ITC Ltd.*, 482 F.3d at 143.

54. *Id.*

55. *Id.* at 144.

56. *Id.*

checkered customer bibs.⁵⁷ One Punchgini shareholder was quoted as saying that the BUKHARA GRILL “is quite like Delhi’s Bukhara.”⁵⁸

When ITC sued Punchgini, the district court was not convinced that ITC could bring a claim under the well-known marks doctrine and dismissed the case on summary judgment.⁵⁹ On appeal, the 2nd Circuit considered this issue in depth and concluded that the well-known marks doctrine is not a part of federal law.⁶⁰ The court noted that Congress has amended federal trademark law, the Lanham Act, numerous times and has failed to incorporate the well-known marks doctrine into the statute.⁶¹ The court also stated that, “TRIPS is plainly not a self executing treaty” and “the Paris Convention creates no substantive United States rights beyond those independently provided in the Lanham Act.”⁶² As a result, the 2nd Circuit held that the well-known marks doctrine is not an exception to the territoriality principle under current federal law, which the court stated in no uncertain terms, requires a trademark holder to use the mark in the United States.⁶³

The principle of territoriality is basic to American trademark law. . . .

Precisely because a trademark has a separate legal existence under each country’s laws, ownership of a mark in one country does not automatically confer upon the owner the exclusive right to use that mark in another country. Rather, a mark owner must take the proper steps to ensure that its rights to that mark are recognized in any country in which it seeks to assert them. . . .

The territoriality principle requires the use to be in the United States for the owner to assert priority rights to the mark under the Lanham Act.⁶⁴

The Second Circuit’s blunt assertion that Congress has failed to incorporate the substantive aspect of the well-know marks doctrine into federal law has caused concern in the U.S. trademark community.

57. *Id.*

58. *Id.*

59. *ITC Ltd.*, 482 F.3d at 145.

60. *Id.* at 159.

61. *Id.* at 162.

62. *Id.* at 161-62.

63. The court left open the issue of whether the plaintiff’s could claim that New York state common law included a well-known marks doctrine. The 2nd Circuit certified this question to the New York Court of Appeals. The New York Court of Appeals held that there was no such specific doctrine under New York laws, but a well-known mark holder could make a claim of common law unfair competition. In considering this issue of unfair competition, the 2nd Circuit affirmed the district court’s dismissal of ITC’s claim on the grounds that the BUKHARA restaurant was not sufficiently well-known in New York to sustain such a claim. See Kenny A. Plevan & Anthony J. Dreyer, *State Common Law Overtakes Famous Marks Doctrine*, 241 N.Y. L.J. 4 (2009).

64. *ITC Ltd.*, 482 F.3d at 155.

Congress's failure to comply with the obligations of the TRIPS Agreement could be seen by officials in other countries as one of the great hypocrisies in international intellectual property law. For most of the 1980s and into the 1990s, the United States Trade Representative aggressively pushed the United States principles of intellectual property protection upon lesser developed countries.⁶⁵ The United States then used TRIPS and the global trading regime of the WTO to finally force lesser developed countries to incorporate the protection of well-known trademarks into their law and surrender their sovereign right to strictly follow the territoriality principle. Now, after all the cajoling and posturing by the United States to push through the adoption of TRIPS, it is U.S. federal law that fails to be TRIPS compliant. The leading scholar on U.S. trademark law, professor Thomas McCarthy, has referred to the BUKHARA decision "as a great embarrassment for the U.S." that may affect our future trade negotiations.⁶⁶ "This decision can be used as a club to beat our trade negotiators, with foreign governments saying, 'Who are you to criticize us? You are not living up to your treaty obligations.'"⁶⁷ In an attempt to resolve the issue, the International Trademark Association (INTA) formed a task force to review the state of federal law relating to well-known trademarks.⁶⁸ The task force has recommended to the INTA Executive Committee that U.S. trademark law should be amended in order to be "consistent with U.S. obligations under various treaties and international agreements."⁶⁹ INTA is now working with other U.S. intellectual property organizations to draft a proposed amendment to U.S. trademark law.⁷⁰

VII. PROTECTING WELL-KNOWN TRADEMARKS OUTSIDE THEIR CLASS OF REGISTRATION

As previously mentioned, Article 16(3) of the TRIPS Agreement provides for protection of well-known marks on dissimilar goods if the well-known mark has been registered. The owner of a registered well-known trademark that wishes to prevent its use on dissimilar goods must prove that use of that trademark in relation to such goods would indicate a connection between those goods or services and the owner of the registered

65. See Donald P. Harris, *TRIPS and Treaties of Adhesion Part II: Back to the Past or a Small Step Forward*, 2007 MICH. ST. L. REV. 185, 199-200 (2007) (describing the superior bargaining power of the industrialized nations and the economic coercion used to push for the acceptance of the TRIPS Agreement).

66. Steve Seidenberg, *Trademark Wars: Court's Failure to Uphold Famous Marks Doctrine Jeopardizes U.S. Interests Overseas*, INSIDECOUNSEL, July 2007, at 26.

67. *Id.*

68. *INTA Board Backs Proposal for U.S. Statute on Well-Known Trademarks*, INTA BULLETIN (May 1, 2011), <http://www.inta.org/INTABulletin/Pages/INTABoardBacksProposalforUSStatuteonWell-KnownMarks.aspx>.

69. *Id.*

70. *Id.*

trademark and that the interests of the owner of the registered trademark are likely to be damaged by such use. The implementation of Article 16(3) coincides with a number of principles that already exist in each individual countries' domestic trademark law that are intended to protect registered trademarks in one class from newcomers who may be attempting to trade off the goodwill of the established mark by applying for a registration for the same name in a different class of goods. These principles include likelihood of confusion, passing off, parasitism, and dilution. As a result, the implementation of Article 16(3), which deals with trademarks that are already registered in the country, has been less controversial than the implementation of Article 16(2), which had significant implications on the sovereignty of each country because it contained an exception to the sovereign principle of the territoriality of trademarks. Therefore, an in-depth review of cases involving Article 16(3) will not be undertaken in this paper. However, provided below are some brief examples of successful actions brought by the holders of well-known trademarks against third parties attempting to use or register the trademark in a different class of goods.

In Chile, Danjaq LLC, the owner of the trademark 007, related to the James Bond character, was able to prevent an operator of telephone services from registering the name 007 PUBLIGUIAS INFORMACION TELEFONICA.⁷¹ The Chilean trademark office initially rejected Danjaq LLC's opposition.⁷² However, the Chilean Industrial Property Court, and on appeal the Supreme Court, sided with Danjaq LLC.⁷³ The decision is reported as significant for trademark law in Chile "because the highest court has recognized that a very well-known trademark may prevent the registration of a similar trademark even for a different and unconnected scope of protection, provided that a risk of confusion may be provoked."⁷⁴

In France, Louis Vuitton (LVM) owned a well-known trademark for a monogram canvas design that was used in connection with leather goods. Louis Vuitton brought an action against the music company EMI for using a similar design on compact disks.⁷⁵ Although the French trial court found infringement, the Court of Appeals overruled the judgment because it felt that compact disks were so different from leather goods that LVM's mark was not damaged.⁷⁶ On further appeal, the Supreme Court held in favor of LVM.⁷⁷ The Supreme Court's decision is seen as support for a line of French cases that provide a broad scope of protection for well-known

71. 101 TRADEMARK REP. 906 (2011).

72. *Id.*

73. *Id.*

74. *Id.* at 906-07.

75. 100 TRADEMARK REP. 503, 503 (2010).

76. *Id.* at 503-04.

77. *Id.* at 504.

marks, even in cases against third parties who attempt to use the mark on very different goods.⁷⁸

In Syria, the Swiss watchmaker Rolex S.A. brought an action against a company that attempted to register the ROLEX trademark.⁷⁹ Rolex S.A. watches are used in the trademark class 14 (jewelry and watches) while the Syrian company attempted to register the ROLEX mark in class 29 (meats and processed food).⁸⁰ The Syrian court took judicial notice of the fame and well-known nature of the ROLEX trademark and found that Rolex S.A. was entitled to protection of the ROLEX trademark regardless of whether the products were the same or different from Rolex S.A.'s products.⁸¹ The court ordered the cancellation of the Syrian company's registration.⁸²

In Australia, the automobile company Saab was able to successfully oppose the attempted registration of the SAAB trademark by a third party for Christmas tree lights, electric fans, kettles, and toasters ("appliances").⁸³ The Trademark office hearings officer found that Saab Automobile AB had a well established reputation in Australia through the use of the SAAB trademark since the 1970s based on its volume of sales and extensive promotions in the country.⁸⁴ Because of the "substantial reputation" of the SAAB trademark for automobiles, the hearings officer ruled that there was a danger consumers would be confused or deceived by the use of the trademark on appliances.⁸⁵

CONCLUSION

Towards the end of the nineteenth century, a number of countries agreed upon the Paris Convention for the Protection of Industrial Property, which provided a certain basic level of protection for trademarks owned by citizens of Member States. The convention was revised several times, including a revision that introduced the concept of a well-known mark and provided for its protection as an exception to the normal territoriality principle.

In the 1980s and 1990s, the global trading system known as the GATT (the predecessor to the more formal structure of the WTO) turned its attention to intellectual property. Advocates of stronger intellectual property protection felt that the lack of reliable world-wide intellectual property

78. *Id.* at 504.

79. 100 TRADEMARK REP. 641 (2010).

80. *Id.* at 641.

81. *Id.* at 642.

82. *Id.*

83. *Re: Opposition by Saab Automobile AB to Registration of Trade Mark Application 826676(11) – SAAB APPLIANCES*, Decision of Delegate of the Registrar of Trade Marks with Reasons (2005).

84. *Id.* at 2, 9.

85. *Id.*

protection was becoming an important issue as the growth of trade liberalization began causing intense competition among manufacturers and developers of goods that could be sold around the world. Multinational manufacturers needed to be sure that the goods they were selling would have adequate patent, trademark, and copyright protection and not be undercut in large parts of the world by patent and copyright infringement and copycat producers of counterfeit goods. As a result, the industrialized countries included intellectual property protection in the negotiations for the new global trading system that would create the WTO.⁸⁶ These negotiations produced the TRIPS Agreement.

The TRIPS Agreement became effective on January 1, 1995. It is considered the most comprehensive global agreement on intellectual property ever implemented and covers, among others, the areas of copyright, patent, industrial design, trade secret, and trademark law.⁸⁷ One small part of that agreement incorporated the Paris Convention rules on well-known trademarks and then expanded those rules to provide further protection for such marks. As a result, the protection of famous global brands is relatively assured.

Some criticism of the TRIPS Agreement may be warranted, particularly in the heavy handed way in which the industrialized nations used the global trading system to force developing countries to accept the loss of sovereignty over determining domestic intellectual property rights, such as the extent to which they would provide exceptions to the trademark territoriality principle.⁸⁸ However, the TRIPS Agreement has been a powerful force in protecting well-known trademarks and, as a result, in protecting consumers from the confusion and deceit of purchasing low quality goods bearing the unauthorized brand of a well-known trademark.

86. See Harris, *supra* note 65.

87. See Donald P. Harris, *Trips' Rebound: An Historical Analysis Of How The Trips Agreement Can Ricochet Back Against The United States*, 25 *Nw. J. INT'L L. & BUS.* 99, 104 (2004) (citing several sources hailing TRIPS as the most important and comprehensive international agreement ever concluded).

88. See Harris, *supra* note 65.