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Reviewing the Past Year's Top 10 Trademark Trends and an Analysis of Their Impact on 2008

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As the New Year begins, it is a good time to examine the top 10 events that shaped trademark law in 2007 and consider what might be ahead in 2008. Overall, the past year has been a mix of good and bad for trademark owners. While famous mark owners may be feeling less secure as courts begin to interpret the Trademark Dilution Revision Act and the Second Circuit repudiates the famous marks doctrine, some comfort can be taken in the Ninth Circuit's refusal to extend the aesthetic functionality doctrine to logos. The Trademark Trial and Appeal Board (TTAB) also seems to have gotten it right in deciding to uphold the Pan-American Convention.

On the prosecution side, the TTAB has reaffirmed its approach to fraud to make clear that subjective intent is irrelevant and has passed a new set of procedural rules. These rules bring TTAB practice more in line with federal procedure. Time will tell if this will expedite cases, as the TTAB hopes, or increase the time and expense of TTAB proceedings.

Four other issues worth watching emerged this year:

1. The Circuit courts clashed over the concept of "use" in the context of metatags and keywords;

2. Congress took up the issue of bringing cohesion to intellectual property (IP) enforcement;

3. The fate of the Whois database was shelved temporarily; and

4. Courts and the TTAB opted against admitting evidence regarding historical internet activity.

All of these issues remain for 2008.

1. Trademark Dilution Revision Act of 2006: What the Courts Said in 2007

Although the Trademark Dilution Revision Act (TDRA) was effective on October 6, 2006, the first cases applying it were decided in 2007. The major provisions of the TDRA (1) pronounced *likelihood of dilution* as the appropriate standard[1] and (2) heightened the fame standard requiring wide recognition by the general consuming public of the United States,"[2] effectively disallowing geographical or market niche fame. The decisions made in 2007 under the TDRA provide some guidance on how these new standards will be applied and analyze dilution in the context of an asserted parody defense.

A claimant under the TDRA can demonstrate fame through surveys and evidence regarding marketing

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efforts and sales of the goods or services under the purportedly famous mark. In *Nike, Inc. v. Nikepal Int'l, Inc.*,[3] Nike brought a dilution claim against a distributor of glass syringes and laboratory equipment, for use of the NIKEPAL mark.[4] The Eastern District of California found the NIKE mark famous because: Nike spent more than $1 billion on promotion; sales of Nike products were more than $1 billion a year by 1997; and survey respondents overwhelmingly recognized the Nike marks.[5] In contrast, the Fourth Circuit in *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*,[6] required no evidence of fame, stating, "[i]t may not be too strong to refer to these famous marks as icons of high fashion."[7] These differing treatments of the fame standard leave open a multitude of questions regarding what types of proof courts will require to demonstrate fame under the TDRA.

In order to demonstrate dilution by blurring, the plaintiff must show that the use in question will harm the distinctiveness of its mark. When considering whether there was a likelihood of dilution, the *Nike* court focused on the similarity of the marks and survey evidence indicating that 87 percent of Nikepal's customers associated its mark with Nike's products and services, demonstrating likely association by the general public.[8] In *Perfumebay.com Inc. v. eBay Inc.*,[9] the Ninth Circuit held that there was a likelihood of dilution by blurring based solely on the similarity of the marks, the fame of the senior mark, and the extent of resources expended to attain fame.[10] No evidence of actual association was required.[11] If other courts follow the Ninth Circuit's lead in analyzing likelihood of dilution, the scope of protection intended by Congress in passing the TDRA will likely be achieved. The Fourth Circuit's recent TDRA decision provides a powerful counterpoint and tool for parties defending dilution claims.

In *Louis Vuitton Malletier*, the Fourth Circuit determined that, while the defendant's asserted parody was not a fair use, it was nonetheless appropriate to consider in determining whether the distinctiveness of the plaintiff's marks was harmed.[12] The court pointed out that parody is not a complete defense to dilution, particularly when the use in question is itself as a trademark, that is, as an identifier of defendant's goods.[13] The court then went on to consider the dilution factors in light of the fact that the defendant's use was a parody.[14] Ultimately, the court concluded that defendant's use was "a successful parody" and that it would "not blur the distinctiveness of the famous mark as a unique identifier of its source."[15] This holding is problematic for owners of famous marks because it implies that the more famous a mark, the less likely a finding of dilution by blurring in the face of an asserted parody.

While these decisions provide some guidance on the application of this new statute, they also demonstrate the complexity of litigating dilution claims in the light of this new legislation and the as yet underdeveloped body of case law construing it.

2. Use of a Mark as a Keyword/Metatag: Is this "Use in Commerce" Actionable Under the Lanham Act?

A metatag is an HTML tag containing information about a Web page that will cause it to be retrieved as a result of a search engine's query, even if that word is not found in the Web page's viewable content. A keyword is a word which will result in a search engine's retrieving particular Web pages for its results list. The split in authority over whether the use of keywords and metatags constitutes actionable "use in commerce" persisted this year as the lower courts decided cases involving this issue in accordance with the precedent in their circuits.

A recent decision out of the Eastern District of New York noted that, while courts in other circuits generally hold that metatag/keyword use constitutes use in commerce, courts in the Second Circuit do not usually ascribe to that line of thinking.[16] While the Second Circuit and its district courts have repeatedly required use of the mark on goods or in connection with the advertising of services,[17] courts in the other circuits have found that such constitutes use in commerce.[18] These holdings are generally based on the notion that the purchase of a keyword is a commercial transaction[19] and inclusion of a mark in a metatag is done for the purpose of trading upon the goodwill of the trademark owner.[20]

On this issue, 2007 proved to be more of the same, as the split in authority continued. The Supreme Court will likely have to take this up soon to bring some clarity to this body of law.

3. The TTAB's 2007 *Medinol* Cases: Are There Any Defenses to Fraud Other Than Truth?

The TTAB's 2007 fraud decisions demonstrate that, while the TTAB continues to assert that there can be no fraud "if it can be proven that the statement, . . . was made with a reasonable and honest belief that it was true,"[21] actually proving a reasonable and honest belief is difficult. Since the TTAB's 2003 decision in *Medinol Ltd. v. Nuero Vasx, Inc.*,[22] it has repeatedly defined fraud as "mak[ing] false, material representations . . . in connection with an application,"[23] making no mention of intent. This year's decisions seem to imply that successfully defending a fraud allegation requires showing that the alleged misstatement was true.

The TTAB decided five fraud cases this year, finding fraud in three.[24] In each of those three, the TTAB rejected intent-based defenses. For instance, in *Hurley International LLC v. Volta*, the Voltas had filed a use-based application and, in response to an opposer's motion for summary judgment of fraud, asserted that they believed that their ownership of the mark in Australia was sufficient to support a use-based application.[25] The TTAB nonetheless granted the motion for summary judgment.[26] *Hachette Filipacchi Presse v. Elle Belle, LLC*[27] and *Sinclair Oil Corp. v. Sumatra Kendrick*[28] ended similarly, as the TTAB found fraud in the face of assertions that the alleged misstatement resulted from a miscommunication between trademark counsel and an applicant who was not a native English speaker and that the applicant honestly believed that the statements made in her declaration were true, respectively.

In the two cases where a fraud allegation was unsuccessful, the TTAB was unconvinced that the alleged misstatement was, in fact, false. In *Asics Corp. v. Paragon Development Corp.*, the TTAB denied a motion for summary judgment, at least in part, because it was not convinced, based on the pre-trial record, that the statement in question was false.[29] Similarly, in *Tri-Star Marketing, LLC v. Nino Franco Spumanti S.R.L.*, the alleged false statement was held by the TTAB to be true.[30]

In light of the TTAB's 2007 fraud decisions, it is difficult to envision overcoming a fraud allegation absent showing the truth of the alleged misstatement.

4. The TTAB Institutes New Procedural Rules: Will the Changes Encourage Earlier Settlements or More Lawsuits?

On August 1, 2007, the TTAB promulgated new rules for all oppositions and cancellations.[31] While several of the rules were effective August 31, 2007, the majority became effective November 1, 2007. These changes were instituted to expedite cases and to encourage greater disclosure and early settlement.

The changes will significantly affect discovery. First, the TTAB's standard protective order is now applied in all proceedings unless modified so parties can no longer withhold confidential information. Second, notification of commencement of a proceeding may be accomplished electronically if the party has provided the Patent & Trademark Office with an email address.[32] Parties may also agree to be served by fax or email and, thereby, lose the benefit of the five-extra-days-to-respond rule.

Service may be accomplished by any means listed in § 2.119 (as amended), including standard US mail. Parties are not required to follow the Federal Rules of Civil Procedure or any international convention regarding service. If a service copy is returned as undeliverable, the plaintiff must notify the TTAB within 10 days and provide any relevant information about the defendant's whereabouts. The TTAB will then attempt service.

The most significant amendments involve disclosure and are modeled after the 1993 revisions to the Federal Rules of Civil Procedure. The parties must now conduct an initial discovery conference in accordance with Federal Rules of Civil Procedure 26(f).[33] The disclosures required before commencing discovery generally mirror those in Federal Rules of Civil Procedure 26(a). Disclosure related to expert witnesses is also required. A failure to make timely and adequate disclosures may be the subject of a motion to compel.[34]

As a result of these changes, practitioners must now formulate their trial plans earlier. The increase in the amount and complexity of discovery will likely extend the duration of proceedings and increase costs. While the TTAB hopes that more cases will be resolved before a hearing is required, these changes may ultimately result in fewer such proceedings being filed because the relief sought can usually also be sought in court proceedings and given these changed rules, appearing before the TTAB may not provide a faster timeline.

5. *Au-Tomotive Gold, Inc. v. Volkswagen of America, Inc.*: The Ninth Circuit Refuses to Extend Aesthetic Functionality to Logos

On March 19, 2007, the Supreme Court denied *certiorari* to a 2006 Ninth Circuit decision that considered the proper scope of the doctrine of aesthetic functionality. The Supreme Court's denial effectively affirmed the Ninth Circuit's rejection of an infringer's attempt to expand the doctrine.[35] The infringer, Au-Tomotive Gold (Au-Gold) claimed the right to sell key chains and license plates bearing various Volkswagen (VW) logos because the "actual benefit that the[ir] consumer wishe[d] to purchase" was only the "aesthetic functional elements" of the products.[36] The trial court accepted Au-Gold's argument, ruling that Au-Gold's use of VW logos was not trademark infringement.[37]

The Ninth Circuit applied a two-step test, considering first whether "the alleged significant non-trademark function" is either "essential to the use or purpose of the article [or] affects[its] cost or quality."[38] If either component of the first prong is satisfied, the disputed feature is functional and thus not eligible for trademark protection. Upon finding the first prong unsatisfied, the court evaluated "whether trademark protection of the feature would impose a significant non-reputation-related competitive disadvantage."[39] The Ninth Circuit rejected the lower court's decision, finding neither prong satisfied and noting that the "alleged aesthetic function is indistinguishable from . . . the mark's source-identifying nature."[40]

In refusing to extend the doctrine of aesthetic functionality to logos, the Ninth Circuit protected the doctrine's limited scope and the trademark protection afforded to manufacturers whose marks are both aesthetic and source-identifying. Considering the multitude of marks fitting that description—like Nike's Swoosh or Ferrari's stallion—2007 was a very good year for the protection of logos.

6. Intellectual Property Rights Enforcement Act of 2007: Better Protection for Trademark Owners or Just More Bureaucracy?

Near the end of 2005, Senators Evan Bayh (D-IN) and George Voinovich (R-OH) introduced Senate Bill 1984, known as the Intellectual Property Rights Enforcement Act, seeking to curb "counterfeiting and piracy" "result[ing] in the loss of hundreds of thousands of jobs" and costing the country "hundreds of billions of dollars."[41] While the bill failed, because of the importance of the issue, it was no surprise when, on February 7, 2007, the senators introduced the Intellectual Property Rights Enforcement Act (IPREA) of 2007.

This legislation creates a unified Intellectual Property Enforcement Network(IPEN), whose duties would include "establishing policies, objectives, and priorities"[42] focused on "eliminating counterfeit and pirated goods" from the international marketplace and coordinating information sharing among both an international task force and the many US agencies currently engaged in some facet of IP protection.[43] Aimed at providing a more cohesive approach to IP protection, the IPREA requires that the functional leader of the IPEN, known as the Coordinator for Intellectual Property Enforcement, produce both a strategic plan and an annual report of IPEN's progress.

The IPREA evidences a move away from complacency regarding global IP rights. This legislation is written with the future in mind and expressly requires that IPEN's strategic plan be reevaluated at least every two years in an effort to prevent the world from falling back into its static ways. IPREA is currently pending before the Senate Judiciary Committee and will likely move forward in the coming year.

7. *ITC Ltd. v. Punchgini, Inc.*: Is the "Famous Marks" Doctrine Still Viable in the US, and If Not, What Does That Mean for the Protection of Famous US Marks Abroad?

A recent Second Circuit decision—*ITC Ltd. v. Punchgini, Inc.*—created a direct split of authority regarding whether the "famous marks" doctrine is considered part of US federal trademark law. In *ITC*, an Indian corporation (ITC) sought to protect its right to a trademarked restaurant name that it had once used in both New York and Chicago. Several years before it filed suit, however, ITC had closed both restaurants and stopped using the mark in the United States. The district court found against ITC due to its continuous failure to use its mark in the United States during the preceding three years. Finding that ITC had not shown its intent to resume use of the disputed mark, the Second Circuit affirmed the lower court's decision that the mark had been fatally abandoned.

Addressing ITC's famous marks argument, the Second Circuit stated: "Congress has not yet incorporated that doctrine into federal trademark law."[44] The literal effect of this statement was to limit ITC's chance for recovery to whatever type of unfair competition claims are available under New York state law. The more profound effect, however, was to bring Second Circuit trademark jurisprudence into conflict with that of the Ninth Circuit, which recognizes the famous marks doctrine as "an element of federal trademark law."[45] On October 1, 2007, the Supreme Court denied *certiorari*.

For now, international trademark rights remain uncertain.[46] For US trademark owners asserting such rights in other nations party to the Paris Convention, the question becomes whether those nations will continue to uphold the doctrine given the United States' ambiguous stance.

8. *Diaz v. Servicios De Franquicia Pardo's S.A.C.*: What Does Conferring Priority Absent Use under the Pan-American Convention Accomplish?

In *Diaz v. Servicios De Franquicia Pardo's S.A.C.*,[47] the TTAB dismissed an opposition based upon the applicant's trademark priority over the opposer in a country signatory to the Pan-American Convention, despite the opposer's earlier use in the United States of the identical mark for identical services.

The TTAB held that a party claiming priority in the United States under Article 7 of the Pan-American Convention must establish that:

- It is the owner of the mark in one of the states signatory to the Convention;

- It "may have known" that the junior party is using or applying to register an "interfering mark" in the United States;

- The junior user had knowledge of the existence and continuous use of the mark in one of the signatory states prior to the use in the United States; and

- It has complied with the requirements of US law and the Pan-American Convention.[48]

This decision demonstrates that, under the terms of the Pan-American Convention, there are certain limited circumstances under which a mark that has never been used in the United States may nonetheless enjoy trademark priority over a mark that was used first in the United States. From a practical standpoint, this decision makes it difficult for a party to adopt a mark known in a country party to the Pan-American Convention for use in areas populated by immigrants from that country and, hopefully, will lead to other signatory countries conferring the same right upon US marks.

9. ICANN Domain Registration Policies: Have We Heard the Last Word on Changes to the Whois Database?

On October 31, the Internet Corporation for Assigned Names and Numbers (ICANN) voted to conduct further studies before deciding the fate of the Whois database. ICANN was considering the Operational Point of Contact Proposal (OPoC), which was "proposed to deal with the issue that 'the amount of data that ICANN requires registrars to display in the Whois is facilitating all sorts of undesirable behaviors. . . .'"[49] Given the articulated privacy concerns that have been pending before ICANN in some form since 2003,[50] ICANN considered both limiting access to Whois and allowing registrars to list proxy information. Of course, a number of intellectual property organizations submitted comments opposing alterations to the Whois database or access to it in any way that would make it more difficult for intellectual property owners to identify potential cyberspace infringers.[51] Ultimately, ICANN decided to table the issue, removing it entirely from the committee's agenda until the board decides how to proceed. For now, this means that the Whois database will continue to be a powerful resource for intellectual property owners whose rights are imperiled in cyberspace.

10. Cases Deciding the Admissibility of Internet Evidence: How Can Trademark Owners Prove Cyberspace Infringement in Light of Recent Decisions Consistently Holding Internet Evidence to Be Inadmissible?

This year the TTAB and two New York District Courts considered whether Internet evidence is admissible.[52] In all three instances, the proffered evidence was found to be improperly authenticated. In *Novak v. Tucows, Inc.*, the Eastern District of New York held that print outs from the WayBack Machine were also hearsay.[53] As to authentication, the *Novak* court explained that the proponent of the evidence had failed to "proffer[] . . . testimony []or sworn statements attesting to the authenticity of the contested Web page exhibits by any employee of the companies hosting the sites from which plaintiff printed the pages. . . ."[54]

The consistency of these cases begs the question of the circumstances under which Internet evidence, particularly print outs from the Internet archive, would be admissible. Given these precedents, trademark owners are left unsure of how best to prove infringement of their marks in cyberspace once the putative infringer removes the mark from its Web site. While some older cases indicated that such objections could be overcome,[55] these recent decisions imply that overcoming an authenticity objection will be quite difficult, particularly with the passage of time. Therefore, trademark owners experiencing cyberspace infringement may need to move swiftly to litigate so as to be in a position to properly authenticate evidence of infringement.

Forecast for 2008: Sunny Skies or Stormy Weather?

While it might be too early to predict precisely what the winds have in store for 2008, it is possible to predict from whence the storms might come. Several key issues were left open at the close of 2007.

First, it remains to be seen whether the TDRA strikes the balance intended by the original Dilution Act. The status of the famous mark doctrine is also in doubt after the Second Circuit's decision in *ITC* created a direct conflict with the Ninth Circuit. A decision by the Supreme Court could resolve this conflict, but this case will not be the testing ground for any such resolution. The question of whether keywords and metatags are trademark uses also continues to divide the circuits with no foreseeable help from the Supreme Court forthcoming. Finally, the fate of the Whois database, and of the legislation that seeks to bring cohesion to intellectual property enforcement, continue to be issues to watch.

Notes

1. 15 U.S.C. § 1125(c)(1) (2006). This standard was enacted in response to the Supreme Court's holding that the FTDA required a showing of actual dilution rather than a mere likelihood. *See* H.R. Rep. No. 109-23, at 4-5, *as reprinted in* U.S.C.C.A.N. 1091, 1093; Moseley v. V Secret Catalogue, Inc., 537 U.S. 418, 432-433 (2003).
2. § 1125(c)(2)(A).
3. Nike, Inc. v. Nikepal Int'l, Inc., No. 2:05-cv-1468-GEB-JFM, 2007 WL 2688499, at *1 (E.D. Cal. Sept. 10, 2007).
4. *Id.*
5. *Id.* at *5-6.
6. Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC, No. 06-2267, 2007 U.S. App. LEXIS 26334 (4th Cir. Nov. 13, 2007).
7. *Id.* at *33.
8. *See Nike*, 2007 WL 2688499, at *8.
9. Perfumebay.com Inc. v. eBay Inc., Nos. 05-56794, 05-56902, 2007 WL 3243998, at *1 (9th Cir. Nov. 5, 2007).
10. *Id.* at *13.
11. *Id.* at *8. It should be noted that the dilution claim in this case was based on California law, but the court stated that the dilution analysis is the same as for a federal claim, cited only federal case law, analyzed the claim as if it were a federal dilution claim, and referenced the TDRA to support its holding. *Id.* at *12 n.8, 13 n.9. It is therefore reasonable to conclude that the court would treat claims brought under the TDRA similarly.
12. *Louis Vuitton Malletier,* 2007 U.S. App. LEXIS 26334, at *27.
13. *Id.* at *30.
14. *Id.* at *31-36.
15. *Id.* at *34.
16. SitePro-1, Inc. v. Better Metal, LLC, 506 F. Supp. 2d 123, 125 (E.D.N.Y. 2007).
17. *Id.* at 125-126 (citing Merck & Co., Inc. v. Mediplan Health Consulting, Inc., 425 F. Supp. 2d 402 (S.D.N.Y. 2006)).
18. *Id.* at 125 (citing, *e.g.*, Australian Gold Inc. v. Hatfield, 436 F.3d 1228 (10th Cir. 2006)).
19. *See, e.g.*, Buying for the Home, LLC. v. Humble Abode, LLC, 459 F. Supp. 2d 310, 322-323 (D.N.J. 2006).
20. *See, e.g.*, Eli Lilly & Co. v. Natural Answers, Inc., 86 F. Supp. 2d 834, 845-847 (S.D. Ind. 2000).
21. Asics Corp. v. Paragon Dev. Corp., Opp. No. 91160352, 2007 TTAB LEXIS 46, at *4 (Feb. 28, 2007).
22. Medinol Ltd. v. Nuero Vasx, Inc., 67 U.S.P.Q.2d (BNA) 1205 (T.T.A.B. 2003).
23. *See, e.g.*, Hachette Filipacchi Presse v. Elle Belle, LLC, Cancel. No. 92042991, 2007 TTAB LEXIS 53, at *10 (Apr. 9, 2007) (citing Torres v. Cantine Torresella S.r.l., 808 F.2d 46 (Fed. Cir. 1986)).
24. *See, e.g.*, Tri-Star Marketing, LLC v. Nino Franco Spumanti S.R.L., Cancel. No. 92043953, 2007 TTAB LEXIS 81, at *13 (Aug. 29, 2007) (finding *no* fraud); Sinclair Oil Corp. v. Sumatra Kendrick, Opp. No. 91152940, 2007 TTAB LEXIS 65, at *20 (June 6, 2007) (fraud found); *Hachette Filipacchi Presse*, 2007 TTAB LEXIS, at *10 (fraud found); *Asics*, 2007 TTAB LEXIS, at *6 (denying motion for summary judgment alleging fraud); Hurley Int'l LLC v. Volta, 82 U.S.P.Q.2d (BNA) 1339, 1346 (T.T.A.B. 2007) (fraud found).
25. Hurley International LLC v. Volta, 82 U.S.P.Q.2d (BNA) at 1342.
26. *Id.* at 1346.
27. Hachette Filipacchi Presse v. Elle Belle, *LLC,* 2007 TTAB LEXIS, at *6.
28. Sinclair Oil Corp. v. Sumatra Kendrick, 2007 TTAB LEXIS, at *17-18.
29. Asics Corp. v. Paragon Development Corp., 2007 TTAB LEXIS, at *5.
30. Tri-Star Marketing, LLC v. Nino Franco Spumanti S.R.L., 2007 TTAB LEXIS, at *11-12.
31. *See* Miscellaneous Changes to Trademark Trial and Appeal Board Rules, 72 Fed. Reg. 42,242, 42,242 (Aug. 1, 2007) (codified at 37 C.F.R. §§ 2.99-.176).
32. §§ 2.105(a) - .113(a).
33. § 2.120(a)(2).
34. § 2.120(e).
35. Au-Tomotive Gold, Inc. v. Volkswagen of America, Inc., 457 F.3d 1062, 1064 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 1839 (2007).
36. *Id.* (internal quotation marks omitted).
37. *Id.* at 1066 (internal quotation marks omitted).
38. *Id.* at 1072 (internal quotation marks omitted).
39. *Id.*
40. *Id.* at 1074.
41. S.B. 1984, 109th Cong. §1 (2005).
42. S.B. 522, 110th Cong. §1 (2007).
43. *Id.*
44. ITC Ltd. v. Punchgini, Inc., 482 F.3d 135, 142 (2d. Cir. 2007).
45. *See* L. Donald Prutzman, "Non-US Trademark Owners Should Consider Protecting Trademarks in the US Even If There Is No Current US Use," *Intell. Prop. & Tech. L. J.*, Nov. 2007, at 1, 2.
46. ITC Ltd. v. Punchgini, Inc., No. 06-1722, 2007 WL 2175922, at *1 (Oct. 1, 2007).
47. Diaz v. Servicios De Franquicia Pardo's S.A.C., 83 U.S.P.Q.2d (BNA) 1321 (T.T.A.B. 2007).
48. *Id.* at 1328.
49. Final Task Force Report on Whois Services, *http://gnso.icann.org/issues/whois-privacy/whois-services-final-tf-report-12mar07.htm* (last visited Nov. 16, 2007).
50. *Seegenerally* Whois Privacy Information, *http://gnso.icann.org/issues/whois-privacy* (last visited Nov. 16, 2007).

51. *See, e.g.*, Posting of American Intellectual Property Law Association to *http://forum.icann.org/lists/whois-comments-2007/msg00195.html* (Oct. 29, 2007, 15:57:05 EST); Posting of International Trademark Association to *http://gnso.icann.org/mailing-lists/archives/whois-tf2-report-comments/msg00003.html* (June 16, 2004, 09:04:37 AST).
52. Chamilia, LLC v. Pandora Jewelry, LLC., Case No. 04-CV-6017 (KMK), 2007 U.S. Dist. LEXIS 71246, at *1-2 (S.D.N.Y. Sept. 24, 2007); Paris Glove of Canada, Ltd. v. SBC/Sporto Corp., Cancel. No. 92044132, 2007 TTAB LEXIS 84, at *2-4 (Aug. 22, 2007); Novak v. Tucows, Inc., No. 06-CV-1909 (JFB) (ARL), 2007 U.S. Dist. LEXIS 21269, at *15-18 (E.D.N.Y. March 26, 2007).
53. Novak v. Tucows, Inc., 2007 U.S. Dist. LEXIS at *15.
54. *Id.* at *18.
55. *See, e.g.*, Telewizja Polska USA, Inc. v. Echostar Satellite Corp., Case No. 02 C 3293, 2004 U.S. Dist. LEXIS 20845, at *16-18 (N.D. Ill. October 14, 2004) (admitting Internet Archive evidence over both hearsay and authentication objections).

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