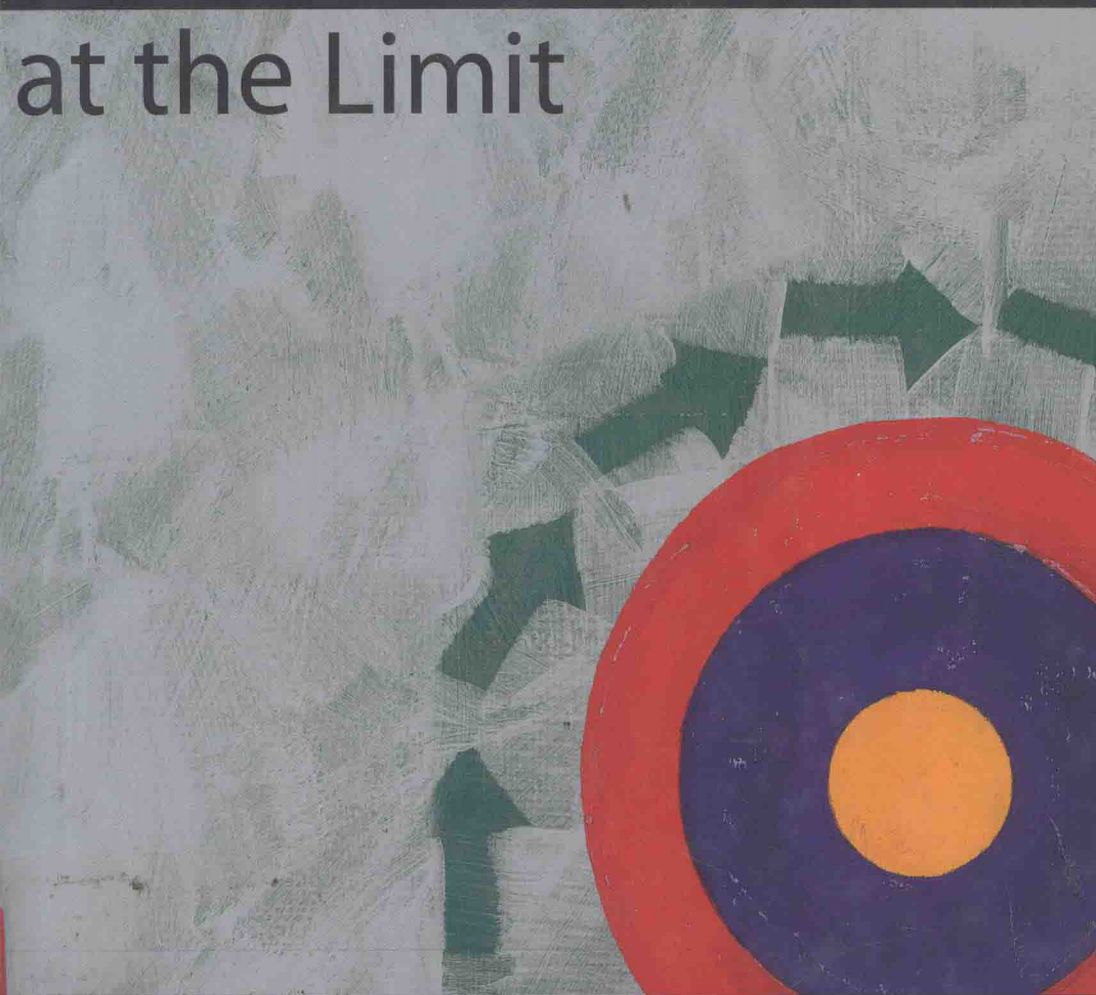




# Trade Marks at the Limit



Edited by  
**Jeremy Phillips**

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*Edited by*

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Cheltenham, UK • Northampton, MA, USA

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# Biographical notes

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## THE EDITOR

### **Jeremy Phillips**

After graduating from Cambridge University and taking a doctorate at the University of Kent, Jeremy held lecturing posts at Trinity College Dublin, the University of Durham and Queen Mary before he assumed the editorship of *Trademark World*, *Patent World*, *Copyright World* and later *Managing Intellectual Property*. A Professorial Fellow at the Queen Mary Intellectual Property Research Institute, he has been Intellectual Property Consultant to London solicitors Slaughter and May since 1994.

A writer and lecturer on many aspects of intellectual law, Jeremy currently edits the *Journal of Intellectual Property Law and Practice* (Oxford University Press), the *European Trade Mark Reports* and the *European Copyright and Design Reports* (Sweet & Maxwell). Since 2003 he has been joint blogmeister of the IPKat weblog, which provides up-to-date news and commentary on a wide range of legal and commercial developments in the intellectual property field. His books include *Trade Mark Law: a Practical Anatomy* (Oxford University Press, 2003).

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Anthony is an associate in the Los Angeles office of Quinn Emanuel Urquhart Oliver & Hedges, LLP. He earned his BA, BS and JD degrees from Monash University in Melbourne, Australia, and an LLM from the Columbia University School of Law in New York.

### **Frank Azzopardi**

Frank Azzopardi is an associate in Davis Polk & Wardwell's Corporate Department, specializing in intellectual property and in mergers and acquisitions. He joined Davis Polk in 2001, having previously been an associate in the Intellectual Property and Technology Department of Australian firm Allens Arthur Robinson. He has extensive transactional experience overseeing intellectual property issues arising from corporate transactions including mergers,

asset sales, reorganizations, spin-offs, licensing arrangements, joint ventures and other collaborations.

Frank advises private equity, media, information technology, bio-pharmaceutical and other clients on a variety of intellectual matters, including patents, trade secrets, trade marks, copyright, mask works, domain names, rights of privacy, rights of personality and related common law rights. He also has litigation experience involving intellectual property disputes in the area of design patents, trade marks, copyright, cyber-squatting, passing off and personality merchandising. Frank holds Bachelors degrees in Law and Commerce from the University of Melbourne, Australia. He is admitted to practice in New York as well as in the Supreme Court of Victoria, Australia, and is a Registered Australian Trade Mark Attorney.

### **Mark Bezant**

Mark Bezant is a Managing Director in the London office of LECG Corporation, a global expert services firm providing expert analysis, testimony, authoritative studies and strategic advisory services to clients. He specializes in intellectual property matters, business valuations and litigation support and his work covers the valuation of all forms of intangible assets.

Mark has acted in a number of high-profile IP matters and he is particularly interested in the interaction between the economics of intangible assets and the legal rights afforded to intellectual property, in both commercial and regulatory (accounting, tax, litigation, anti-trust) environments. He has presented and published extensively on IP and related valuation matters and is the author of *The Use of Intellectual Property as Security for Debt Finance*, published by the Intellectual Property Institute, London.

### **Thierry Calame**

Thierry is a partner in Lenz & Staehelin, Switzerland, specializing in intellectual property law. He represents clients in patent, trade mark and other IP-related litigation and arbitration, advising on a wide range of IP-related commercial matters and licensing. His significant contentious practice includes numerous patent, trade mark and copyright infringement actions in various Swiss courts and the Federal Supreme Court.

Thierry holds a degree in Chemistry from the Swiss Federal Institute of Technology and a Doctorate in Law from the University of St Gallen, Switzerland. A visiting scholar at the Max-Planck Institute in Munich, Germany in 1996, he held a similar position at the University of Santa Clara Law School in the USA in 1998. Thierry is currently Assistant to the Rapporteurs General of the International Association for the Protection of Intellectual Property (AIPPI) and a member of the Board of Directors of the Swiss group of AIPPI. He is a regular lecturer on intellectual property issues

and has written on a wide range of intellectual property topics, notably in patent and trade mark law.

### **Karin Cederlund**

Joining the firm in 1994, Karin has been a partner in Mannheimer Swartling Advokatbyrå in Stockholm since 2001, specializing in intellectual property and advertising law. A member of the firm's practice group for litigation and arbitration, she also has extensive experience of litigation and transactions involving all forms of intellectual property rights.

Karin has in-depth knowledge of a number of business sectors, focusing particularly on biotech and pharmaceutical companies, media and publishing companies and collecting societies. A member of the board of the Swedish Association for the Protection of Industrial Property Law, she was admitted to the Swedish Bar Association in 1998, holding an LLM from the University of Stockholm and an MBA from the Stockholm School of Economics. She is a guest lecturer at the Faculty of Law, University of Stockholm, and at the Riga Graduate School, the LLM program.

### **Lasse A. Søndergaard Christensen**

Lasse, a partner in the Danish law practice Gorrissen Federspiel Kierkegaard, is head of the firm's IP/Technology Group. He is also Associate Professor at the University of Aarhus, where he teaches intellectual property law and unfair marketing practices law.

Lasse received his law degree from the University of Aarhus in January 1991 and his LLM from the New York University School of Law in 1995. He has received further education at City University of Hong Kong. Admitted to the bar in 1994 and the High Court in 1996, Lasse joined Gorrissen Federspiel Kierkegaard in January 2002. Before that he worked for the Danish Ministry of Justice and as a partner in a law firm.

Lasse has authored numerous articles and book contributions on intellectual property-related matters in Danish and international publications and is the Danish correspondent to the *European Copyright and Design Reports*.

### **Lewis Clayton**

Lew is a partner in the Litigation Department and co-chair of the Intellectual Property Litigation Group at Paul, Weiss, Rifkind, Wharton & Garrison LLP. He has chaired the Committee on Intellectual Property of the Commercial and Federal Litigation Section of the New York State Bar Association and contributes regular columns on intellectual property litigation to the *New York Law Journal* and the *National Law Journal*.

Lew has counselled clients and handled major litigation, both for plaintiffs and defendants, in a broad range of patent, copyright, trade mark and unfair

competition matters across a wide spectrum of industries. He successfully enforced Revlon's patent on its ColorStay lipstick, and represents Gillette in its patent infringement litigation against Schick. He has won federal court injunctions for Castrol Inc. against the continued broadcast of competitors' nationwide advertising campaigns. Lew has also handled major trade mark litigation for such companies as Unilever and Revlon, successfully representing Unilever in a groundbreaking trade secret dispute with Procter & Gamble. In addition, he represented CBS in copyright litigation concerning CBS's reality television programme 'Survivor'.

### **Nicolas Dontas**

Nicolas heads the IP department of Dontas Law Offices, a Greek business law firm established in 1922 by the late Nicholas A. Dontas. He graduated in Law with First Class Honours from the Law School of the University of Athens and was awarded a Merit in his LLM from the London School of Economics and Political Science. He regularly advises clients on matters involving trade mark, design and copyright protection, licensing and information technology agreements and unfair competition law claims; his litigation experience covers all these areas, with particular emphasis on trade dress infringement and trade mark dilution cases.

Nicolas has been included in the Euromoney guide, *The World's Leading Trademark Law Practitioners*, and has written and lectured widely on intellectual property matters. An active member of the International Trademark Association, he has made presentations to its meetings on a variety of trade mark-related topics.

### **Dawn Franklin**

Dawn studied modern languages before joining Hertz to work for several years in UK sales, international sales and marketing. She later joined the service and finance division within Mars Confectionery before transferring to the parent company, Mars Incorporated, where she held roles in legal, personnel, risk management and site management. She subsequently became Marketing Property Manager, Europe, with responsibility for marketing properties in the pet-care and human foods businesses. Dawn left Mars after 21 exciting years to set up her own brand protection consultancy, Brandright, in 1996. She now works with a number of small, medium-sized and multinational companies in the development and management of their brand portfolios in fields as diverse as biotechnology, design, food and drink manufacture, chemicals, toiletries and publishing.

Dawn has served on the Board of Directors of the International Trademark Association, as a consultant to the World Intellectual Property Organization in Geneva and was a founder member of the British Brands Group. She is

currently Chairman of the trade mark committee of AIM (the European Brands Association) based in Brussels and remains passionate about the benefits of brands and the importance of best branding practice.

**Luca Giove**

A lawyer with leading Italian law firm Bonelli Erede Pappalardo since 2004, Luca was admitted to the Venice bar in 2002. He holds a law degree from the University of Padua (where he now teaches patent law) and an LLM from the School of Oriental and African Studies, University of London.

Luca's practice is centred on IP litigation in disputes involving patents in various fields (pharmaceuticals, chemicals, electronics, mechanical engineering), trade marks, copyright, advertising and unfair competition issues. He also handles transactional work on a wide variety of IP/IT non-contentious matters for Italian and international companies operating in the media, entertainment, publishing, pharmaceutical, chemical, software, medical devices, mechanical engineering, luxury and fashion and consumer products sectors.

**Charles H. Googe, Jr**

Charles, a partner in the Entertainment and Corporate Departments of Paul, Weiss, Rifkind, Wharton & Garrison LLP, leads the Intellectual Property Group which focuses on all aspects of intellectual property, including copyright, trade mark and patent, trade secret and internet law. His experience covers a broad range of industries, specialties and deal sizes.

Charles's special expertise encompasses all forms of transactional work involving intellectual property and technology such as IP audits, developing and implementing prosecution strategies, licensing and due diligence. He possesses specific experience in software, information technology and entertainment content development, acquisition and distribution over the internet and other media. Charles works closely with Paul, Weiss lawyers on structuring the intellectual property aspects of highly sophisticated transactions, as well as addressing the intellectual property needs of numerous medium-sized and start-up enterprises. In addition, he represents many notable individuals and companies involved in every aspect of the entertainment, new media and publishing industries.

**Janne Britt Hansen**

Janne is an associate in the Danish law practice Gorrisen Federspiel Kierkegaard. She is a member of the firm's IP/Technology Group and the head of its intellectual property right registration department. Janne focuses on the areas of trade marks, design and counterfeit. Her practice primarily includes trade mark prosecution, protection, licensing and enforcement, litigation including trade mark, design and copyright disputes as well as advertising and

marketing law. She also advises clients on international strategy and management of intellectual property portfolios.

Janne received her law degree from the University of Copenhagen in January 2000. She joined Gorrissen Federspiel Kierkegaard in October 2002 and was admitted to the Danish bar in January 2005. Between April 2000 to October 2002 she was head of section in the Danish Ministry of Justice and in the Danish Patent and Trade Mark Office.

### **Petra Hansson**

Petra joined Mannheimer Swartling in 2000 after serving as a junior judge in Swedish District and Appeal Courts. She advises clients within a number of business sectors, including IT, entertainment and media, focusing primarily on intellectual property law.

Petra holds two LLM degrees. The first is from the University of Lund; the second is in Intellectual Property from Queen Mary and Westfield College, University of London. She is a guest lecturer in copyright law at the Faculty of Law, University of Stockholm, and is one of two editors of the Mannheimer Swartling intellectual property newsletter.

### **Rainer Hilli**

Rainer is a partner in the law firm of Roschier Holmberg, based in Helsinki. He heads the firm's technology, media and communications group. He is experienced in both contentious and non-contentious intellectual property matters.

Rainer has litigated several landmark intellectual property cases before the national courts in Finland and has also appeared before the European Court of Justice (ECJ). He represented Gillette before the ECJ in a reference for a preliminary ruling which was discussed in his chapter. Rainer is also President of the Finnish AIPPI Group.

### **Philippe de Jong**

Philippe is an associate at the Altius law firm, based in Brussels, Belgium. Having previously studied at the universities of Antwerp and Lausanne, he obtained an LLM Masters degree in intellectual property law from the University College London (UCL) and is currently a member of the Brussels bar.

Philippe specializes mainly in patent and trade mark law and has developed substantial knowledge of the regulatory regime for pharmaceuticals. He has published a number of articles in various leading European legal journals with regard to specific topics in intellectual property litigation.

### **Wolfgang Kellenter**

Wolfgang is a partner in the German law firm of Hengeler Mueller, Düsseldorf, where he is co-head of the Intellectual Property Practice Group.

Wolfgang studied law at the universities of Erlangen and Bayreuth where he graduated and received a PhD in law. He subsequently obtained an LLM degree at the London School of Economics, where he specialized in intellectual property law. Wolfgang was admitted to the German bar in 1990 and as solicitor of England and Wales in 1992. He also currently lectures in Intellectual Property and Internet Law at the Heinrich Heine University in Düsseldorf. His main areas of practice are trade mark litigation, patent litigation and intellectual property licensing.

### **Susie Middlemiss**

Susie is a partner and head of the Intellectual Property and Information Technology practice of the law firm Slaughter and May. She has extensive experience of a wide range of intellectual property matters involving all forms of intellectual property rights. Susie's litigation practice covers the High Court, the Patents County Court and the European Patent Office; she also advises in multi-jurisdictional disputes, particularly concerning patents and trade marks. Her practice encompasses strategic advice on the protection and enforcement of portfolios of trade marks and other IP rights. Her non-contentious experience includes advising on licences, distribution agreements, franchises and the intellectual property aspects of a range of other transactions.

Susie holds degrees in genetics and biological sciences and in law, both from the University of Sydney. She has considerable experience in acting for clients in the pharmaceutical, biotechnology and healthcare fields on a range of transactions and contentious matters and is a member of the editorial board of the *Bioscience Law Review*. Susie is also Chair of the European Sub-Committee of the International Trademark Association's Amicus Committee, which files briefs in cases raising significant issues of trade mark law before European National courts and the European Court of Justice.

### **Montiano Monteagudo**

Montiano is a partner in the Barcelona office of Uría Menéndez. Since 1993 he has been a Professor of Commercial Law at the Universitat Pompeu Fabra (Barcelona). A regular speaker at other universities in Spain and abroad, he also participates in law seminars and conferences. He is the author of several books and articles regarding trade mark and unfair competition law.

Montiano's practice focuses on advising national and multinational companies on matters relating to intellectual property, unfair competition, competition law, contract law, information technology and corporate law. He also regularly advises multinational pharmaceutical companies and other innovative foreign and domestic businesses in sectors such as electronics and microelectronics, software, food, textile, homecare products and education. He represents clients before regulatory bodies and courts in proceedings for the protection of

patents, trade marks, industrial designs, copyright, know-how and other intellectual property rights. He counsels market leaders in the telecommunications, pharmaceutical, electronics, financial services and food and drinks sectors in both contentious and non-contentious matters regarding unfair competition and advertising, including passing-off, misleading practices, protection of trade secrets, misappropriation of trade marks and trade dress.

### **Jackie O'Brien**

Jackie is a partner in Allens Arthur Robinson in the Intellectual Property, Communications & Technology department, practising from its Sydney office. Jackie has practised IP for over 20 years, advising clients across a variety of industries including entertainment, eCommerce, clothing, pharmaceutical and luxury goods. She also advises on brand protection, registration and maintenance for some of the world's highest profile companies.

Jackie has developed anti-piracy programmes for numerous clients, using copyright and trade mark rights in combination with working with Australian Customs. She has also handled a number of domain name disputes and undertakes clearance work for advertising and promotional campaigns. Jackie advises extensively in relation to comparative advertising, specifically in sectors experiencing rapid growth and competition. Her considerable experience spans advising in relation to co-branded products and services and the legal issues surrounding product placement and promotion.

### **Núria Porxas**

Núria is a lawyer in the Barcelona office of Uría Menéndez. Joining the firm in 1997, she became a senior associate in January 2005. She has lectured on intellectual property law and advertising law on several Master's programmes. Her practice covers all areas of copyright and intellectual property law, focusing on trade marks, unfair competition and advertising. In particular, she deals with know-how and IP licensing, and in creating strategies for developing, managing and protecting IP portfolios.

Núria regularly advises national and multinational companies regarding intellectual property rights, unfair competition and advertising. Her experience includes passing off, protection of company secrets and the misappropriation of trade marks. Núria participates in proceedings before regulatory bodies, Spanish courts and alternative dispute resolution bodies, particularly self-regulatory advertising associations. She is a member of the editorial team of *Uzía Menéndez* in charge of comments and updates on intellectual property issues and unfair competition.

### **Bruce Proctor**

Bruce began his career as an intellectual property litigator in his native New

York with the law firm of Wyatt, Gerber, Shoup, Scobey and Badie. He then worked in industry, joining the Bristol-Myers Squibb Company where he handled IP matters. Subsequently Bruce joined Unilever United States where he managed Unilever's New York Trademark function and also handled general corporate matters, with an emphasis on acquisitions and diversitures. Bruce then joined The Coca-Cola Company as their Global Head of Trademarks, managing all of Coke's trade mark and related issues. In 2002 he moved to London, where he now works as Global Head of Intellectual Property for Diageo, managing a team located in both the US and the UK.

### **David W. Quinto**

David W. Quinto is a partner in the Los Angeles office of Quinn Emanuel Urquhart Oliver & Hedges, LLP. The author of *Law of Internet Disputes* (Aspen, 2003), he has long represented numerous clients in trade mark matters. He is principally responsible for protecting the rights of the Academy of Motion Picture and Sciences in the OSCAR statuette and ACADEMY AWARDS telecasts and has been called upon to protect Mattel's BARBIE doll and HOT WHEELS toys, the America's Cup marks, the EMMY and numerous other intellectual properties. In 2004 he was retained to represent the government of the Russian Federation in an effort to recover for Russia the rights to STOLICHNAYA and other vodka trade marks.

David earned his BA degree from Amherst College, in Massachusetts, and his JD from the Harvard Law School.

### **Christian Schumacher**

Christian is a junior partner at Schönherr Attorneys-at-Law, Vienna, Austria. Admitted to the Bar in 2003, he specializes in intellectual property law, unfair competition law and media law. Christian holds Master of Law and Doctorate degrees from the University of Vienna and a Master's degree from the New York University School of Law; he has also studied at the Université Paris II Panthéon-Assas.

Christian has authored a monograph on *Media Coverage and Protection of Personality Rights* (Manz, 2001) and contributed to the trade mark commentary entitled *marken.schutz* (Manz, to be published 2005). He regularly publishes articles and comments on recent court decisions in the Austrian law review entitled *ecolex* (Manz).

### **Grace Smith**

Grace was admitted as a solicitor in Ireland in 1985 and as an attorney in the State of New York in 1989. She is also a Community trade mark attorney and has completed the WIPO workshop for Mediation in Intellectual Property Disputes.

Joining McCann FitzGerald, one of Ireland's leading law firms, in 1989, Grace became a partner in the Dispute Resolution & Litigation Group in 1994. For the past decade she has specialized in intellectual property law and now heads the firm's Intellectual Property Group. Grace has acted in most of the significant IP cases in Ireland over the last few years including *Guinness v Kilkenny*; *Monsanto v Merck*; *B&S v Autotrader*; *EMI v Gormley* and *Merial v Virbac*. Her practice includes contentious and non-contentious aspects of intellectual property including protection of knowhow, goodwill, trade marks, patents, copyright and designs. Her extensive experience includes advising on the legal issues arising from advertising and on the regulatory framework applicable to pharmaceutical products.

### **Grégoire Triet**

Grégoire is a partner in Gide Loyrette Nouel's Intellectual Property, Technology & Electronic Communications Department. A specialist in patent and trade mark law, he has wide-ranging experience in patent infringement and validity disputes and in working on behalf of national and international clients. He also deals with copyright and unfair competition cases.

Having joined Gide Loyrette Nouel in 1983, Grégoire has been a partner since 1990. He is the author of a study commissioned by the Ministry of the Economy, Finance and Industry (2000), 'Comparative survey on the cost of litigation connected with industrial property in France, Germany, England, the United States, Spain and the Netherlands'. The President of AAPI (the French Association of Intellectual Property Lawyers), Grégoire is a member of the editorial boards of both the *European Trade Mark Reports* and the *European Copyright and Design Reports*.

### **Steven Warner**

Steven joined Slaughter and May in 2000 and has been an associate solicitor in that firm's Intellectual Property Department since 2002. His practice covers both contentious and non-contentious matters relating to all aspects of intellectual property, including patents, trade marks, passing off, copyright and the protection of trade secrets and other confidential information.

Before moving into law, Steven obtained a Bachelor of Arts degree (Philosophy, Politics and Economics) and a DPhil degree (Political Theory) from the University of Oxford.

### **Steven Weiner**

Steven, a partner in Davis Polk & Wardwell, spearheads the firm's corporate intellectual property practice. He advises clients on business-critical IP matters including assessment and resolution of IP threats, patent analysis and strategy, copyright fair use analysis, negotiation of IP licences, participation in tech-

nology standards and the complex IP aspects of mergers and acquisitions, divestitures, and other corporate transactions. His clients include technology and media industry leaders such as Yahoo! and Comcast, investment and financial services firms and new ventures and non-profits at the cutting edge of research and development.

Before joining Davis Polk in 2002, Steven served as Vice President for Intellectual Property and Strategic Planning at SRI International, as Senior Intellectual Property Counsel at SGI and as an intellectual property litigation associate at Irell & Manella. He graduated, *summa cum laude*, from the University of Pennsylvania in 1985, receiving a Master's degree in electrical engineering and computer science from MIT in 1987 and a J.D., *cum laude*, from Harvard Law School in 1990. He is a registered US patent attorney and is admitted to the bar of California.

## Preface

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To the best of my knowledge this is the first book on the subject of permitted but unauthorized uses of the trade marks of others. Working without an obvious model to which reference may be made or from which inspiration may be drawn, we have had to draw on our own ideas – an exciting and stimulating experience.

The launch of this volume at the May 2006 International Trademark Association Meeting is to the credit of its many authors, whose unstinting efforts, trade mark expertise, enthusiasm and ability to work under pressure have turned the project from dream to reality.

Particular credit is due to my friend and colleague, Susie Middlemiss, who heads the Intellectual Property Group at Slaughter and May. Susie's participation in this book at every level cannot be understated. Her expert professional knowledge, tact and humour have each been invaluable assets and I have shamelessly made demands upon all three of these assets when necessary.

Luke Adams also deserves a special mention, together with his team at Edward Elgar Publishing. Luke cannot have faced a team of contributors that was more determined to get a title out on time: the sprint to print has been fraught with difficulties but Luke has seen it through with admirable cool.

Jeremy Phillips  
Temple Fortune, April 2006

# Introduction: Permitted but unauthorised use

**Jeremy Phillips**

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## WHAT IS MEANT BY ‘PERMITTED BUT UNAUTHORISED USE’?

Trade mark law confers upon the proprietor of a registered trade mark a very wide power over other traders who use his trade mark. Put simply, if that use is without the proprietor’s permission, the proprietor has the power to prohibit it by bringing a legal action against the user for infringement. If however that use is with the proprietor’s permission, he may make that use conditional upon such terms as he seeks to impose.

The reality is less simple. This is because there is a category of use that the trade mark owner is powerless to prevent: use which, while lacking the proprietor’s authorisation, is nonetheless permitted by the law. More accurately, there are several different categories of use that the law tolerates, whatever the feelings of the trade mark owner. Some of these uses are based on commercial imperatives, such as a retailer’s need to be able to inform consumers about the goods he sells; others are based on political imperatives, such as the exercise of the human right of freedom of speech; others again are based on considerations of honesty or fairness, such as where a trader seeks to trade under his own name even though that name is the same as, or similar to, an earlier registered trade mark.

## STRIKING A BALANCE

In each of the instances in which the law permits the use of a trade mark even where that mark’s owner does not authorise it, it is plain that the law has sought to establish a balance between the interests of the trade mark owner and those of others. In some cases the balance is sought between the trade mark owner and a direct competitor; in other cases it may be sought between him and those whose business interests lie downstream of his own (such as distributors and retailers), the consumer of his goods or even the public at large.

Wherever a balance is sought, it is necessary to identify the point at which the competing or conflicting interests are in equilibrium. Too much protection for the trade mark owner may mean that others cannot refer to the mark when critically comparing products sold under it with those of other products; too little protection may mean erosion of the trade mark's ability to provide consumers with a confident guarantee that its use indicates the identity of the origin of goods or services for which it is used.

The technique provided by legislators the world over is the same. Since it is impossible to predict the precise circumstances in which the valuable role of a trade mark is threatened, and it is equally impossible to anticipate the circumstances in which its enforcement may be oppressive, general principles are enacted into law. It is then left to the courts or other tribunals to interpret those general principles in the light of specific sets of facts in which the interests of trade mark proprietor and unauthorised user collide.

## THE TENSIONS OF TRADE MARK LAW

It is now no longer doubted that the right conferred by trade mark registration is a property right. This is something that is explicitly stated in the trade mark legislation of most countries and which has been backed by a ruling of the European Court of Human Rights in 11 October 2005 in Case 73049/01 *Anheuser-Busch Inc. v Portugal*.

Many property rights are vulnerable to exceptions or limitations in favour of third parties, even where the property right owner withholds his authorisation. Thus, in respect of real property such as land, the right to exclude others may be exercised against casual acquaintances or passers-by, but will not enable the rights owner to bar access to, for example, the police authorities or the emergency fire services. Other third party users may include members of the public who have a right of way. The enforcement of intellectual property rights is likewise diminished by the ability of third parties to 'invade' the rights owner's intellectual estate and to do so against his will. Patent, trade mark and copyright law make ample provision for such use.

The analogy between real property and intellectual property is however an imperfect one. This is because the unauthorised but permitted use of land or other real property is unlikely to destroy its value completely while, in the case of a trade mark, permitted third party use can result in the goodwill in the mark being wiped out (as where one branded product is compared highly unfavourably with another). Nor does the analogy with land convey the risk that a trade mark will cease to be able to inform consumers of the origin of goods or services marketed under it (as happens where the honest use of a confusingly similar mark cannot be restrained). The vulnerability of trade