

Multi-Jurisdictional Enforcement Strategies

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I. Introduction¹

For a multi-national company, a trademark injunction in one country may necessitate a change in marketing and manufacturing strategies worldwide. Lawyers strategically file actions in various jurisdictions to curtail their opponents' abilities to use trademarks across markets. In these circumstances, two multi-nationals may find themselves in a standoff where neither can emerge as a clear winner. Since both have rights in different jurisdictions, neither can use a mark without settling with the other. This problem is exacerbated by the Internet, which makes commercial entry into other countries relatively easy. Thus, companies likely will engage in more international disputes, simply because there are more international companies in an electronic age.

This paper provides an example of strategic uses of multi-jurisdictional litigation in the Internet age. It next covers whether a U.S. company can stay at home and obtain extraterritorial relief from foreign infringement, or conversely, relief in the U.S. from a foreign judgment. Finally, it explores some proactive measures companies can take to avoid, or win, multi-jurisdictional disputes.

1. The authors wish to thank Chad Doellinger of Pattishall, McAuliffe, Newbury, Hilliard and Geraldson for his creative thoughts and writing incorporated into this paper.

II. The Framework: Territorial Trademark Rights in a Global Economy

Trademark law is based on the principle of territoriality. As Professor McCarthy explains, “a trademark is recognized as having a separate existence in each sovereign territory in which it is registered or legally recognized as a mark.”² Thus, it is possible for two companies to have the same trademark rights in remote geographical regions. For example, rights in the SCRABBLE trademark are split by territory. Hasbro owns the rights in the United States and Canada, while Mattel owns the rights in rest of the world.³

Particularly with the advent of the Internet as a commercial tool, the tension between trademark law and market realities is obvious. What happens when a United States company and a foreign company, both with trademark rights in their respective countries, move online? When can, or should, a United States court issue an injunction that affects rights outside of the United States? When may a U.S. court grant relief from a foreign judgment? These problems were summarized by one court several years ago: “The challenge for the courts is to recognize that the Internet has erased [the geographic] boundaries while still respecting both trademark rights and the *limits* of those rights.”⁴

III. Lindows v. Windows - A Practical Example of Multi-Jurisdictional Strategy

Microsoft’s juggernaut strategy in *Microsoft Corp. v. Lindows.com, Inc.*, C01-2115C, W.D. Wash. is instructive of international trademark litigation and registration after the arrival of the Internet as a business tool.

In 2001, Michael Robertson began to advertise that his company “Lindows.com” would offer an operating system for PCs called LindowsOS. LindowsOS was designed to run with both Windows and Linux code. On December 20, 2001, Microsoft filed suit and moved for preliminary injunction in the Western District of Washington, alleging that Lindows.com’s use of LINDOWS in connection with an operating system infringed Microsoft’s WINDOWS trademark. Lindows.com counterclaimed for cancellation of Microsoft’s WINDOWS trademark on the grounds that it was generic.

On March 15, 2002, the Court denied Microsoft’s motion for preliminary injunction, issuing a damaging opinion in which it stated that Lindows.com had submitted enough evidence that the WINDOWS mark was generic that Microsoft could not show probable success on the merits.⁵

2. 4 *McCarthy on Trademarks*, § 29.1

3. See *scrabble.com*.

4. *Simon Property Group v. mySimon, Inc.*, 104 F. Supp. 2d 1033, 1037 (S.D. Ind. 2000) (emphasis in original).

5. The Court stated: “Although Lindows.com certainly made a conscious decision to play with fire by choosing a product and company name that differs by one letter from the world’s leading computer software program, one could just as easily conclude that in 1983 Microsoft made an equally risky decision to name its product after a term commonly used in the trade to indicate the windowing capability of a [graphical user interface].” *Microsoft Corp. v. Lindows.com, Inc.*, 2002 U.S. Dist LEXIS 24616, *52, 64 U.S.P.Q.2d 1397 (W.D. Wash.).

The case continued in motion practice until January, 2004 when Microsoft filed a motion asking the court to make a determination on a controlling issue of law and then certify the question to the Ninth Circuit. Lindows.com objected to this as a tactic to delay the trial date.

At about the same time, Microsoft launched a campaign against Lindows.com's use of LINDOWS overseas, filing at least seven foreign trademark actions.⁶ Not surprisingly, Microsoft had registrations throughout the world for WINDOWS and therefore had its arsenal prepared ahead of the time it needed to use it.

In November, 2003, Microsoft filed a request for an *ex parte* temporary injunction against Lindows.com's use of the Lindows mark.⁷ The Finnish court enjoined sales of Lindows.com's products, although not of its right to advertise on its web site *lindows.com*.⁸ Without serving the injunction on Lindows.com,⁹ Microsoft filed, days after the grant of the Finnish injunction, a request for an *ex parte* temporary injunction in Sweden.¹⁰ The Swedes, following the lead of the Finns, enjoined Lindows.com's product sales.¹¹

The day after the Swedish injunction was entered, Microsoft sued in the Benelux countries. There, Microsoft obtained an order not only prohibiting sales, but also prohibiting Lindows.com from making its Internet web site available to Benelux citizens.¹²

Lindows.com promptly launched a new web site at *www.lin---s.com*, which it pronounced "*lindash.com*."¹³ Visitors to the web site were greeted with the following graphic:

6. Microsoft filed actions in Finland, France, Sweden, the Netherlands, Canada, Mexico and Spain and threatened action in South Africa. *Microsoft Corp. v. Lindows.com, Inc.*, 319 F. Supp. 2d 1219 (W.D. Wash. 2004).

7. Complaint to the District Court of Helsinki, November 28, 2003, attached as Exh. 3 to the Declaration of Daniel R. Harris in Support of Motion for Anti-Suit Injunction and Declaration of Non-Enforceability of Foreign Orders, March 15, 2004 (hereafter "Harris Decl.").

8. Helsinki District Court Order NR33757, December 1, 2003; Harris Decl. Exh. 4.

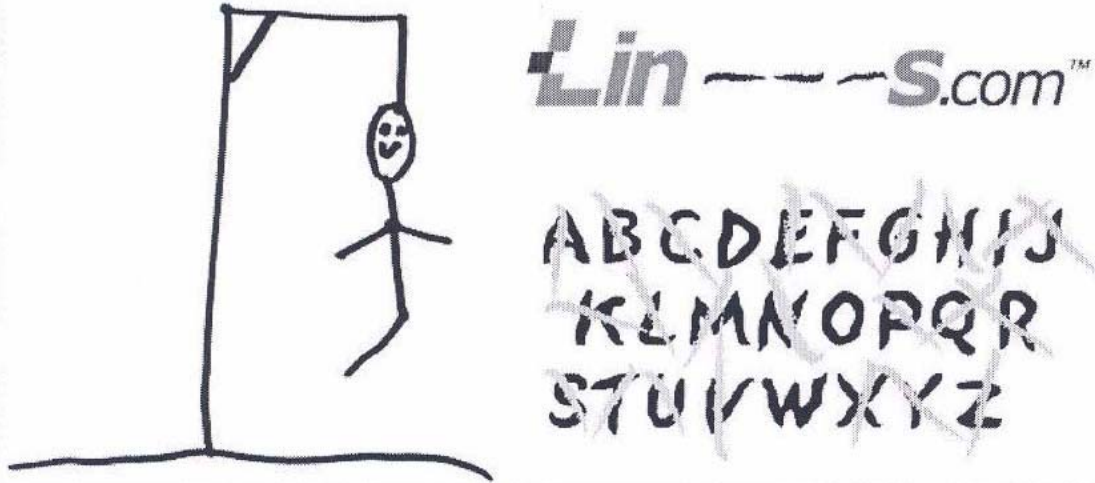
9. Perhaps Microsoft declined to exercise the injunction because, as Lindows.com claimed, Lindows.com had only 45 sales in Finland. *Transcript of Proceedings*, March 24, 2004 at 6.

10. Complaint to the Stockholm District Court; Harris Decl. Exh. 6.

11. Stockholm City Court Minutes, December 10, 2003; Harris Decl. Exh. 7.

12. District Court Amsterdam Court of Appeal in Summary Proceedings Judgement, January 20, 2004; Harris Decl. Exh. 9.

13. Declaration of Russell C. Pangborn in Support of Microsoft's Opposition to Lindows.com's Motion for Anti-Suit Injunction, ¶23 (hereafter "Pangborn Decl.").



Thus provoked, Microsoft filed another action in the Benelux court, seeking to enjoin use of Lin---s.com and to increase the fairly nominal fine imposed by the Benelux court to 100,000 Euros per day.¹⁴

To this, Lindows.com responded with a motion before the Washington federal court seeking an “anti-suit injunction and declaration of non-enforceability of foreign interim order,” and arguing that Microsoft’s real aim in the foreign suits was to cause Lindows.com to take down its web site.¹⁵ Lindows.com claimed that it could not make its site inaccessible only to persons in certain jurisdictions and therefore had no choice but to change its name in order to comply. Lindows.com asserted that the foreign suits constituted an end-run around the Washington court’s likely ruling that Windows was generic. As Lindows.com’s lawyer stated during oral argument:

And I think that’s, frankly, what Microsoft is hoping, that they had a chance of losing before a jury in the United States and that this [foreign lawsuit campaign] is a way in which they can have their cake without ever having the evidence [of genericness] exposed to the public....¹⁶

Lindows.com further claimed that enforcement of the foreign judgment would violate Lindows.com’s First Amendment rights since Lindows.com could only comply with the injunction by shutting down completely its web site, which contained “both expressive and informative speech and some protected commercial speech.”¹⁷

Microsoft responded that “the concept of territoriality is basic to trademark law; trademark rights exist in each country *solely* according to that country’s statutory scheme.”¹⁸ Therefore, Microsoft claimed, it had every right to protect its marks in other jurisdictions, and a holding in one country should have no effect on the holding in another.

14. Pangborn Decl. ¶26.

15. Lindows.com’s Motion and Memorandum for Anti-Suit Injunction and Declaration of Non-Enforceability of Foreign Interim Order (hereafter “Lindows.com Anti-Suit Motion”) at 4.

16. *Transcript of Proceedings*, March 24, 2004 at 14.

17. *Microsoft Corp. v. Lindows.com, Inc.*, 319 F. Supp. 1219, 1223 (W.D. Wash. 2002).

The Court ultimately found for Microsoft on the anti-suit motion, based largely on Microsoft's territoriality argument. As the Court stated, anti-suit injunctions are only available if the parties are the same, the issues are the same, and the resolution of the U.S. action will be dispositive of the action to be enjoined.¹⁹ The Court then held that the issues in foreign trademark suits cannot be considered "the same" as U.S. trademark issues, since trademark rights arise separately in separate territories.²⁰

The Court avoided the First Amendment issue by finding that the Benelux court had not decided whether something less than shutting down the web site would comply with its injunction. However, the Court stated: "Should the [Benelux] court decide that compliance with its preliminary injunction can only be accomplished by the extraordinary act of shutting down the Lindows.com website, comity may no longer stay [this] Court's hand."²¹

In or about April, 2004, Lindows.com began the process to introduce a new product name "Linspire" for its operating system.²² Lindows.com claimed "Microsoft's ever-expanding foreign litigation campaign left Lindows.com with no option but to change its international product name pending completion of the litigation in this Court."²³ Lindows.com hung on to its chance to invalidate Microsoft's WINDOWS trademark by keeping its Lindows.com corporate name. Grounds for the infringement suit, and the counterclaim, therefore remained.

On or about July of this year, Microsoft and Lindows.com settled their dispute. Reports are that Microsoft paid Lindows.com \$20 million.²⁴ Ironically, at approximately the same time as the settlement Lindows withdrew an IPO which was expected to raise \$22 million.²⁵

Microsoft's international strategy appears to have been successful in seizing less stinging defeat from the jaws of defeat. The international litigation forced Lindows.com to cease using LINDOWS, whereas, had Lindows.com prevailed in U.S. District court, Lindows.com would have both been able to retain the LINDOWS name and to cancel the WINDOWS trademark.

IV. Foreign Remedies from the Comfort of Your Home: Extraterritorial Reach of U.S. Trademark Law

The Lindows/Windows Court was considerate of foreign rights in its holding on the anti-suit injunction. In *Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc.*, 939 F.Supp. 1032 (S.D.N.Y. 1996), the Court was less solicitous of foreign rights, imposing

18. Microsoft Corporation's Memorandum in Opposition to Lindows.com's Motion for Anti-Suit Injunction and Declaration of non-Enforceability of Foreign Interim Order, March 19, 2004, at 1 (citing *Person's Co., Ltd. v. Christman*, 900 F.2d 1565, 1568-69 (Fed. Cir. 1990)(emphasis in original).

19. *Microsoft Corp. v. Lindows.com, Inc.*, 319 F.Supp. 2d 1219, 1222 (W.D. Wash. 2004) citing *Sun World, Inc. v. Lizarazu Olivarría*, 804 F.Supp. 1264, 1267 (E.D. Cal. 1992).

20. *Microsoft Corp. v. Lindows.com, Inc.*, 319 F.Supp. 2d 1219, 1222 (W.D. Wash. 2004).

21. *Microsoft v. Lindows.com, Inc.*, 319 F. Supp. 1219, 1223 (W.D. Wash. 2002).

22. Lindows OS becomes Linspire, PC World, April 14, 2004.

23. Lindows.com's Motion to Set a Trial Date, at 2, April 15, 2004.

24. Client Server News, August 23, 2004 *Market Spits Out Lindows IPO*.

25. *Id.*

U.S. law on an Italian company. Chuckleberry Publishing (“Chuckleberry”) had published a men’s magazine in Italy under the name PLAYMEN since 1967. In 1979, Chuckleberry announced its plans to publish a version of the magazine for the United States. Playboy Enterprises objected to the use of PLAYMEN, and in 1981, a United States court permanently enjoined Chuckleberry from using the word PLAYMEN within the United States. Playboy also sought and received similar injunctions in other countries including England, France and West Germany. Playboy tried, but failed, to obtain such relief in Italy. Thus, Chuckleberry’s use of PLAYMEN was permissible in Italy.

Fifteen years after the injunction issued, Chuckleberry created an Internet web site located at www.playmen.it.²⁶ This Italian web site contained images of the covers of the Italian magazine and other explicit images. At the site, users had two options: PLAYMEN Lite and PLAYMEN Pro. The PLAYMEN Lite version allowed viewers to see images without paying or needing a password. Thus, anyone who visited PLAYMEN Lite (from any country) could view these images. PLAYMEN Pro required a paid subscription. To obtain this service, a web user was required to fill out a form and then received a unique password from Chuckleberry. The district court found that both versions of the Italian web site were in violation of its injunction and Playboy’s United States’ trademark rights. The court ordered that “[Defendant] must either shut down PLAYMEN Lite completely or prohibit United States users from accessing the site.”²⁷ If Chuckleberry attempted to screen United States’ users in its PLAYMEN Lite version by requiring password access (analogous to the PLAYMEN Pro version), the court required near perfect accuracy: “If technology cannot identify the country of origin of e-mail addresses, these passwords and user Ids should be sent by mail. Only in this way can the Court be assured that United States users are not accidentally permitted access to PLAYMEN Lite.”²⁸ Thus, the court’s order effectively required Chuckleberry to shut down its web site and prevent anyone, anywhere in the world, from viewing it, in spite of Chuckleberry’s rights in Italy. Thus, the *Chuckleberry* Court ignored the territoriality aspect of trademark law and instead granted the American company a world-wide right in the mark used on-line.

The *Chuckleberry* Court did, however, caution that territoriality must not be ignored: “[Defendant] cannot be prohibited from operating its Internet site merely because the site is accessible from within one country in which its product is banned. To hold otherwise ‘would be tantamount to a declaration that this Court, and every other court throughout the world, may assert jurisdiction over all information providers on the global World Wide Web.’”²⁹ The court continued by stating that “[s]uch a holding would have a devastating impact on those who use this global service.”³⁰ Yet this is precisely what the court did. As *Lindows.com* argued, prohibiting a web site access in certain countries is the same as prohibiting the web site around the world.

The *Chuckleberry* court’s power to grant extraterritorial relief was established in 1952, in *Steele v. Bulova Watch Company*.³¹ In *Bulova*, a United States court enjoined the defendant from engaging in infringing acts in Mexico. Courts have interpreted this holding as requiring three elements for an extra-territorial injunction to be proper: “(1) the

26. The “.it” top-level domain name indicates that it is an Italian web site.

27. *Chuckleberry*, 939 F. Supp. at 1044.

28. *Chuckleberry*, 939 F. Supp. at 1045 n. 4.

29. *Chuckleberry*, 939 F. Supp. at 1040.

30. *Chuckleberry*, 939 F. Supp. at 1039-40.

31. 344 U.S. 280 (1952).

defendant's conduct must have a substantial effect on United States commerce; (2) the defendant must be a United States citizen; and (3) there can be no valid trademark registration in the foreign country and no conflict with trademark rights conferred by that foreign country."³² Courts have been careful in exercising this broad power. As one court explained, "[w]here...both parties have legitimate interests, consideration of those interests must receive especially sensitive accommodation in the international context."³³ For example, in *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633 (2d Cir. 1956), an American clothing manufacturer attempted to enjoin a Canadian retailer selling similar goods in Canada. The court dismissed the claim "because it was a Canadian corporation using a mark to which it held presumably valid trademark rights in Canada."³⁴

For better or worse, as evidenced by the *Chuckleberry* holding, courts may now be willing to more freely grant extraterritorial injunctions to handle Internet-related disputes.

V. More Home Remedies: Using ACPA In Rem Jurisdiction to Adjudicate the Rights of Foreign Owners

U.S. extraterritorial relief may be available through the in rem jurisdiction provision of the Anti-Cybersquatting Consumer Protection Act ("ACPA").³⁵ The ACPA provides for a cause of action against the domain name itself if its owner cannot be found or if personal jurisdiction cannot be obtained.³⁶ Under the in rem provision, a suit may be brought against the domain name "in the judicial district in which the domain name registrar, domain name registry, or other domain name authority that registered or assigned the domain name is located."³⁷ Given that the registry for all ".com" domain names, (as well as ".net", ".gov", ".edu", and certain other domain names) is located in the United States within the Eastern District of Virginia, that court can assert jurisdiction and resolve disputes involving any ".com" domain name, regardless of the location of the registrar or the parties involved.³⁸ This provision, while enacted to deal with cybersquatters who could not be found, also requires foreign entities, potentially with legitimate rights outside of the United States, to be subject to United States trademark law.

For example, in *Cable News Network, LP, LLLP, v. cnnews.com*, 56 Fed. Appx. 599, 66 U.S.P.Q.2d 1057 (4th Cir. 2003) (unpublished), a United States Court exercised jurisdiction and ordered the transfer of a domain name registered by a Chinese news entity with a Chinese registrar. The affiliated web site was primarily in Chinese. In affirming the district court's decision to transfer the domain name, the Fourth Circuit declared that the *Bulova* analysis,³⁹ did not apply. Because the "res was located within the United States, the Act's application was domestic, not extraterritorial."⁴⁰ Thus, United States courts can use the in rem provision to significantly affect foreign commerce without engaging in the traditional balancing test.

32. 4 *McCarthy on Trademarks*, § 29:58.

33. *Sterling Drug, Inc. v. Bayer AG*, 14 F.3d 733, 747 (2d Cir. 1994).

34. *Id.*

35. See 15 U.S.C. § 1125(d).

36. See 15 U.S.C. § 1125(d)(2).

37. *Id.*

38. Verisign, Inc., located in Herndon, Virginia, is the exclusive registry for all ".com" domain names, as well as for all ".net," ".org," and ".edu" domain names.

39. *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952), see *supra*.

40. 2003 WL 152846, at * 2.

In addition to the extra-territorial reach of the ACPA, the in rem provision has also been used to adjudge legitimate territorial rights of two non-United States companies. For example, a United States Court, applying United States law, resolved a dispute between a UK company and a Buenos Aires company merely because of the involvement of “.com” domain names.⁴¹ Therefore, merely by registering a “.com” domain name, companies with legitimate foreign rights and no United States presence may be judged according to United States trademark laws.

Thus, the ACPA in rem jurisdiction provisions currently provide an advantage to U.S. companies. However, new registries with similar rules may be created in other countries in order to level the playing field.

VI. U.S. Relief from Foreign Judgments

Courts are willing to grant extraterritorial relief, but they are typically unwilling to bar similar relief against U.S. companies pursuant to foreign judgments. U.S. courts continue to respect comity when dealing with cross-border Internet-related disputes. *Yahoo! Inc. v. La Ligue Contre le Racisme et L'antisemitisme* (“LICRA”),⁴² while not a trademark case, is illustrative.

Yahoo v. LICRA pitted the United States’ strong principles of free expression embodied in the First Amendment and France’s strong prohibitions against hate speech. Yahoo!, Inc. (“Yahoo”) is an Internet service provider that operates various Internet web sites and services, which can be found at yahoo.com. Certain services provided by Yahoo enable end-users to post materials on Yahoo’s servers that can be accessed by other end-users. Some end-users have posted Nazi-related propaganda and memorabilia, which can be accessed via Yahoo’s “.com” web site. Given the global nature of the Internet, this material can be viewed from anywhere in the world, including France. The display and sale of such material is illegal in France, and thus Yahoo was sued in French court because of the content of its “.com” Internet site.⁴³ The French Court found Yahoo in violation of French law and thus required Yahoo to block access these web sites to all end-users located in France.⁴⁴ Yahoo was required to fully comply with the order within three months or face a penalty of 100,000 Francs for each day of non-compliance thereafter.⁴⁵

Following the judgment, Yahoo filed suit in the United States stating the now familiar problem that complying with the French order would require it to exclude altogether Nazi materials from its auction site, and all discussions from its chat rooms, since it is impossible to limit Internet access by jurisdiction. This, Yahoo! said, violated its free speech rights under the First Amendment.⁴⁶

41. See *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214 (4th Cir. 2002).

42. 2004 U.S. App. LEXIS 17869 (Aug. 23, 2004).

43. It should be noted that Yahoo’s regional French site, located at yahoo.fr does not permit such postings.

44. See *UEJF and LICRA v. Yahoo!, Inc., and Yahoo France* (Tribunal de Grande Instance de Paris, November 20, 2000).

45. See *Id.*

46. See *Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'antisemitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001). It should be noted that the court’s assertion of personal jurisdiction was questionable. See *Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'antisemitisme*, 145 F. Supp. 2d 1168 (N.D. Cal. 2001)

The District Court found the French order unenforceable, and highlighted the tensions caused by the global nature of the Internet: “What makes this case uniquely challenging is that the Internet in effect allows one to speak in more than one place at the same time. Although France has the sovereign right to regulate what speech is permissible in France, this Court may not enforce a foreign order that violates the protections of the United States Constitution by chilling protected speech that occurs simultaneous within our borders.”⁴⁷

The 9th Circuit, in August, 2004, reversed, deferring weighing the respective values of the United States and France. The Court held that it lacked personal jurisdiction over the French defendants who originally brought the French suit because they had only sent cease and desist letters to Yahoo! in California and used U.S. Marshals in California to serve the injunction. This, the Ninth Circuit said, did not establish that the defendants purposefully availed themselves of jurisdiction in the California courts. “Jurisdiction may be obtained, and the First Amendment claim heard, once [the French defendants] ask a U.S. court to enforce the French judgment.” The dissent noted that the 9th Circuit decision leaves Yahoo! in the somewhat untenable position of incurring fines until the French LICRA seeks such enforcement. According to news reports, Yahoo! is now seeking reconsideration *en banc*.⁴⁸

VII. Protecting Your Interests

A. File Applications Early and Often

While no legal strategy will prevent cross border disputes, companies can act to protect their trademarks from foreign attack by proactively adopting a global trademark clearance and registration strategy for critical marks. Companies should apply in foreign jurisdictions in order to cement trademark rights against later comers. Some countries, notably those in South America, have no use requirements, making defensive filing reasonable. Other countries permit registration without proof of use but will cancel if the registration is attacked and the owner cannot prove use of its mark three to five years after either application or registration.

B. Enforcement - Ward Off Future Disputes

Companies should regularly obtain World Identical Screening Searches, available from Thomson & Thomson, for their most important marks to see where trouble may come up. They should be running worldwide watches on their most important marks, so they can deal with problems as they arise. Many times, companies have ignored small players in far-flung markets. The danger is twofold. First, given the realities of global sourcing and counterfeiting, annual sales by market are not the only criteria by which to evaluate which countries are strategically important from a trademark perspective. Second, the once small player may globalize quickly, and become very invested in a name either by registering the mark in additional jurisdictions, by acquiring common law rights in additional countries, or both. Since he will have resources and incentive to fight hard, chances are good that any dispute will result in a negotiated settlement allowing two players in the marketplace and weakening both parties' trademark rights. A deliberate strategy to keep marks strong will ward off future problems.

47. *Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'antisemitisme*, 169 F. Supp. 2d 1181, 1192 (N.D. Cal. 2001) (citation omitted).

48. National Journal Technology Daily, *Courts*, September 8, 2004.

VIII. Conclusion

Multi-jurisdictional disputes regarding trademarks will increase as commercial use of the Internet grows. Companies with well-prepared foreign trademark filing strategies and vigilance against new infringers will fare best in dealing with such disputes. U.S. companies with infringement problems may want to explore the availability of extraterritorial relief here. U.S. courts may evince more willingness to grant such relief now that the Internet is in common use, although it is too early to tell. The ACPA in rem provisions may provide another avenue for relief from U.S. courts for foreign infringement. However, U.S. companies against whom foreign courts have issued judgments likely will find it difficult to get relief from U.S. courts because of comity concerns.