

SIGNIFICANT DEVELOPMENTS IN TRADEMARK LAW 2008

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CONTENTS

1. Expected Expansion of Domain Name Space Through Introduction of New Generic Top Level Domains (gTLDs).	1
2. eBay’s General Knowledge That Counterfeit Tiffany Goods Were Sold on Its Site Does Not Make It Liable for Contributory Trademark Infringement.	1
3. Use of Trademarks in Metadata Is a “Use in Commerce,” Eleventh Circuit Holds, But May Not Establish Irreparable Harm for Purposes of Injunctive Relief.....	2
4. Fifth Circuit Upholds Universities’ Color Schemes as Enforceable Unregistered Trademarks.	3
5. Use of Similar Mark and Storefront Appearance in Video Game Cannot Constitute Nominative Fair Use, But Is Protected by First Amendment, Ninth Circuit Rules.	4
6. Ninth Circuit Holds That Customs May Impose Civil Penalties Under Tariff Act for Importation of a Product Bearing a Counterfeit Mark Even if the Mark Owner Does Not Make That Particular Product.....	5
7. First Circuit Holds That Evidence of Actual Confusion Is Largely Irrelevant When the Trademark Is Generic.....	5
8. District Court Holds Trademark Remedy Clarification Act Unconstitutional in Abrogating States’ Sovereign Immunity from Trademark Infringement Claims.	6
9. Eleventh Circuit Holds Use of Plaintiff’s Trademark on Website Accessible in State Where Plaintiff Resides Sufficient to Create Personal Jurisdiction over Defendant There.	7
10. Use of a Slogan in an Advertising Proposal Does Not Create Trademark Rights When the Slogan Does Not Indicate the Source of Goods, Second Circuit Holds.....	7
Recent Publications by Covington Lawyers.....	8
Primary Contacts in the Trademark Practice.....	9

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Below are the selections of Covington's Trademark/Copyright Group for the ten most significant and interesting developments in trademark law during 2008.

1. EXPECTED EXPANSION OF DOMAIN NAME SPACE THROUGH INTRODUCTION OF NEW GENERIC TOP LEVEL DOMAINS (gTLDs).

In June 2008, the Internet Corporation for Assigned Names and Numbers ("ICANN"), the California non-profit corporation that manages assignment of domain names and IP addresses, adopted a policy framework to guide the introduction of new gTLDs. (A gTLD is the part of the domain name to the right of the dot—.com, .net, .biz.) The introduction of new gTLDs will transform the Internet as we know it by dramatically expanding the opportunities for commerce and community. Every company, organization, and group could have its own gTLD—.shop, .blog, .green, .sports, or .[brand]—to use for a commercial platform, for brand expansion, or for authentication and security. The expansion of the domain name space will also provide opportunities for online abuse through fraud, theft, and infringement. In particular, the expansion will impose on owners of famous and well-known marks unparalleled brand protection challenges, most notably combatting potentially massive cybersquatting.

Although ICANN has released two draft implementation plans since June, it recently announced that the 30- or 45-day application round (in which applications are processed on a first-come, first-served basis) will probably not open before December 2009. Businesses should consider now how to pursue the opportunities and address the challenges presented by the introduction of new gTLDs, especially if they are considering applying for a new gTLD. Covington's Kristina Rosette, who represents the Intellectual Property Constituency on ICANN's Generic Names Supporting Organization ("GNSO") Council, is deeply involved in the development of the policy recommendations and the implementation plans.

In another significant development, the ICANN Board also adopted in June 2008 a policy intended to eliminate "domain tasting," a practice by which registrants have abused a "5-day, no-pay" contractual provision in order to "taste" the monetization potential of a domain name. Covington's Kristina Rosette received her second Volunteer Service Award from the International Trademark Association for her extensive work on the research and policy development that resulted in the policy adopted by the ICANN Board.

2. EBAY'S GENERAL KNOWLEDGE THAT COUNTERFEIT TIFFANY GOODS WERE SOLD ON ITS SITE DOES NOT MAKE IT LIABLE FOR CONTRIBUTORY TRADEMARK INFRINGEMENT.

This case was not about whether counterfeit Tiffany jewelry was available on eBay—because everyone knew it was—but about who should bear the burden of policing Tiffany's trademark for infringement. The United States District Court for the Southern District of New York held in favor of eBay, finding that its generalized knowledge that counterfeit Tiffany goods were sold on eBay's auction site was insufficient to make it liable for contributory trademark infringement. *Tiffany (NJ) Inc. v. eBay, Inc.*, 576 F. Supp. 2d 463 (S.D.N.Y. 2008). Rather, the court held, specific knowledge of individual infringing listings was required. Because eBay removed counterfeit listings from its

SIGNIFICANT DEVELOPMENTS IN TRADEMARK LAW 2008

site when it had specific knowledge of such listings, it was not contributorily liable for sales of counterfeit Tiffany products. The court praised eBay's anticounterfeiting measures and, in particular, its Verified Rights Owner Program. Other Internet businesses facing potential trademark liability should review the court's detailed discussion of the VeRO program for guidance, particularly because the court rejected eBay's argument that, as an online advertising venue, it could not be contributorily liable for trademark infringement at all. The court held that eBay *could* be contributorily liable—just like a brick-and-mortar swap meet or flea market—but was not in this instance because of the strength of its anticounterfeiting program.

The *Tiffany* decision created an international split over whether eBay is liable for the sale of counterfeit goods. In contrast to this decision, courts in France and in Germany have held eBay liable for the sales of counterfeit products. *Louis Vuitton v. eBay*, Tribunal de Commerce de Paris, 1re chambre B, June 30, 2008; *Rolex v. eBay*, Bundesgerichtshof [BGH], Urt. v. 30.4.2008 - Az.: I ZR 73/05. Intriguingly, French and U.S. courts have agreed that eBay is an active participant in the sale of items on its site and can be contributorily liable for trademark infringement. The disagreement concerns whether eBay exercises the proper duty of care in ensuring that its site does not facilitate unlawful acts.

On another subject, the *Tiffany* decision held that use of the Tiffany trademark in promotions on eBay's homepage and as a keyword to generate sponsored links to eBay's homepage is a protected, nominative fair use in view of the fact that authentic Tiffany items were in fact also for sale on eBay's auction site. This is one of the first times the nominative fair use doctrine, which originated in the Ninth Circuit, has been applied by a court in the Second Circuit. See Covington's "Significant Developments in U.S. Trademark Law 2007" for a review of conflicting decisions as to whether use of third parties' trademarks as keywords constitutes actionable trademark use.

3. USE OF TRADEMARKS IN METADATA IS A "USE IN COMMERCE," ELEVENTH CIRCUIT HOLDS, BUT MAY NOT ESTABLISH IRREPARABLE HARM FOR PURPOSES OF INJUNCTIVE RELIEF.

Axiom Worldwide, a competitor of the North American Medical Corporation ("NAM"), used two of NAM's registered trademarks in metatags on its website. *North American Medical Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211 (11th Cir. 2008). Axiom's website itself did not display NAM's trademarks, but when consumers performed a Google search for the words in the marks, the search results included a description of Axiom's website that included NAM's trademarks. The district court issued a preliminary injunction preventing Axiom from using NAM's trademarks in metatags. Relying on the plain language of the Lanham Act, 15 U.S.C. § 1114(1), the Eleventh Circuit affirmed the district court's holding that use of trademarks in metatags is a trademark "use in commerce" in connection with the advertisement of goods. In so holding, the court disagreed with the Second Circuit's decision in *1-800 Contacts, Inc. v. WhenU.com, Inc.*, 414 F.3d 400 (2d Cir. 2005), which held that defendant's inclusion of a domain name incorporating plaintiff's trademark in a directory of terms used by defendant to trigger pop-up ads for plaintiff's competitor does not constitute "use in commerce" of plaintiff's mark. The Eleventh Circuit next affirmed the district court's holding that Axiom's use of the trademarks in metatags created a likelihood of confusion, finding both a likelihood of initial interest confusion as well as a likelihood of

SIGNIFICANT DEVELOPMENTS IN TRADEMARK LAW 2008

actual source confusion because NAM's trademarks were displayed to consumers in the Google search results that described Axiom's website. (Interestingly, the First Circuit held this year that use of trademarks in metatags creates a likelihood of confusion even when the trademarks are *not* displayed to consumers. *Venture Tape Corp. v. McGills Glass Warehouse*, 540 F.3d 56 (1st Cir. 2008).)

Although NAM was thus likely to succeed on the merits of its trademark infringement claim, the Eleventh Circuit disagreed with the district court's holding that NAM would suffer irreparable harm absent a preliminary injunction. The court vacated the preliminary injunction and remanded to the district court for further proceedings consistent with the Supreme Court's decision in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), which rejected the presumption of irreparable harm in patent infringement cases. The Eleventh Circuit found *eBay* "applicable" in the context of a preliminary injunction motion in a Lanham Act trademark case, but it declined to decide whether the previously well established presumption of irreparable harm in trademark infringement cases survives the decision in *eBay*.

4. FIFTH CIRCUIT UPHOLDS UNIVERSITIES' COLOR SCHEMES AS ENFORCEABLE UNREGISTERED TRADEMARKS.

Various universities, along with their licensing agent, sued Smack Apparel company for trademark infringement, alleging that Smack Apparel's unlicensed t-shirts bearing the schools' color schemes created a likelihood of confusion among consumers. The Fifth Circuit affirmed the district court's ruling granting summary judgment to the universities. *Board of Supervisors v. Smack Apparel Co.*, 550 F.3d 465 (5th Cir. 2008). The district court's decision is described in Covington's "Significant Developments in U.S. Trademark Law 2006."

The universities claimed unregistered rights in their color schemes combined with "other identifying indicia referring to the Universities." The court reasoned that a color scheme can be protected as an unregistered mark where it has acquired secondary meaning and is non-functional, and it then looked to the factors for determining secondary meaning—the length and manner of use of the mark, sales of products bearing the mark, the amount and manner of advertising, the nature of use of the mark or trade dress in newspapers and magazines, consumer-survey evidence, direct consumer testimony, and the defendant's intent in copying the trade dress.

The Fifth Circuit found the color schemes had developed a secondary meaning because the universities had been using their respective color schemes and associated indicia for more than a century, the colors were identified with the universities, millions of dollars of merchandise bearing the color schemes were sold by the universities every year, the color schemes were frequently referenced in the media, and Smack Apparel intentionally used the color schemes in the belief that they were identified with the universities. The court also found that Smack Apparel's products caused a likelihood of confusion with the plaintiffs' products, remarking that "Smack's use of the Universities' colors and indicia is designed to create the illusion of affiliation with the Universities and essentially obtain a 'free ride' by profiting from confusion among the fans of the Universities' football teams who desire to show support for and affiliation with those teams."

SIGNIFICANT DEVELOPMENTS IN TRADEMARK LAW 2008

The Fifth Circuit's decision leaves no doubt that unregistered school color schemes, combined with other indicia of the trademark owner, can be enforced against confusingly similar uses. The opinion also suggests, but does not quite hold, that unregistered color schemes alone could also be enforced.

5. USE OF SIMILAR MARK AND STOREFRONT APPEARANCE IN VIDEO GAME CANNOT CONSTITUTE NOMINATIVE FAIR USE, BUT IS PROTECTED BY FIRST AMENDMENT, NINTH CIRCUIT RULES.

Rock Star Videos Inc., a subsidiary of Take-Two Interactive Software Inc., created the hugely popular *Grand Theft Auto* video games. For *Grand Theft Auto: San Andreas*, Rock Star's artists traveled to Los Angeles and took numerous pictures, which they then used to create the not-so-fictional city of Los Santos. *San Andreas* included "a virtual, cartoon-style strip club known as the 'Pig Pen.'" *E.S.S. Entertainment 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095 (9th Cir. 2008). The owner of the Play Pen Gentlemen's Club, a not-so-virtual strip club in East Los Angeles, was not amused by the fact that a building looking similar to theirs, sporting a similar logo, was appearing in a violent video game. So the owner of the Play Pen, E.S.S. Entertainment, sued for trademark infringement, claiming that Rock Star's use created a likelihood of confusion as to whether E.S.S. had endorsed or was associated with the video depiction. Rock Star claimed protection under both nominative fair use and the First Amendment. The district court agreed on the latter ground only and granted summary judgment dismissing the claim; E.S.S. appealed.

The Ninth Circuit rejected the claim of nominative fair use—the contention that Rock Star had permissibly used E.S.S.'s mark to describe or refer to E.S.S.'s product, not to Rock Star's. With little discussion, the court held that because Rock Star had not used an *identical* mark—"Pig Pen" instead of "Play Pen"—it could not claim to be commenting on or referring to E.S.S.'s strip club, but the Ninth Circuit then held that Rock Star's use was protected from any infringement claim by the First Amendment. Under *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), use of a trademark in the title of an artistic work is permissible if the use has *some* artistic relevance to the defendant's underlying work and if the use does not explicitly mislead consumers regarding the origin of the work. The Ninth Circuit had adopted this test for titles in *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002), but now expanded its application, holding that "[a]lthough this test traditionally applies to uses of a trademark in the title of an artistic work, there is no principled reason why it ought not also apply to the use of a trademark in the body of the work." The court then held that the logo and appearance of the Play Pen, as one element of the urban neighborhood of East Los Angeles pictured in *San Andreas*, had *some* artistic relevance to the video game. As to the second prong of the standard, the Ninth Circuit reasoned that *San Andreas* did not explicitly mislead—after all, "[n]othing indicates that the buying public would reasonably have believed that [E.S.S.] produced the video game or, for that matter, that Rockstar operated a strip club." Accordingly, the First Amendment barred any infringement claim.

SIGNIFICANT DEVELOPMENTS IN TRADEMARK LAW 2008

6. NINTH CIRCUIT HOLDS THAT CUSTOMS MAY IMPOSE CIVIL PENALTIES UNDER TARIFF ACT FOR IMPORTATION OF A PRODUCT BEARING A COUNTERFEIT MARK EVEN IF THE MARK OWNER DOES NOT MAKE THAT PARTICULAR PRODUCT.

When Able Time, Inc. imported a shipment of watches bearing the mark TOMMY—a registered mark of Tommy Hilfiger Licensing, Inc.—the Bureau of Customs and Border Protection seized the watches as counterfeit and then imposed a civil penalty under the Tariff Act, 19 U.S.C. §1526(f). *United States v. Able Time, Inc.*, 545 F.3d 824 (9th Cir. 2008). But the district court held that, because Tommy Hilfiger did not make watches at the time of the importation, the watches imported by Able Time were not counterfeit and so any penalty was unlawful. The Ninth Circuit disagreed and reversed. The language of the Tariff Act prohibits importation of merchandise bearing a registered trademark without the mark owner’s permission. In a case of first impression, the Ninth Circuit held that, while the statutory language requires that “the offending merchandise copies or simulates the registered trademark, meaning that it is likely to cause the public to associate the offending merchandise with the registered trademark”—that is, to cause a likelihood of confusion—“[n]owhere does this statutory scheme require the owner of the registered mark to make the same goods as those bearing the offending mark.” The Ninth Circuit remanded for determination of whether the mark used by Able Time was substantially identical to Tommy Hilfiger’s mark and whether such use was impermissible under “the traditional likelihood of confusion test for infringement.”

7. FIRST CIRCUIT HOLDS THAT EVIDENCE OF ACTUAL CONFUSION IS LARGELY IRRELEVANT WHEN THE TRADEMARK IS GENERIC.

Boston Duck Tours and Super Duck Tours are competitors offering land-and-water tours in Boston. *Boston Duck Tours, LP v. Super Duck Tours, LLC*, 531 F.3d 1 (1st Cir. 2008). When Super Duck came to town in 2007, Boston Duck, which had been operating tours in Boston since 1994, sued for trademark infringement. The First Circuit found that the term “duck tours” is generic for amphibious vehicle sightseeing tours, citing widespread use of the term by the media, the tourism industry, and Boston Duck Tours itself, as well as the name of the original amphibious vehicles used for such tours, World War II-era DUKWs (pronounced “ducks”). Boston Duck Tours, therefore, could not prevent Super Duck Tours from describing its product by its name.

Although Boston Duck Tours presented evidence of actual confusion between the two companies after Super Duck Tours started operations, the court held that for such evidence to be relevant, it would have to be the “type of confusion that warrants trademark protection” under the Lanham Act. Because trademark law “is not intended to prevent confusion between two similar, generic marks,” actual confusion about the phrase “duck tours” was “largely irrelevant” to the likelihood-of-confusion analysis. Rather, actual confusion must result from the protectable elements of a trademark. The court also stated that actual confusion resulting from the entry of a new player into a market previously serviced by a single player using a generic phrase to describe its product—as was the case here because Boston Duck Tours was the sole provider of amphibious sightseeing tours in Boston for 13 years—is not the type of confusion protected under the Lanham Act. Regarding the similarity of the parties’ marks, the

SIGNIFICANT DEVELOPMENTS IN TRADEMARK LAW 2008

court found that the non-generic elements—"Boston" and "Super"—were "completely different," which weighed against finding a likelihood of confusion. The First Circuit thus reversed the district court's preliminary injunction that had prevented Super Duck Tours from using the phrase "duck tours."

8. DISTRICT COURT HOLDS TRADEMARK REMEDY CLARIFICATION ACT UNCONSTITUTIONAL IN ABROGATING STATES' SOVEREIGN IMMUNITY FROM TRADEMARK INFRINGEMENT CLAIMS.

In response to Phoenix Software's claims of trademark infringement, the Regents of the University of Wisconsin asserted immunity under the Eleventh Amendment of the U.S. Constitution. *Board of Regents v. Phoenix Software Int'l, Inc.*, 565 F. Supp. 2d 1007 (W.D. Wis. 2008). Phoenix Software, in turn, contended that Congress had abrogated states' sovereign immunity in trademark infringement suits by enacting the Trademark Remedy Clarification Act ("TRCA"), 15 U.S.C. § 1122(b).

In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), the Supreme Court had held the TRCA did not validly abrogate states' immunity from false advertising claims under Section 43(a) of the Lanham Act. See Covington's "Significant Developments in U.S. Trademark Law 1999." In *Board of Regents*, the Wisconsin District Court held that the TRCA likewise did not validly abrogate states' immunity from trademark infringement sections under the Lanham Act.

Because the Supreme Court has held that Congress may not abrogate sovereign immunity pursuant to its power under the Commerce Clause, the court ruled that justification for the Act must instead be found in Section 5 of the Fourteenth Amendment, which grants Congress authority to "enforce" the substantive provisions of the Amendment such as the Due Process Clause. Even though the legislative history reflects Congress's view that a due process violation occurs when a state "deprives" a person of property by infringing its trademark rights, the court held that in passing the Act, Congress did not meet its obligation to "identify a constitutional injury that it seeks to prevent or remedy and tailor its abrogation accordingly." Noting that Congress presented little evidence of trademark infringement by states and did not analyze whether state remedies for trademark violations are inadequate, the court held that the Act was not "congruent and proportional to any Fourteenth Amendment injury" and therefore did not abrogate state sovereign immunity from trademark infringement suits.

The court further held that the Regents did not waive sovereign immunity by appealing a decision of the Trademark Trial and Appeal Board to cancel its trademark because contesting unfavorable decisions in suits brought against the state is not a "voluntary" invocation of federal jurisdiction and thus does not waive immunity.

SIGNIFICANT DEVELOPMENTS IN TRADEMARK LAW 2008

9. ELEVENTH CIRCUIT HOLDS USE OF PLAINTIFF'S TRADEMARK ON WEBSITE ACCESSIBLE IN STATE WHERE PLAINTIFF RESIDES SUFFICIENT TO CREATE PERSONAL JURISDICTION OVER DEFENDANT THERE.

Carman Licciardello is a nationally-known Christian musician and entertainer. During 2000-2001, Rendy Lovelady was the personal manager for Licciardello. Some five years later, Lovelady, a Tennessee resident, allegedly used Licciardello's trademarked name and picture on his website, which promoted him as a personal manager for music artists—implying that Licciardello endorsed Lovelady's skill as a personal manager. Apparently, Licciardello did not, and instead he sued Lovelady for trademark infringement in federal court in Florida. The district court dismissed the action for lack of personal jurisdiction over Lovelady, but the Eleventh Circuit reversed. *Licciardello v. Lovelady*, 544 F.3d 1280 (11th Cir. 2008). The court held that Lovelady was within Florida's long-arm statute because the alleged infringement occurred there: "We need not decide whether trademark injury necessarily occurs where the owner of the mark resides . . . because in this case the alleged infringement clearly also occurred in Florida by virtue of the website's accessibility in Florida." The court went on to hold that due process permitted the exercise of jurisdiction over Lovelady in Florida because he was alleged to have committed an intentional tort—use of Licciardello's picture and trademarked name—that would necessarily cause injury to Licciardello in Florida.

Although the Eleventh Circuit stressed that its holding was "limited to the facts before us," its opinion can be read as setting out the sweeping rule that alleged use of mark on a website will necessarily subject the defendant to personal jurisdiction in the state where the mark owner lives, so long as the website is accessible in that state. Notably, the Ninth Circuit had found personal jurisdiction over a defendant for use of a mark in a domain name in the landmark case of *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998), but in that case the defendant had written to the plaintiff in the forum state, seeking to sell plaintiff the domain name—evidencing a "targeting" of the forum state that would make the exercise of jurisdiction reasonable. In contrast, the Ninth Circuit found no personal jurisdiction over the defendant in *Pebble Beach Co. v. Caddy*, 453 F. 3d 1151 (9th Cir. 2006), where there was similar use of the forum plaintiff's mark in a domain name, but no offer to sell to the plaintiff. Future decisions, perhaps by the Supreme Court, may bring clarity to this issue—but don't hold your breath.

10. USE OF A SLOGAN IN AN ADVERTISING PROPOSAL DOES NOT CREATE TRADEMARK RIGHTS WHEN THE SLOGAN DOES NOT INDICATE THE SOURCE OF GOODS, SECOND CIRCUIT HOLDS.

Stephen Goetz, the president of a design company, pitched a concept for personalizing credit cards to several credit card companies, including American Express. Along with a description of his concept, Goetz's proposal included the slogan "My Life, My Card." *American Express Co. v. Goetz*, 515 F.3d 156 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 176 (2008). Goetz then filed an application to register "My Life, My Card" as a trademark. A week before American Express received Goetz's proposal, however, and

SIGNIFICANT DEVELOPMENTS IN TRADEMARK LAW 2008

several weeks before Goetz's trademark application, American Express's own advertising consultant proposed a "MY LIFE. MY CARD." campaign. Some time later, American Express launched its campaign featuring such celebrities as Robert De Niro and Tiger Woods. Goetz objected, and American Express sought a declaratory judgment that Goetz did not have a viable trademark infringement claim.

The Second Circuit affirmed the district court's finding that Goetz had no protectable trademark rights in "My Life, My Card." For a slogan to be used as a trademark, the court held, it must be "used to identify and distinguish goods or services and to indicate their source." 15 U.S.C. § 1127. Because Goetz used "My Life, My Card" as a component of a business proposal "rather than a mark designating the origin of any goods or services he offered" to the credit card companies, he did not use the phrase as a trademark. The court pointed out that in Goetz's proposals, "My Life, My Card" never appeared as a stand-alone logo or in connection with Goetz or his company, but was always followed by the name of the credit card company to which the pitch was directed. Therefore, Goetz did not use the slogan to identify himself or his company, but to interest credit card companies in using the slogan to identify themselves. Having not used the slogan as a mark, Goetz could not claim infringement.

RECENT PUBLICATIONS BY COVINGTON LAWYERS

Kristina Rosette, *The Impending Introduction of New gTLDs*, LAW360, Nov. 4, 2008.

Ron Dove & Hope Hamilton, *Combat Grey Market Goods in the US*, MANAGING INTELLECTUAL PROPERTY, Nov. 2008, at 58.

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Kristina Rosette & Mark Young, *Virtual Reality, Real Infringement*, COPYRIGHT WORLD, Dec. 2007.

SIGNIFICANT DEVELOPMENTS IN TRADEMARK LAW 2008

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