

United States

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Ownership and scope of marks

1 Who may apply?

An application may be filed by any person (individuals, corporation, partnership, or other legal entity) who believes itself to be entitled to use a mark in commerce. The owner of a mark is the person who controls the nature and quality of the goods identified and/or services rendered in connection with the mark. An applicant does not have to be a US citizen or reside in the United States. A trademark owner may request registration on the Principal Register or the Supplemental Register (the differences of which are discussed more fully below).

2 What can and cannot be protected and registered as a trademark?

Any word, name, phrase, symbol or design that identifies and distinguishes the source of one person's or party's goods or services from another's. A trade dress, also protectible, is a form of trademark that refers to the design or packaging of a product, which like a trademark, serves to identify a product's source. Colours, shapes, sounds and smells are also protectible and satisfy the statutory definition of a trademark as a 'symbol'.

Under Section 2 of the Trademark Act, marks in general are not registrable on the Principal Register if they: (i) are immoral, deceptive, scandalous, disparaging or falsely suggest connection with persons, institutions, beliefs, or national symbols; (ii) are coats of arms, flags, or other insignia of the United States or state or municipality; (iii) are the name, portrait, etc. of a living individual; (iv) so resemble a mark registered in the Patent and Trademark Office by another as to be likely to cause confusion; (v) are merely descriptive or deceptively misdescriptive, primarily geographically misdescriptive, geographically deceptively misdescriptive, merely a surname, or functional.

Marks not registrable on the Principal Register under certain subsections of Section 2(e) (eg highly descriptive marks), but nonetheless capable of distinguishing applicant's goods or services, may be registered on the Supplemental Register if they are in use in commerce. Once such marks reach a certain level of distinctiveness over time, they may be eligible for registration on the Principal Register, where they will enjoy more significant benefits.

Trademark office procedures

3 How long does it typically take, and how much does it typically cost, to obtain a trademark registration?

From the time the application is filed in the United States Patent and Trademark Office (USPTO) until a registration is granted, it can take anywhere from 12 months to several years, depending

upon how many stops are made along the way. After the USPTO determines the minimum filing requirements have been met, the application is assigned to a trademark examining attorney, who then reviews the mark's eligibility for registration. This initial review generally occurs within the first six months from filing. An application that complies with all applicable rules and statutes, includes all required fees, faces no major conflicts, objections, or refusals to register from the USPTO (discussed more fully below), and faces no oppositions from other parties, could be granted a registration in approximately 12–18 months from the date of filing. When there are major conflicts or objections, registration can typically take two to three years. Oppositions from third parties can delay registration for numerous years.

The typical cost of registration varies depending upon whether and what type of trademark searches are performed; the number of classes covered in the application; the number and complexity of responses to objections and/or refusals from the USPTO, and objections or oppositions from other parties, among other things. At the simplest, registration of a mark in one international class, without a trademark search, and to which the USPTO makes no refusal or requests only very minor amendments, and to which no opposition is filed, would typically cost approximately US\$2,000, inclusive of the government filing fee.

4 What classification system is followed, and what goods/services may be claimed?

Since 1973, the International Classification (IC) of goods and services has been the primary classification used by the United States. There are now 34 international classes of goods (IC 1–34) and 11 classes of services (IC 35–45). However, the listing of goods and services in the International Schedule of Classes of Goods and Services is considered merely a guide and is not binding on the USPTO. To assist applicants, the USPTO publishes a manual, *Acceptable Identification of Goods and Services*, which provides examples of acceptable wording for goods and services.

5 Are applications examined for conflicts with other trademarks? What is the procedure followed in the trademark office?

In the substantive examination of an application, the examining attorney will search the USPTO records to determine if a conflict exists, ie a likelihood of confusion between the mark in the application and registered or pending marks for the same or similar mark for the same or related goods or services and, depending on the mark, will often perform other searches, such as those available on the Internet, to determine a mark's registrability. The examining attorney also examines the written application, the drawing, and any submitted specimen.

If the examining attorney decides that a mark should not be registered, a letter (known as an 'office action') will be issued explaining any substantive reasons for refusal – eg a determination of a likelihood of confusion with a registered mark – and any technical or procedural deficiencies in the application – eg an unacceptable identification of goods or services. A response to the office action must be received in the USPTO within six months of the mailing date or the application will be deemed abandoned (although a limited provision for 'revival' of an abandoned application exists under appropriate circumstances). If the response does not overcome all objections, the examining attorney may issue another office action or a final refusal to register.

If the examining attorney raises no objections to registration or the response overcomes all objections, the mark will be approved for publication in the *Official Gazette*, a weekly publication of the USPTO. Any party who believes it will be injured by registration of the published mark has 30 days from the publication date to file an opposition to registration (notice of opposition) or a request to extend the time to oppose. If neither occurs, the mark will normally be registered if it is based upon the actual use of the mark in commerce, on a foreign registration under Section 44 of the Trademark Act, or on an extension of protection of an international registration to the United States under the Madrid Protocol. A certificate of registration will issue about 12 weeks after the publication date. If the application was based on an intent-to-use, the mark will be allowed, and a notice of allowance issued about 12 weeks after the publication date.

- 6 Does use of a trademark or service mark have to be claimed before a registration is granted? Does proof of use have to be submitted? If registration is granted without use, is there a time by which use must begin to maintain the registration?

Yes and no. Applications can be filed based on current use of the mark in commerce or the intent to use the mark in commerce. With the exception of an application based on foreign registrations filed under Section 44 of the Trademark Act, registration in the United States is based on actual use in commerce. For US applications filed under Trademark Act Section 44, actual use is not required.

Proof of use

If the application is based on use, or use is alleged after filing but before publication, or use is claimed after allowance of an intent-to-use application, an actual example ('specimen of use') showing how the mark is used in commerce must be filed for each class of goods or services, and a date of first use must be indicated for each class. For registrations based on a foreign registration granted under Section 44, specimens are not required.

Registration granted without use

Once issued, a registration under Section 44 exists independent of the underlying foreign registration and must comply with all the provisions of the Trademark Act that are applicable to other US registrations. Therefore, between the fifth and sixth year after registration, a statement of continued use of the mark as well as a specimen showing current use in connection with the goods or services identified in the application must be filed.

- 7 Is there an appeal process if the application is denied?

Within six months after the mailing date of an examining attorney's final decision refusing registration, an appeal may be taken

to the Trademark Trial and Appeal Board (TTAB) by filing a notice of appeal. Within 60 days of the date of the appeal, an appeal brief must be filed. However, if a request for reconsideration is also filed, the appeal can be suspended until the examining attorney acts on the request and either reconsiders and allows registration, or again denies it and returns the file to the TTAB, which resets a date for filing the appeal brief. If, at the conclusion of the appeal process the TTAB denies registration, a dissatisfied applicant may appeal to the United States Court of Appeals for the Federal Circuit, or to a US district court by way of a civil action (within prescribed time limits).

- 8 Can a third party oppose registration or seek cancellation of a trademark or service mark? What are the procedures?

Any person(s) (individual, corporation, or other legal entity) who believes s/he or it is likely to be damaged by registration of a mark on the Principal Register may oppose registration by filing a notice of opposition with the TTAB within 30 days after the date of publication of that mark or within an extension period granted by the TTAB for filing an opposition. A notice of opposition does not have to be verified and can be signed by the opposer or the opposer's attorney.

Marks approved for registration on the Supplemental Register are not published for opposition. However, upon registration, they are published in the *Official Gazette* and any person who believes s/he or it is likely to be damaged by registration of a mark may at any time file a petition with the commissioner of the USPTO to cancel such registration. A proscribed filing fee and petition stating the ground for the cancellation must be filed. The petition is referred to the TTAB, which gives notice to the registrant.

A petition to cancel a registration on the Principal Register may be filed by any person who believes that s/he or it is or will be damaged by registration of the mark. Within five years of the date of registration, the grounds include: likelihood of confusion with petitioner's previously used or registered mark; descriptiveness, deceptive misdescriptiveness, primarily geographic descriptiveness, and primarily a surname or generic; fraud; and abandonment.

After five years of registration, under appropriate circumstances (discussed further below), a mark cannot be cancelled because of likelihood of confusion with a senior user's mark, or owing to descriptiveness. However a petition for cancellation may be filed at any time if the registered mark is or becomes: generic; functional; abandoned; obtained fraudulently; comprises immoral, scandalous, or deceptive matter; or misrepresents the source of the goods or services.

- 9 How long does a registration last and what is required to maintain a registration?

A registration remains in effect for 10 years, but can last indefinitely if the owner continues to use the mark on or in connection with the goods or services in the registration and files all necessary documentation for renewal in the USPTO at the appropriate times. Between the fifth and sixth years after the date of registration (during the sixth year), the owner of the registered mark must file an affidavit or declaration attesting to continued use or excusable non-use of the mark. Such affidavits or declarations, known as 'Section 8 affidavits', must also be filed within the year before the end of every 10-year period after the date of registration. Specimens showing use of the mark in each class in which use has continued must also be filed.

Declarations or affidavits can also be filed during the sixth

year after registration stating that the mark has been in continuous use in commerce for a period of five years after the date of registration. This document, known as a 'Section 15 affidavit of incontestability', provides 'incontestability' to the exclusive right to the registered mark. Filing a Section 15 affidavit is optional, but highly recommended, as it eliminates the possibility of an attack against the registration upon certain grounds.

At the end of the first 10-year period, the registration may be renewed for successive periods of 10 years (Section 9 renewal). A Section 8 affidavit of continued use must be filed with the Section 9 renewal.

10 What are the benefits of registration?

Owning a federal registration on the Principal Register provides the following benefits:

- constructive notice to the public of the registrant's claim of ownership of the mark;
- legal presumption of the registrant's ownership of the mark and the registrant's exclusive right to use the mark nationwide on or in connection with the goods and/or services listed in the registration;
- ability to bring an action concerning the mark in federal court;
- US registration as basis to obtain registration in foreign countries;
- ability to record US registrations with the US Customs Service to prevent importation of infringing foreign goods.

Assignment

11 What can be assigned – trademark with goodwill, without goodwill, all of the goods/services, some of the goods/services? Must other business assets be assigned to make it a valid transaction?

A registered mark is assignable with the goodwill of the business in which the mark is used or with that part of the goodwill of the business connected with the use of and symbolised by the mark. No application to register a mark based on an intent to use is assignable prior to the filing of an amendment to allege use or the filing of a statement of use, except to a successor to the applicant's business or portion of the business to which the mark pertains, if that business is ongoing and existing.

Trademark owners may also assign a separate portion of a business, together with the goodwill and trademarks associated with that portion of the business, but retain rights in the mark for uses pertaining to another part of the business.

12 What documents are required?

Written assignments and an USPTO recordation cover sheet detailing the relevant information must be filed.

13 Must the assignment be recorded for validity?

The recording of an assignment document is not a determination of the validity of the document or the effect the assignment has on the title to an application or registration. However, an assignment will be void against any subsequent purchaser unless the assignment or relevant portions or a statement signed by the parties regarding the interest conveyed is recorded within three months after the date of the assignment or prior to a subsequent purchase.

14 Are security interests recognised?

Security agreements are recognised and recordable in the USPTO to give third parties notification of equitable interest or other matters relevant to the ownership of a mark. As with assignments, there are significant benefits for recording them promptly.

Markings

15 What words or symbols can be used to indicate trademark use or registration? Do these words or symbols have to be used? What are the benefits of using them and the risks of not using them?

Any time rights in a mark are claimed, the TM (trademark) or SM (service mark) designation may be used to give notice to the public of the rights claimed, whether or not the mark is registered or an application has been filed in the USPTO. The words "Trademark of [name]" in a footnote can also be used.

When a mark is actually registered (not just pending or allowed) in the USPTO on either the Principal Register or the Supplemental Register, the symbol ® may be used. The registration symbol may be used with the mark only with the goods and services listed in the federal trademark registration. Alternatively, or in addition, the words "Registered in the US Patent and Trademark Office" or "Reg US Pat & Tm Office" may be displayed.

The use of the registration notice is not mandatory, but its presence is considered a deterrent to potential infringers. Significantly, in the event of an infringement, the failure to use the notice would prevent the registrant from recovering certain profits or damages for the period before it could be proven that the infringer had actual notice of registration.

Trademark enforcement proceedings

16 What types of legal or administrative proceedings are available for enforcing trademark rights against an infringer? Are there specialised courts or other tribunals?

Two types of civil proceedings – one legal and one administrative – are available by which the owner of a trademark registered on the Principal Register can enforce trademark rights against a potential infringer. In the legal action, which is also available to owners of unregistered marks, a suit may be instituted in state or federal (in most cases) court by filing a complaint against an alleged infringer. If the mark is unregistered, it is nonetheless common to litigate in federal court, since other unfair competition-type provisions of the federal Trademark Act (also known as the Lanham Act) often apply.

The common causes of action in the complaint for violation of rights granted under the Trademark Act include: infringement of the plaintiff's federally registered trademark, infringement of the plaintiff's unregistered, common-law trademark, and unfair competition; misappropriation; false advertising, dilution, and violation of state statutory trademark protections. A suit for infringement may be filed in any federal district court that can properly assert personal jurisdiction over the defendant and is a forum in which a substantial part of the events giving rise to the claim has occurred.

The available remedies sought include injunctive relief, monetary relief, cancellation of trademark registration, ban on importation from abroad, criminal penalties and declaratory judgment of non-infringement.

Although there are no specialised trademark courts, all

appeals of federal district court decisions in trademark cases may be taken to the relevant circuit court of appeal. Appeals from those decisions, and decisions of the Federal Circuit on appeals from the TTAB may be heard by the US Supreme Court on a permissive basis, but this is relatively rare.

Administrative vehicles for protection from infringing or counterfeit goods imported into the United States from abroad can be obtained two ways. First, the owner of a US trademark registration may record the registration with the United States Customs Service (Customs). Customs has the authority to seize merchandise considered counterfeit or bearing infringing marks that violate the registration. Through this vehicle, a US registrant may also, under certain conditions, bar the importation of genuine foreign goods permissibly bearing the same mark, goods known as 'grey goods'.

Second, the International Trade Commission (ITC) is another administrative resource for enforcement against unfair competition from imported goods and is generally a speedy procedure. Such a proceeding is instituted by submitting a complaint to the ITC, which has its own rules regarding required elements of proof, discovery, hearings, and conferences; and an administrative judge recommends a decision to the ITC. In the event that infringement is proven against a registered mark, all infringing merchandise, from any infringer, is specifically denied entry into the United States.

Procedural format and timing

- 17** What is the format of the infringement proceeding? Is discovery allowed? Live testimony? Experts? Who decides the case? How long does the proceeding typically last?

Following the filing of a complaint in a federal district or state court by a plaintiff, a copy of the complaint and a summons issued by the court is served on a defendant. Within set periods of time, an answer is made to the complaint and can include defences and counterclaims; a reply may be made to the answer, and the counterclaims, if any, are answered. Sur-replies and cross-claims may also be made. Collectively, these are known as the pleadings which may be amended or supplemented.

It is not uncommon in trademark cases for the plaintiff to seek a quick remedy, in the form of a temporary restraining order (which can be done on an ex parte basis) or a request for a preliminary injunction. This is most often the case where the alleged infringement is just being commenced, and the plaintiff alleges that an 'irreparable injury' will occur without such extraordinary relief.

Unless otherwise limited by an order of the court, the parties may obtain discovery regarding any matter, not privileged, that is relevant to the claims or defences of any party. This includes any documents or other tangible things and the identity and location of persons having knowledge of any discoverable material.

Deposition, ie questioning of persons having knowledge of discoverable material or who may be presented at trial or whose opinion will be presented at trial, is also part of discovery. A party may also depose any person who has been identified as an expert whose opinions may be presented at trial.

The ordinary vehicle for introducing evidence in an infringement trial is through live testimony of witnesses. First, counsel for the party offering a witness directly questions the witness to elicit specific detailed testimony. Then, opposing counsel is given the opportunity to cross-examine the witness on matters within the scope of the direct testimony. Parties in a trademark case will

often present an expert to testify on technical matters relating to infringement or dilution, such as survey evidence. Documents and other physical items, such as a sample of the allegedly infringing mark on goods or services, may be received into evidence, usually through a witness.

Trademark infringement cases may be tried before a judge or jury, and either the plaintiff or defendant may demand a jury trial. In a jury trial, the judge is responsible for deciding all disputed issues of law, and the jury is responsible for deciding all disputed issues of fact. In a trial before a judge only, known as a 'bench trial', the judge decides all disputed issues. However, there is no right to a jury trial on equitable issues, only legal ones, and these issues are distinguished by the relief sought, ie injunctive relief is an equitable issue, and money damages is a legal issue. However, some courts consider a request for profits and damages under the Lanham Act incidental to a claim for injunctive relief, thus equitable and not requiring a jury trial.

The length of a trademark infringement proceeding varies widely, depending upon when and how it is terminated. A proceeding can be terminated as early as weeks to months after a complaint is filed if an agreement is reached, months to years if the case is terminated by preliminary injunction before trial, and years if through judgment after trial and through appeal.

Procedural

- 18** What is the burden of proof to establish infringement or dilution?

Plaintiffs have the burden of proof and must show by a preponderance of evidence that a significant number of prudent purchasers are likely to be confused by the defendant's mark and believe it originated with the plaintiff. The courts consider the following factors in determining the likelihood of confusion:

- the strength (distinctiveness) of the plaintiff's mark;
- the degree of similarity between the defendant's and plaintiff's marks;
- the similarity or relatedness of the plaintiff's and defendant's goods or services;
- the likelihood that the plaintiff will bridge the gap if the goods are different;
- the channels of trade;
- evidence of actual confusion;
- the sophistication of buyers;
- the defendant's good faith in adopting the mark; and
- the quality of the defendant's goods or services.

Until 1996, federal law protected trademarks only in infringement actions. In 1996, the Federal Trademark Dilution Act extended protection for so-called 'famous marks' (eg Coca-Cola), notwithstanding an absence of confusion between the marks. Here, the plaintiff must show that the mark is famous and that the same or similar mark causes dilution of the distinctive quality of the plaintiff's mark, that is, a "lessening of the capacity of the famous mark to identify and distinguish goods and services". Further, in a recent ruling, the Supreme Court held that proof of actual dilution rather than likelihood of dilution must be shown.

State anti-dilution statutes may also be available.

Standing

- 19** Who is entitled to seek a remedy (trademark owner, licensee, etc) and under what conditions?

In general, every action shall be prosecuted in the name of the real

party in interest. This means that any person entitled to a benefit or privilege under provisions of the Trademark Act has standing to bring an action for infringement or dilution in the appropriate federal court. An 'entitled person' includes the owner of a trademark or trademark registration and its legal representatives, successors, predecessors, valid assignees, licensees, and franchisees. However, agreements entered into between registrants and the latter identified persons can and should spell out whether, and to what extent, these latter entities will participate in infringement or dilution actions.

Foreign activities

20 Can activities which take place outside the country support a charge of infringement or dilution?

No. The only activities that can support a charge of infringement or dilution under the federal Trademark Act are those that take place in the United States or its territories. However, goods bearing infringing trademarks which are brought into the United States can be evidence of infringement or dilution.

Discovery

21 What, if any, discovery devices are permitted for obtaining evidence from an adverse party, from third parties, or from parties outside the country?

Under the Federal Rules of Civil Procedure (FRCP), the scope of permissible pre-trial discovery is extremely broad. In general, a party is entitled to discover any non-privileged information that is relevant to any claim or defence of any party in a suit. The FRCP provides a variety of mechanisms for obtaining discovery, and, except under certain circumstances, the parties are required to disclose a substantial amount of information through 'initial disclosures' without waiting for discovery requests, 'disclosure of expert testimony', and 'pre-trial disclosures'.

Traditional methods of discovery include:

- interrogatories – written questions;
- document requests – written requests to produce documents;
- requests for admissions – written requests that the adverse party admit or deny statements of opinion or fact; and
- depositions – oral questions and answers by persons who may or may not be called as witnesses.

The FRCP also permits discovery to be taken from third parties, but with additional limitations to prevent the imposition of undue burden or expense. Discovery may also be taken from persons or entities outside the United States pursuant to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the Hague Convention). Taking discovery under the Hague Convention is often cumbersome and time-consuming compared to the liberal discovery approach embodied in the FRCP. Further, the party from whom discovery is sought must be a resident of a country that, like the United States, is a signatory to the convention. Procedurally, the court in which the action is pending must request by letter to the appropriate authority in the other party's country the exact discovery sought, and the authority in that country will apply its own laws governing discovery.

Timing

22 What is the typical timeframe for an infringement or dilution action, at the trial level and on appeal?

The average duration of a trademark infringement or dilution suit from filing of a complaint to entry of a judgment varies widely, depending upon the court in which a case is filed, the number and nature of motions filed, whether surveys supporting confusion or dilution are conducted, and whether agreements can be reached and at what stage in the action. A duration of two to five years is not uncommon.

Litigation costs

23 What is the typical range of costs associated with an infringement or dilution action, including trial preparation, trial and appeal?

Costs of a trademark or dilution litigation can vary greatly, depending on the issues involved, the property at stake, the forum, whether a survey or expert testimony is involved, and the stage to which the proceeding advances, recognising that many trademark cases do not advance far beyond a preliminary injunction stage. Perhaps the best data on actual litigation costs in the United States is that compiled by the American Intellectual Property Law Association, which conducts a biannual survey of IP lawyers which includes questions on this issue. In 2003, the survey results disclosed that a typical trademark infringement action cost approximately US\$150,000 through to the end of discovery and just under US\$300,000 through to the end of the case, where less than US\$1 million was at risk; US\$365,000 through to the end of discovery and just over US\$600,000 through to the end of the case, where US\$1–25 million was at risk; and US\$599,000 through to the end of discovery and just over US\$1 million through to the end of the case, where more than US\$25 million was at risk. For opposition or cancellation proceedings before the Trademark Trial and Appeal Board, the figures are much lower, at approximately US\$50,000 through to the end of discovery and just under US\$80,000 through to the end of the case.

Appeals

24 What avenues of appeal are available?

The grant of a preliminary injunction can be appealed, and an appeal from any district court decision can be taken to the Court of Appeals in that circuit.

Defences

25 What defences are available to a charge of infringement or dilution?

Numerous defences are available, and depend on the specific facts in question. In the case of infringement, a defendant may argue that it is the owner of prior rights, or that there is no likelihood of confusion between the subject marks. Factors which go into an analysis of the likelihood of confusion are discussed above, and include differences between the marks, differences between the goods/services, different channels of trade, different purchasers; and weakness of the mark as evidenced by many third-party users. A second line of defence includes affirmative defences, which raise equitable issues, and include, for example: laches, acquiescence, and estoppel; abandonment; genericness; fair use; fraud; 'unclean hands'; trademark misuse; and violation of the antitrust laws.

Remedies

- 26** What remedies are available to a successful party in an action for infringement or dilution? How is monetary relief apportioned? Is injunctive relief available, preliminarily or permanently, and under what circumstances and conditions?

The remedies available to a prevailing plaintiff can include both monetary damages, injunction against future infringement and, in cases of counterfeits of registered marks used with goods or services, seizure of the goods and counterfeit marks.

A privilege against disclosure attaches to attorney-client communications and to attorney work product.

Alternative dispute resolution

- 27** Are ADR techniques available and commonly used? What are the benefits and/or risks?

In disputes before the TTAB, the TTAB espouses that it encourages the use of ADR, the umbrella name for mediation and arbitration, to settle opposition or cancellation proceedings. Disputes based in federal court can also be resolved similarly. A number of organisations provide dispute resolution services including the International Trademark Association, the American Intellectual Property Law Association, American Arbitration Association, and the CPR Institute for Dispute Resolution. This alternative remedy

is used less often than settlement or entry of pre-trial judgment, by which 95 per cent of TTAB proceedings are resolved prior to trial. ADR, which has fewer formal requirements, greater control over the procedure, and a wider range of settlement options, can provide a faster and less expensive way of resolving a dispute. The disadvantage is that dissatisfied parties can revert to a court solution if the ADR is not mandatory.

Miscellaneous

- 28** Are there any emerging trends or hot topics in the law of trademark infringement or dilution in the country?

The newest issue in the law of trademark infringement and dilution is 'pop-up' advertising ('pop-ups' or 'pop-up ads') on the Internet – an ongoing battle between advertisers and website owners. Pop-up ads are those that appear when an online shopper or surfer clicks onto a particular website by use of a domain name or trademark and entry into the site triggers an unauthorised advertisement, sometimes for a competitor of the website owner, to pop up on the screen obstructing the website owner's display. Four federal district court cases decided in the past two years have evenly split between finding these ads a confusing (and in one case diluting) infringement of the plaintiff's name and/or trademark, and finding them a protected nuisance. A fifth case filed in May 2004 is still pending.

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