



Special Edition

# NEWSLETTER

*Reflections on the Firm's first 125 years*

April 2008

## THE 125TH ANNIVERSARY OF PATTISHALL, MCAULIFFE, NEWBURY, HILLIARD & GERALDSON LLP

*O*n the occasion of the 125th Anniversary of Pattishall, McAuliffe, Newbury, Hilliard & Geraldson LLP, we are pleased to present these reflections on the firm's history.

### I. THE EARLY YEARS

The Pattishall law firm began in a thunderstorm. The decisive moment came in 1898, when Edward S. Rogers, a third year at the University of Michigan law school, ducked into a classroom to get out of the downpour. At the lectern was Frank F. Reed, the leading trademark and copyright lawyer from Chicago. But let William T. Woodson, later a name partner, tell the story:

The young Mr. Rogers became so interested in the lecture, which was on the law of trademarks and unfair competition, that he not only stayed to the finish, but also attended the remaining lectures. When he graduated that spring he called upon Mr. Reed in his Chicago office. He told me that the conversation went about as follows:

**Mr. Rogers:** "Mr. Reed, I am Edward S. Rogers. I have just graduated from the University of Michigan Law School. I attended your lectures last spring on trademarks and unfair competition. I was tremendously interested in them. I know that I would like that branch of the law and want to go to work for you."

**Mr. Reed:** "All right young man, hang up your coat and hat and go to work."

Frank F. Reed was indeed an authority on the subject. Beginning in 1883, he quickly became the leading trademark and copyright lawyer in Chicago. In the 1890's he addressed the Law Club of Chicago on trademark and copyright law and was appointed a Lecturer at the University of Michigan Law School. What Reed needed was a worthy partner. In Rogers he found one.

By 1900, the firm of Reed and Rogers became the nation's leading law firm on the laws of unfair competition, trademarks and copyright, tracing its origins to Reed's pioneering role in 1883. Rogers was a dynamo. His legal writing caught the attention of Henry Wigmore, the legendary scholar and Dean of Northwestern Law School. In 1911 Wigmore praised Roger's scholarly writing as "fine work, real history, and as good as a novel ... What I want to say is that your learning and capacity for writing a law book which is both sound and entertaining ought not to be buried in the oblivion of the monthly periodicals."

Rogers took up this challenge and in 1914 published "Good Will Trade-Marks and Unfair Trading," which became for many decades the leading book in its field. Wigmore also advised Rogers that "you ought to make an impress on the law other than the decisions which you have as counsel secured ..." This goal inspired Rogers and has since been a sustaining force of our law firm.

By the 1920's, Rogers had become known as the "Dean of the Trademark Bar." He tried many of the leading cases of his day for such companies as Miles Laboratories, Pabst Brewing Company, The Quaker Oats Company, Sunkist and Swift and Company. He began drafting a new Federal trademark law, which following World War II, was enacted as the Lanham Act. That statute remains the core of trademark and unfair competition law in the United States to this day. In 1930, he received an Honorary LLD from the University of Michigan.

It was characteristic of Rogers that in 1917-18, he volunteered for the War effort by joining the "Patent, Trademark and Copyright Board" of the Federal Trade Commission in Washington, D.C., under the "Trading With the Enemy Act." Later, at the outbreak of World War II, Rogers' experience in 1917-18 led to his being appointed Chairman of Sterling Drug, Inc., a leading U.S. pharmaceutical company under German ownership.

At the end of World War II, Rogers offered his resignation as Chairman of Sterling Drug, but as Mr. Woodson recalled:

*"The Board asked him to stay, stating that he could go back to Chicago and still remain Chairman of the Board; that he could come to Board meetings only as frequently as he deemed necessary. Mr. Rogers said that would be all right but of course his salary would be reduced. The Board said no, your salary will remain the same. Mr. Rogers replied - 'If I am going to be paid for doing a full time job, I am going to do a full time job.'"*

He added, however, that he would practice law after hours, and enjoyed working with his Chicago colleagues for several years to come.

## II. NEW LEADERSHIP

After World War II, the Firm's reputation as the leading trial firm in its field increased and expanded internationally. Beverly Pattishall and Jeremiah McAuliffe, former officers in the United States Navy, joined the firm and, a decade later, were joined by Robert Newbury, another Navy veteran. The credo of the firm remained to strive to "make an impress on the law." This was done through leadership in intellectual property law as trial lawyers, and through scholarship and teaching. To this day, Beverly Pattishall remains one of the most influential authors on trademark law in the last fifty years.

No other law firm has had four presidents of the U.S. Group of the International Association for the Protection of Intellectual Property (AIPPI), as well as three Chairs of the American Bar Association Section of Intellectual Property Law, Presidents of the Chicago Bar Association and Intellectual Property Law Association of Chicago (IPLAC) and three Presidents of the Legal, Law and Lawyers Clubs of Chicago.

Jeremiah McAuliffe travelled the world in the 1950's to develop relationships with foreign law firms that remain the backbone of our international practice to this day.

During our history, members of the firm have appeared in trial and appellate courts on behalf of our clients in nearly every federal jurisdiction, including the U.S. Supreme Court, and with local counsel in many foreign jurisdictions. Three Firm members have been leaders in the American College of Trial Lawyers. As a result, we have been recognized by our peers in the profession as the leading firm in the country for trademark litigation. The Firm appointed its first woman partner, Helen Nies, in 1965. Helen later became Chief Judge of the United States Court of Appeals for the Federal Circuit in the 1980's. For many years she was the highest ranking woman jurist in America, second only to Supreme Court Justice Sandra Day O'Connor.

Mergers and acquisitions have long been an important area of expertise. The RJR Nabisco acquisition was an example of the Firm's important skills in evaluating intellectual property assets. Trademarks are enormously valuable. Over the years that realization alerted other business lawyers to the fact that brands were valuable corporate assets, and worth the expense to protect.

Recent Firm cases have resulted in more than 150 leading federal appellate and district court opinions in intellectual property law. Major cases were fought for such clients as Abbott Laboratories, BASF Group, Bayer, Del Monte Foods, Florsheim Shoes, Ford Motor Company, General Electric, General Motors Corporation, W.R. Grace & Co., Hart Schaffner & Marx, Jaguar Cars, RJR Nabisco, The Northern Trust Company, Paxar Americas, Inc., PepsiCo, Robert Bosch LLC, SC Johnson, The Scotch Whisky Association, Standard Oil Company (now BP), Sun Life of Canada, Ticketmaster, Walt Disney Company and Wells Fargo & Co. The Firm also has a long history of representing sports and celebrity clients such as Jack Nicklaus, Johnny Carson, Tiger Woods and March Madness.

But the firm doesn't just litigate cases – we also decide them. Members of the Firm were among the first to become mediators and arbitrators in intellectual property disputes including the decision of domain name and cybersquatting cases. Firm members have also been leaders for many years in representing clients in mediations and arbitrations throughout the United States and abroad.

In the 1970's and early 80's, Beverly Pattishall served as a U.S. Government Delegate to Diplomatic Conferences on the International Trademark Registration Treaty, the Geneva Conference on Industrial Property and Consumer Protection, and the Diplomatic Conference on the revision of the Paris Convention. In the 1990's Robert Sacoff also served as a Private Sector Advisor to the U.S. Delegation to the Trademark Law Treaty Diplomatic Conference in Geneva, Switzerland. Robert Sacoff also has testified repeatedly before Congress on important intellectual property legislation as Chairman of the American Bar Association Section of Intellectual Property Law. In the late 1990's Jonathan Jennings helped draft the Illinois Right of Publicity Act and testified before the Illinois legislature in its support.

All was not work! For decades we have hosted Holiday galas for our clients as well as for our entire staff. Our client parties at the Art Institute of Chicago have been a trademark of the Firm for a quarter of a century. Our staff parties are equally memorable. In the early days, the staff parties were held in the wood paneled library of the Firm's offices. As entertainment, the partners would perform skits about the associates and the associates would perform skits about the partners. Now there was a dangerous instrumentality! In later years the Holiday parties far outgrew the Firm library — and the skits, well, they were really too dangerous to continue.

Beginning in the 1970's Trademark and Unfair Competition law entered a Golden Era. Trademark law became one of the top two areas of law for graduating law students. In the 1980's and after came major new legislation and treaties, the modernization of trademark law around the world, the advent of the Internet and e-commerce and, for the past dozen years, a string of major U.S. Supreme Court opinions in the field. The Firm's practice, scholarship and teaching were continuously on the cutting edge of these developments.

In 1966, Beverly Pattishall began teaching at Northwestern University School of Law, having previously been a founder of the John Marshall LLM Program. Over the years he co-taught and was succeeded at Northwestern by David Hilliard, Joseph Welch, Danielle Lemack, Thad Chaloeintiarana and Janet Marvel. In 1998, the University of Chicago Law School offered David Hilliard a teaching position which he accepted in honor of Frank Reed, the Firm's founder, who was a Lecturer on the first faculty at Chicago in 1903. David was soon joined by Uli Widmaier teaching Advanced Trademark Law and First Amendment Law.



*Edward S. Rogers*



*Frank F. Reed*

Other members of the Firm created new or expanded courses at John Marshall Law School (Raymond Geraldson, Mark Partridge and Jonathan Jennings) and DePaul Law School (Brett August and Bradley Cohn). In addition, for twenty years, David Hilliard chaired the Northwestern Law School Symposium on “Intellectual Property and the Corporate Client,” that attracted Federal judges and legal experts from across the United States and abroad whose opinions were on the cutting edge of the law.

The Firm’s first book since Rogers’ book in 1914 was Beverly Pattishall and David Hilliard’s book in 1974 on “Trademarks, Trade Identity and Unfair Trade Practices.” It was the first law school textbook devoted entirely to trademark and unfair competition law. All other law school texts were then primarily focused on patent and copyright law with, in some instances, trademarks added on. From 1974 to the early 1980’s it remained the only law school text devoted exclusively to trademarks and unfair competition law.

Over the years this work was revised and updated with Joseph Welch added as co-author. In 1994, these books were merged into a new text called “Trademarks and Unfair Competition.” This book was an immediate success and is now used in forty-eight law school courses nationally. Now in its seventh edition, with Uli Widmaier as a third author, it was cited and quoted by the United States Supreme Court in *Moseley v. Victoria’s Secret Catalogue* (in an opinion by Justice Stevens) in 2003, a significant honor for a work intended for law students.

In 2001, David and Joe also launched a single volume treatise called “Trademarks and Unfair Competition.” It has served both practitioners and students ever since and, in its introduction, credits the enlightened benefit of criticism by Northwestern and University of Chicago law students.

Since 2001 this single volume treatise has been the text for the Federal Judiciary Intellectual Property Seminars attended by federal judges and their law clerks from around the country. The third edition was launched by Lexis Nexis in 2007 at the International Trademark Association meeting in Chicago, with the added attraction of Janet Marvel as a third author.

Other books by Firm members include “Guiding Rights: Trademarks, Copyright and the Internet” written by Mark Partridge.

### III. THE FUTURE

The task before our Firm is to continue to build on this great tradition. To evolve and become home to the best and brightest young lawyers. To make an impress on the law by serving our clients and our profession through ideas and diligent effort. At the same time we must continue to create a wealth of enjoyable experiences. These are the rich rewards of our legal career.

– David C. Hilliard

## REMEMBRANCE OF LITIGATION PAST

Litigation is often educational, sometimes entertaining, and occasionally both. I have selected the following cases to reminisce about because they meet at least one of those criteria. Naturally, I selected only cases in which our client prevailed. Any other result would have been wrongly decided by the court and therefore improper for reminiscence.

◆  
**S.C. Johnson & Son, Inc. v. Drop Dead Co., Inc., 210 F.Supp. 816 (S.D. Cal. 1962), affirmed 326 F.2d 87 (9th Cir. 1963), decision on accounting for profits and statutory damages, 144 U.S.P.Q. 257 (S.D. Cal. 1965).**

This was a claim for label copyright infringement, unfair competition and trademark infringement of the mark PLEDGE by the mark PROMISE. The trial was my first opportunity to second-chair a case with Beverly Pattishall. There was an important lesson to be learned from his exceptional attention to detail in strategizing and preparing the case for trial. He generously allowed a very green associate to prepare and examine a number of witnesses at the trial, of course all under his close supervision.

My fondest remembrance of the case came after the trial when we were on our way back to Chicago. The District Court had taken the case under advisement and Mr. Pattishall asked me what I thought the decision would be. I answered that I thought we would win on all three counts and would be awarded an accounting of profits and statutory damages. He believed that we would win, but that there would be no monetary award. We received the District Court’s



opinion a few days later. The court held for our client on all three counts. Besides injunctive relief, the court awarded statutory damages for label copyright infringement, an accounting of profits for trademark infringement and unfair competition, and an award of attorneys’ fees.

On the flight home when we had disagreed as to the final outcome of the case, I presented Mr. Pattishall with the proposition that if we were awarded an accounting, he should let me handle that hearing. He agreed to that, I think largely because he did not believe it would happen. When it came time for the accounting to proceed, he went to bat for me with the client and persuaded them to let me handle the accounting, which was a four-day trial. I have always appreciated his standing by that bargain and letting me have my first trial as first chair.





**John W. Carson, d/b/a/ Johnny Carson and Johnny Carson Apparel, Inc. v. Here's Johnny Portable Toilets, Inc., 498 F.Supp. 71 (E.D. Mich. 1980), reversed 698 F.2d 831 (6th Cir. 1983), further opinion 810 F.2d 104 (6th Cir. 1987).**

This was a case brought by the famous entertainer, Johnny Carson, to protect his right of publicity against the defendant's use of the name, HERE'S JOHNNY, for portable toilets. Johnny Carson had been introduced on the Tonight Show for years with the phrase, "HERE'S JOHNNY." In fact, our first exhibit at trial was a video of Ed McMahon introducing "HERE'S JOHNNY" over many years. The defendant even admitted that the name, HERE'S JOHNNY, was associated with Johnny Carson.

The case was most notable because of the media attention given to it. It was impossible to have even the simplest hearing in court without, it seemed, at least six reporters present and wanting to ask questions afterward. The only safe way to respond to these questions was with the simple phrase, "I do not comment on pending litigation." I have never seen media attention close to this in any other case. Unfortunately, since I do not think the media was there to cover the lawyers' performance, I can only assume it was because of Johnny Carson.

After trial, the District Court held that the right of publicity extended to Johnny Carson's name and likeness, but not to other aspects of his identity. The Court of Appeals reversed on the basis that HERE'S JOHNNY was a prominent part of Johnny Carson's identity and should be protected.

One of the more interesting sidelights to this case from my point of view came years later when a friend told me that his son was in his first year at Harvard Law School and the Johnny Carson case was the first case he read in his torts class. The student hopefully made points by telling the professor that he knew the lawyer that had tried the case.

◆  
**IBM v. NCR, 82-5946KN(Mcx) (C.D. Cal. 1986).**

This was one of the first major computer software copyright cases after the Copyright Law was amended to recognize that computer programs are entitled to protection. The scope of protection was very much up for grabs and there were major questions over how one company could make its software compatible with a prior copyrighted program without infringing. The stakes in this case were very high and both parties pulled out all the stops. Our client, NCR, designed software for use in a front-end processor for IBM computers. IBM requested a preliminary injunction and very extensive discovery was taken during the approximately six months after that motion was filed.

Because of the importance of the matter, the parties also engaged in extensive settlement negotiations which were ultimately successful. When we reported to the court that the settlement negotiations had been successful, we were told that the court had just completed its decision on the motion for preliminary injunction, and was willing to tell us what the ruling would have been if we could all agree that we wanted to know. One of the more interesting moments came when not one of the lawyers involved wanted to know what the decision would have been. It seems that, one way or another, no one could stand the disappointment of losing, or the disappointment of winning if it were determined that a bigger victory than the settlement could have been had.

◆  
**Plus Products v. Plus Discount Foods, Inc. and The Great Atlantic & Pacific Tea Co., 722 F.2d 999 (2d Cir. 1983).**

This case was a claim by the owner of the PLUS trademark for vitamin and mineral supplements against our client, a subsidiary of A&P, who was using PLUS as the name for discount food stores, and products sold in those stores. A&P at that time was owned by a German company who was already using PLUS for the same type of store and products in Germany.

We thought the trial had gone well and expected a strong win. The decision of the trial court came as a substantial disappointment. Although finding for our client on most of the *Polaroid* likelihood of confusion factors, the court nevertheless substantially enjoined our client from use of PLUS. The proposed injunction was so broad that our client would not have been able to continue using the mark even to identify its stores.

We asked the lower court for a stay of the injunction pending appeal, which was summarily denied. We then filed a motion for a stay before the Court of Appeals. At that time, the Second Circuit held oral argument on a motion for a stay, so I went to New York for the argument. When I stood to argue before the Court of Appeals, I was told that the District Court had notified the Court of Appeals that it would like to have a chance to reconsider its decision if we did not object. Of course, we had no objection. The subsequent District Court opinion granted the stay based on the brief filed before the Court of Appeals. Of course, essentially the same argument had been made when seeking the stay before the District Court, so we never learned the reason for the District Court's change of heart.

On appeal on the merits, we argued that the trial court's findings on the *Polaroid* likelihood of confusion factors showed there was no likelihood of confusion. We did not attempt to contest the findings of the trial court, but only the conclusion from those findings. At the oral argument, the Court of Appeals told us within one minute that they did not need to hear what I had to say, but wanted to question the plaintiff. As soon as the plaintiff began its argument, the first statement of the Court of Appeals was to the effect that when they read the trial court's findings, they thought the defendant had won, and were surprised when they saw the judgment. Needless to say, we were ready to pack up and go home and when we received the decision, the Court of Appeals had followed what it implied in its question.

**Beer Nuts, Inc. v. Clover Club Foods Co., 711 F.2d 934 (10th Cir. 1983), further opinion at 805 F.2d 920 (10th Cir. 1986).**

This case involved the trademark BEER NUTS versus BREW NUTS, both used on sweetened, salted peanuts. The case is interesting because it required two appeals to reach the correct result. After trial, the District Court held our client's BEER NUTS trademark to be valid, but not infringed by BREW NUTS. On appeal, we contended that the District Court had made a number of errors including relying on a side-by-side comparison and, most importantly, finding that BREW NUTS was not being used by the defendant as a trademark. The Court of Appeals reversed that decision in an extensive opinion and remanded the case to the lower court with instructions to proceed in accordance with that opinion.

At a subsequent hearing before the District Court, the judge expressed strong dissatisfaction with the Court of Appeals decision. The District Court then entered a second opinion which came close to reiterating its original opinion, particularly in holding that the defendant was not using BREW NUTS as a trademark, and again, entered judgment for the defendant.

The Court of Appeals again reversed, but this time, instead of just remanding to the District Court, the Court of Appeals set forth the form of the judgment which should be entered. That judgment both enjoined the defendant from use of BREW NUTS and gave our client our accounting of the defendant's profits.

**GFA Brands, Inc. v. Canbra Foods, Ltd. and Campbell Mithune Esty (N.D. Cal. 1990).**

This case demonstrates the pleasure of working with a co-counsel with whom you get along and for whom you have respect. We represented the defendant advertising agency Campbell-Mithun-Esty, and our co-counsel represented Canbra Foods. The co-counsel was the late Henry Mason of Sidley & Austin. We had been opponents previously on several cases and I had great respect for him. He started off representing both defendants, but then decided that their interests were not identical and recommended that the advertising agency retain our firm.

The case involved the plaintiff's trademark HEARTBEAT for cooking oil and spread, and our client's use of the mark HEARTLIGHT for the same products. The plaintiff not only alleged trademark infringement, but that use of HEARTLIGHT was false advertising because it represented the product as being low in calories. Early in the case, the court had denied the plaintiff's motion for preliminary injunction, but had set the case for trial on a very short schedule so that we had only about six months to take discovery and prepare for trial.

The trial took place before a jury in San Francisco, and lasted almost three weeks. Two matters that emerged on cross-examination emphasized the importance of the jury finding your witnesses to be credible. On the first, I was fortunately able to show that a transcript the plaintiff had prepared of one of its radio advertisements was materially wrong and did not follow the actual text of the radio advertisement. The change was key to the case and, I believe, caused the jury to disbelieve the chief executive of the plaintiff. The other important cross-examination was done by



Henry Mason on the subject of damages. He was able to show that the defendant's damage claim was totally unfounded and based on false presumptions, again causing the jury to find a lack of credibility by the plaintiff. Although we have no way of knowing for certain, we believe these two instances were major factors in causing the jury to find for our clients.

**AT&T v. Eastern Telecom, Civil Action No. 4:92CV00072 (E.D. Vir. 1993).**

This was a trademark infringement action involving the AT&T trademark, and again illustrates the importance of your witnesses maintaining credibility before a jury. In this action, the defendant was using the AT&T trademark, but claimed that it had the right to do that through agreement. On depositions, the defendant claimed that this was a written agreement and even identified the particular letters and documents which it claimed constituted the agreement.

At trial, the defendant's principal executive tried to recant his deposition testimony completely and claim that the agreement was oral. The opportunity to impeach the witness with his deposition testimony was irresistible and so easy that, I believe, the jury was not willing to believe anything that witness said. The good part was that the jury was out less than an hour, before returning with a verdict in favor of our plaintiff and an award of substantial damages.

**Car-Freshner Corp. v. S.C. Johnson & Son, Inc., 70 F.3d 267 (2d Cir. 1995).**

This case illustrates my inability, and I assume that of other lawyers, to outguess what a court is going to do. In this case, the plaintiff was the owner of a trademark in the configuration of the little tree air fresheners which you often see hanging in taxis. Our client was using the configuration of a tree in a three-dimensional form as a container for an air freshener, and the plaintiff claimed use of that tree was likely to cause confusion. After discovery, we moved for summary judgment on the alternative grounds of: 1) no likelihood of confusion; and 2) fair use. After briefing and argument, the District Court granted summary judgment on the grounds that there was no likelihood of confusion, but *sua sponte*, granted summary judgment to the plaintiff on the fair use defense.

Plaintiff appealed the grant of summary judgment and we cross-appealed on the fair use defense. At the oral argument, the Court of Appeals asked me if the court affirmed on the likelihood of confusion argument, would they need to reach the question of the fair use defense. I responded that they would not have to reach that issue since holding for us on the likelihood of confusion issue would dispose of the case. At that point, I was very sure that we would win on the issue of likelihood of confusion, but that the Court would say nothing about fair use. I was therefore quite surprised upon receiving the decision about one week later to find that the entire decision was about fair use, and that the Court of Appeals had reversed the District Court's ruling on fair use and granted us summary judgment on that ground. The issue of likelihood of confusion was never reached. I can only surmise that the reason for this was that the Court of Appeals wanted to clarify the law on fair use and had therefore asked me that question on oral argument in order to determine whether it should even touch upon the issue of likelihood of confusion. That, however, was the furthest thing from my mind when I answered the question at oral argument.

◆

**Jerry Reed and T.S.C. Productions, Inc. v. Amoco Oil Company, 611 F.Supp. 9 (M.D. Tenn. 1984).**

This was a case brought by the country and western singer, Jerry Reed, against Amoco. Jerry Reed was perhaps best known for being the buddy to Burt Reynolds in the "Cannonball Express" movies and for his hit song, "She Got The Gold Mine - I Got The Shaft." In this case, Mr. Reed claimed rights in the phrase, "Goin' the extra mile" for an advertising campaign licensed to independent tire dealers.

Amoco was using the phrase, "We go that extra mile" in a national advertising campaign for Amoco service stations and petroleum products. Mr. Reed sought a preliminary injunction and the District Court held an evidentiary hearing on that motion.

There were two entertaining moments during the course of this hearing. The first came during opening argument when the judge asked both sides if they knew the origin of the phrase, "Going the extra mile." Although we had made a major effort to determine the origin before the hearing, we could not find it. The plaintiff also admitted that it could not determine the origin. The judge then informed us that the phrase came from the Bible, and that he was familiar with it because of his teaching Sunday school. Of course, "mile" does not appear in the Bible, but when the judge read the Bible quote to us, it was clear that was the origin of the phrase.

The second entertaining moment came after Jerry Reed testified. He was visibly nervous on the stand, but because his testimony did not hurt Amoco's case we did not cross-examine. After leaving the stand, Mr. Reed asked to be excused from the court for a few minutes. When he returned, after approximately 10 or 15 minutes, he was quite transformed and surprisingly steady.

After the hearing, the District Court, not surprisingly, issued its opinion holding that there was no likelihood of confusion caused by the use of these phrases in the respective advertising campaigns. This should have been the highlight of the case, but an almost equal highlight came from the discovery by Amoco's then in-house counsel, Bob Blankenbaker, of the best place in Tennessee to eat fried catfish.

– Robert M. Newbury

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