

O-399-12

IN THE MATTER OF REGISTRATION NO 2429824
IN THE NAME OF PAVEL MASLYUKOV

AND

AN APPLICATION FOR A DECLARATION OF INVALIDITY THEREOF UNDER NO
84199 BY FREDERIC ROBINSON LTD

Background

1. Registration no 2429824 stands in the name of Pavel Maslyukov. It has an application date of 13 September 2006 and completed its registration on 2 September 2011. The registration is for the following trade mark:



2. On 7 October 2011, Frederic Robinson Limited (“the applicant”) filed an application seeking a declaration that the registration is invalid. The application was made on grounds under sections 3(6), 5(2)(b), 5(3), 5(4)(a) and 5(4)(b) of the Act.

3. There then followed an exchange of correspondence between the Trade Marks Registry (“TMR”) and the applicant by which the TMR sought clarification of various grounds on which the application was made.

4. At this point, I pause to explain that the initial letter of this exchange, from the TMR and dated 20 October 2011, had been copied to Mr Maslyukov at his given address for service in London but it was returned promptly by the Royal Mail marked “Addressee gone away”. The returned envelope also had another sticker of unknown origin placed across its window on which was typewritten “Return back to the sender Not at this address Please update your records”.

5. Not having been notified of any change of his address for service, the TMR wrote to Mr Maslyukov at what I take to be his home address in Russia. This letter, dated 28 October 2011, enclosed a copy of the earlier letter and asked that he provide a UK address for service by way of a Form TM21. For reasons unknown to me, the letter did not warn Mr Maslyukov of any consequences of his not filing an acceptable address for service.

6. Meanwhile, satisfactory clarification of the grounds of the application had been received from the applicant and the application was formally served on Mr Maslyukov to his home address. Despite the issue of an acceptable address for service not having been resolved, the letter advised Mr Maslyukov that the application to declare his registration invalid had been formally admitted and that he was allowed until 31 March 2012 to file any Form TM8 and counterstatement. The letter also gave Mr Maslyukov another opportunity to file an acceptable address for service in the UK but again, for reasons unknown to me, did not warn him of any consequences of not doing so.

7. On 22 March 2012, the TMR received a Form TM8 and counterstatement along with a Form TM21 notifying of a change of address for service from Mr Maslyukov. They were both dated 3 March 2012. The amended address for service he gave was his home address in Russia. The form included the following statement: "I am a Russian citizen. I am not interested in life in England". For reasons also unknown to me, no action was taken in respect of the Form TM21 but the Form TM8 and counterstatement were admitted and served on the applicant by way of a letter dated 28 March 2012. The letter allowed the applicant until 28 May 2012 to file evidence or submissions in support of its application. The letter was copied to Mr Maslyukov in Russia.

8. On 28 May 2012 the TMR received evidence from the applicant. The accompanying letter indicated that the evidence was incomplete and sought an extension of time of one month to complete the filing of evidence. The letter also sought permission to amend the application. The amendment sought to add a further ground under section 3(3)(a) of the Act and to provide further particulars of existing grounds under 3(6) and 5(4)(b) of the Act.

9. By way of a letter dated 12 June 2012, the TMR wrote to Mr Maslyukov. The letter served to advise him of the applicant's request to amend the application as well as the request for an extension of time to complete the filing of evidence. The letter again noted that no suitable address for service had been provided by him and gave him until 12 July 2012 to file a suitable address for service. This time, it warned him of the consequences of failing to do so, which was that he would be deemed to be taking no further part in the proceedings.

10. Nothing was received from Mr Maslyukov by the given date and thus, on 26 July 2012, the TMR wrote to him to notify him that, in the circumstances, he was deemed to be taking no further part in the proceedings though any correspondence would be copied to him for his information. The letter also advised both parties that a case management conference ("CMC") would be appointed to determine the future conduct of the proceedings.

11. The CMC was appointed to take place on 9 August 2012. On the day of the CMC, I received a letter from Mr Maslyukov which was dated 7 July 2012. A copy of that letter is attached at Annex 1 to this decision. Briefly, he acknowledged receipt of the papers that had been sent to him but he refused, in no uncertain terms, to provide any other address for service.

12. The CMC went ahead as arranged. The applicant was represented by Mr Ian Silcock, of counsel. Mr Silcock confirmed he had seen Mr Maslyukov's letter of 7 July 2012. In brief, I gave directions that:

- Mr Maslyukov was considered to have wilfully refused to provide a suitable address for service and was deemed to have withdrawn from the proceedings under the provisions of rule 12(4)(d) of the Trade Mark Rules 2008;
- the amended Form TM26(l) was admitted into the proceedings insofar as it related to clarification of the grounds brought under sections 3(6) and 5(4)(b) of the Act;

- the proceedings would be determined in the first instance on grounds under section 3(6) of the Act;
- all other matters would lie on file pro tem but would be considered in due course should the application not succeed under section 3(6) of the Act;
- the applicant was allowed until 7 September 2012 to file written submissions in relation to the objection under section 3(6) of the Act following which a decision from the papers would be issued.

13. Written submissions were subsequently received from the applicant within the period allowed and I now give this decision from the papers before me.

The objection under section 3(6) of the Act

14. Section 3(6) of the Act states:

“3(6) A trade mark shall not be registered if or to the extent that the application is made in bad faith.”

15. In case O/094/11 [*Ian Adam*] Mr Hobbs Q.C. acting as the Appointed Person summed up the bad faith test in the following manner:

“31. The basic proposition is that the right to apply for registration of a trade mark cannot validly be exercised in bad faith. The invalidity of the application is not conditional upon the trade mark itself being either registrable or unregistrable in relation to any goods or services of the kind specified. The objection is absolute in the sense that it is intended to prevent abusive use of the system for acquiring title to a trade mark by registration. Any natural or legal person with the capacity to sue and be sued may pursue an objection on this ground: see the Judgment of the Court of Justice in Case C-408/08P Lancôme parfums et beauté & Cie SNC v. OHIM [2010] ECR I-00000 at paragraph [39] and the Opinion of Advocate General Ruiz-Jarabo Colomer at paragraphs [63] and [64]. Since there is no requirement for the objector to be personally aggrieved by the filing of the application in question, it is possible for an objection to be upheld upon the basis of improper behaviour by the applicant towards persons who are not parties to the proceedings provided that their position is established with enough clarity to show that the objection is well-founded.

32. Any attempt to establish bad faith must allow for the fact that there is nothing intrinsically wrong in a person exercising *‘the right to apply the rules of substantive and procedural law in the way that is most to his advantage without laying himself open to an accusation of abuse of rights’* as noted in paragraph [121] of the Opinion delivered by Advocate General Trstenjak in Case C-482/09 Budejovicky Budvar NP v. Anheuser-Busch Inc on 3 February 2011. In paragraph [189] of his judgment at first instance in Hotel Cipriani SRL v. Cipriani (Grosvenor Street) Ltd [2009] EWHC 3032 (Ch); [2009] RPC 9 Arnold J. likewise emphasised:

... that it does not constitute bad faith for a party to apply to register a Community trade mark merely because he knows that third parties are using the same mark in relation to identical goods or services, let alone where the third parties are using similar marks and/or are using them in relation to similar goods or services. The applicant may believe that he has a superior right to registration and use of the mark. For example, it is not uncommon for prospective claimants who intend to sue a prospective defendant for passing off first to file an application for registration to strengthen their position. Even if the applicant does not believe that he has a superior right to registration and use of the mark, he may still believe that he is entitled to registration. The applicant may not intend to seek to enforce the trade mark against the third parties and/or may know or believe that the third parties would have a defence to a claim for infringement on one of the bases discussed above. In particular, the applicant may wish to secure exclusivity in the bulk of the Community while knowing that third parties have local rights in certain areas. An applicant who proceeds on the basis explicitly provided for in Art. 107 can hardly be said to be abusing the Community trade mark system.

These observations were not called into question in the judgment of the Court of Appeal in that case: [2010] EWCA Civ 110; [2010] RPC 16. They were re-affirmed by Arnold J. in Och-Ziff Management Europe Ltd v. Och Capital LLP [2011] ETMR 1 at paragraph [37].

33. The line which separates legitimate self-interest from bad faith can only be crossed if the applicant has sought to acquire rights of control over the use of the sign graphically represented in his application for registration in an improper manner or for an improper purpose. The appropriate remedy will in that case be rejection of the offending application for registration to the extent necessary to render it ineffective for the purpose which made it objectionable in the first place.

34. In a case where the relevant application fulfils the requirements for obtaining a filing date, the key questions are: (1) what, in concrete terms, is the objective that the applicant has been accused of pursuing? (2) is that an objective for the purposes of which the application could not properly be filed? (3) is it established that the application was filed in pursuit of that objective? The first question serves to ensure procedural fairness and clarity of analysis. The second question requires the decision taker to apply a moral standard which, in the absence of any direct ruling on the point from the Court of Justice, is taken to condemn not only dishonesty but also *'some dealings which fall short of the standards of acceptable commercial behaviour observed by reasonable and experienced men in the particular area being examined'*: Gromax Plastics Ltd v. Don & Low Nonwovens Ltd [1999] RPC 367 at 379 (Lindsay J). The third question requires the decision taker to give effect to the principle that innocence must be presumed in the absence of evidence sufficient to show that the applicant has acted improperly as alleged.

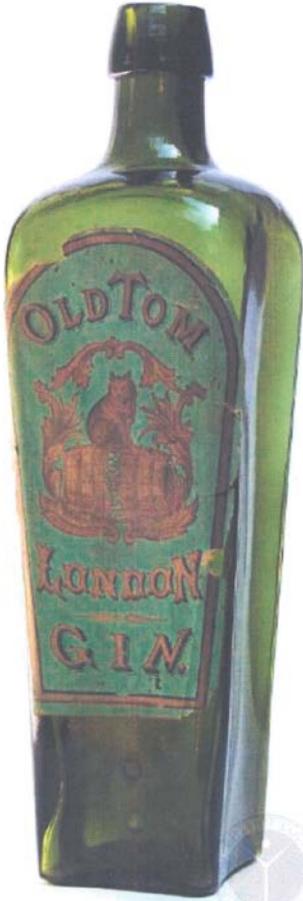
35. In assessing the evidence, the decision taker is entitled to draw inferences from proven facts provided that he or she does so rationally and without allowing the assessment to degenerate into an exercise in speculation. The Court of Justice has confirmed that there must be an overall assessment which takes into account all factors relevant to the particular case: Case C-529/07 Chocoladefabriken Lindt & Sprüngli AG v. Franz Hauswirth GmbH [2009] ECR I-4893 at paragraph [37]; Case C-569/08 Internetportal und Marketing GmbH v. Richard Schlicht [2010] ECR I-00000 at paragraph [42]. As part of that assessment it is necessary as part of that approach to consider the intention of the applicant at the time when the application was filed, with intention being regarded as a subjective factor to be determined by reference to the objective circumstances of the particular case: Chocoladefabriken Lindt & Sprüngli GmbH (above) at paragraphs [41], [42]; Internetportal und Marketing GmbH (above) at paragraph [45]. This accords with the well-established principle that 'national courts may, case by case, take account on the basis of objective evidence of abuse or fraudulent conduct on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provisions of Community law on which they seek to rely': Case C16/05 The Queen (on the applications of Veli Tum and Mehmet Dari) v. Secretary of State for the Home Department [2007] ECR I-7415 at paragraph [64].

36. The concept of assessing subjective intention objectively has recently been examined by the Court of Appeal in the context of civil proceedings where the defendant was alleged to have acted dishonestly: Starglade Properties Ltd v. Roland Nash [2010] EWCA Civ 1314 (19 November 2010). The Court considered the law as stated in Royal Brunei Airlines v. Tan [1995] 2 AC 378 (PC), Twinsectra Ltd v. Yardley [2002] 2 AC 164 (HL), Barlow Clowes International Ltd v. Eurotrust International Ltd [2006] 1 WLR 1476 (PC) and Abu Rahman v. Abacha [2007] 1 LLRep 115 (CA). These cases were taken to have decided that there is a single standard of honesty, objectively determined by the court and applied to the specific conduct of a specific individual possessing the knowledge and qualities that he or she actually possessed: see paragraphs [25], [28], [29] and [32]. This appears to me to accord with treating intention as a subjective factor to be determined by reference to the objective circumstances of the particular case, as envisaged by the judgments of the Court of Justice relating to the assessment of objections to registration on the ground of bad faith."

16. In terms of the date at which the matter falls to be considered, it is well established that the relevant date for consideration of a bad faith claim is the application filing date or at least a date no later than that (*Chocoladefabriken Lindt & Sprüngli AG v. Franz Hauswirth GmbH* [2009] ECR I-4893; *Hotpicks Trade Mark*, [2004] RPC 42 and *Nonogram Trade Mark*, [2001] RPC 21).

17. In its initial statement of grounds, the applicant claims the trade mark should not have been registered as it "was made in bad faith because the image represented [in it] is a direct copy of a photograph taken by a third party in which copyright subsists."

18. For ease of reference, I set out the respective mark and image below:

Mr Maslyukov's trade mark	Mr Haigh's image
	

19. Its amended application clarified the claim. It stated:

- 1: The image represented [-] is a direct copy of a photograph taken by a third party in which copyright subsists;
- 2: A copy of that photograph is set out in Schedule 1 hereto on sheet 16 of these Amended Grounds of Invalidity (“the cocktail DB Image”);
- 3: The Cocktail DB Image is an original copyright work within the meaning of the Copyright, Designs and Patents Act 1988 (“CDPA 1988”);
- 4: The Cocktail DB Image was created in about 2004, prior to the filing of the Registered Mark in 2006, in the United States of America by an independent third party, Mr Edward Newman Haigh II, who was at all material times a US citizen;

5: As at the date hereof the copyright in the Cocktail DB Image is and was at all material times owned by the said Mr Haigh as the sole and exclusive legal and beneficial owner thereof;

6: The lower half of the Cocktail DB Image bears a copyright protection watermark, applied by Mr Haigh after taking the original photograph constituting the Cocktail DB Image.

7: In 2004, shortly after the said photograph was taken, the Cocktail DB Image (bearing the said watermark) was uploaded on to a website operated by Mr Haigh, and at all material times between then and the date hereof has remained available online and accessible to the general public;

8: The Registered Mark was created and filed by for or on behalf of Mr Pavel Maslyukov ("the RP") subsequent to the creation of the Cocktail DB Image, without the knowledge, licence or consent of the said Mr Haigh;

9: The Registered Mark is identical to the top half of the Cocktail DB Image, and appears likely to have been (and it is alleged that it was) simply cropped (that is to say, selectively copied and pasted) from the Cocktail DB Image. The result is that the copyright protection watermark (which appeared only on the lower half of the Cocktail DB Image) does not appear in the Registered Mark;

10: It is reasonable to infer, and is hereby alleged, that the removal of the copyright protection watermark was a deliberate act done to avoid drawing attention to the fact that the Cocktail DB Image was a copyright work owned by an independent third party who had not provided his consent to the use of that work;

11: Nevertheless, the Registered Mark constitutes a substantial reproduction of the Cocktail DB Image, made without the knowledge, licence or consent of the copyright owner. Both the making of the Registered Mark and the filing of the application to register the Registered Mark therefore involved one or more acts of copyright infringement, and copies of the Registered Mark constitute infringing articles within the meaning of the CDPA 1988;

12: All of the above matters must have been known, or ought to have been known, by the Registered Proprietor at the time that the application for registration of the Registered Mark was filed;

13: In all the said circumstances, the Registered Proprietor's conduct in filing the application for registration of the Registered Mark fell short of the standards of acceptable commercial behaviour observed by reasonable people operating in the provision of the goods and services covered by the specification of the Registered Mark;

14: In all the circumstances it is reasonable to infer, and the applicant for invalidity...does infer.....that the application for registration of the Registered

Mark was made in bad faith, contrary to section 3(6) of the Trade Marks Act 1994.”

20. In his counterstatement, Mr Maslyukov stated:

“The image represented in my trademark is not a direct copy of some drawing opponent claims to own copyright. I ordered the design of the cat shown on the label of my trademark from the famous Russian artist Danila Reshta and he designed the Cat, totally different from the trademarks of the opponent”.

The evidence

21. The applicant’s evidence is from Mr Andrew John Murch, a registered trade mark attorney with Hallmark IP Limited, its legal representatives in these proceedings. Mr Murch states that he has conducted the proceedings on behalf of his firm having taken over from his colleague, Mrs Jennifer Hitchcock due to her unavailability.

22. Mr Murch states that Mrs Hitchcock was the person who traced the owner of the image from which the mark in suit derives. She also identified the original copyright owner.

23. Mr Murch refers to Mr Maslyukov’s assertion in his counterstatement that he commissioned the cat design and states that he has carried out searches for the Russian artist Denila Reshta but did not find any references to him in connection with the words shown within the trade mark or the image of the mark. The results of his searches are exhibited at AJM3.

24. Mr Murch states that in earlier proceedings involving Mr Maslyukov, the propriety of his commercial conduct has been found to fall short of the standards of acceptable commercial behaviour. He refers to the decision in *Maslyukov v Diageo Distilling Ltd* [2010] EXHC 443 [2010] RPC (21) 641 (Ch).

25. In her witness statement, Mrs Hitchcock states that the cocktaildb.com website styles itself as the Internet Cocktail Database. She exhibits, at JH1, copies of pages downloaded from that website which she viewed in November 2010. At pages 19 and 21 are shown pictures of a bottle of gin bearing an “Old Tom and cat” label. The pages bear a copyright date of 2004. Mrs Hitchcock comments on the points of similarity of those images to that of the mark in suit and points out that only the bottom half, which shows a copyright protection watermark, has been excluded from Mr Maslyukov’s mark. A further print of the bottle is exhibited at JH-2.

26. Mrs Hitchcock states that she traced the owner of the website, Mr Edward Haigh. Details taken from the WHOIS register giving his name are exhibited at JH-3. It shows the registration of the Internet Cocktail Database website created on 28 June 2000 and expiring the same date in 2018 and gives the contact details of Mr Haigh as both administrative and technical contact. Mrs Hitchcock states she telephoned Mr Haigh on or about 25 November 2010 and followed up that conversation with an email. As a result, Mr Haigh confirmed that he had created the image which appeared on his website, having taken the photograph in 2004 from a bottle of gin which he owned. Mr Haigh subsequently wrote to Mrs Hitchcock confirming the

content of the earlier telephone call. A copy of the letter from Mr Haigh to Mrs Hitchcock is exhibited at JH-4. The letter is addressed to Mrs Hitchcock and is dated 23 February 2011. Written on the Internet Cocktail Database headed paper, it is signed by Edward Newman Haigh II, owner of cocktaildb.com and refers specifically to trade mark registration no 2429824. A copy of the letter is at Annex 2 to this decision but, in brief, it confirms the earlier telephone conversation between Mr Haigh and Mrs Hitchcock and indicates Mr Haigh's understanding that the letter is to be used in evidence before the Office. He confirms that he has no objection to this. Mr Haigh confirms he co-founded the website and domain name cocktaildb.com and is now the sole owner of it and is responsible for both the administration and maintenance of it. He confirms he has seen a copy of the registered mark and that he alone is the owner of that image and all rights accorded to it. He states he has never given Mr Maslyukov permission to use the image in any manner nor has he given permission to him to apply for trade mark registration containing that image.

27. Mr Haigh explains how he created the original photographic image and how it is used on his database/website. He confirms he was not acting in the course of any duties for an employer or organisation when he took the photograph. He explains how a digital watermark is applied to assert ownership of the images. He states the image was uploaded onto his website in September 2004 and, with the exception of occasional system maintenance, it has been in continuous operation and available for view since that date.

28. Mr Haigh states that the trade mark in suit is: "an obvious and direct copy of the top half of [his] original image" and that "Clearly, deleting the bottom half also deletes Cocktaildb's digital watermark." He asserts, "with complete certainty that, pixel-for-pixel, Mr Maslyukov's image and [his own] are absolutely identical."

29. That concludes my summary of the evidence to the extent I consider it necessary.

Decision

30. In its written submissions, the applicant refers me to the case of *DEMON ALE Trade Mark* [2000] RPC 345 where the Appointed Person said:

"...these observations recognised that the expression "bad faith" has moral overtones which appear to make it possible for an application for registration to be rendered invalid under section 3(6) by behaviour which otherwise involves no breach of any duty, obligation, prohibition or requirement that is legally binding on the applicant."

31. As indicated above, the applicant also refers me to the case of *Maslyukov v Diageo Distilling Ltd*. In this case, and in applying to register the trade marks DALLAS DHU, CONVALMORE AND PITYVAICH in relation to alcoholic drinks, the same Mr Maslyukov was found to have been attempting to appropriate the reputation of those distilleries. On appeal to the High Court from a decision of the registrar, Arnold J noted "that whilst this finding had not involved a finding of actual dishonesty, it was nevertheless supported by the facts, and was in itself (i.e. without any finding of actual dishonesty) sufficient to justify a finding of bad faith".

32. Mr Maslyukov's claim that the "design of the cat" was created by a Russian artist is not substantiated in any way but, in any event, Mr Maslyukov's trade mark registration consists of much more than just a device of a cat. He is silent as to the provenance of the trade mark itself but there can be little doubt that the whole of Mr Maslyukov's trade mark is taken from, and is a direct copy of, a significant part of the image which Mr Haigh states he created in September 2004 and which has been on his website since then. I find that the complexity of the image is such that it is simply not credible that a second person would have arrived at it co-incidentally and without reference to the earlier photograph.

33. Whilst the information provided by Mr Haigh is given only in a letter, its content makes it clear that he understands the letter will be used in evidence in these proceedings and that he has "no objection to this letter being put forward to the UK IPO as evidence of the matter set forth [in it] without limitation." The letter refers to his telephone conversation with Mrs Hitchcock. Mrs Hitchcock confirms that conversation and its content in a witness statement. In the circumstances of these proceedings, I give this evidence considerable weight.

34. There is no evidence from Mr Maslyukov though it is clear he has been involved in the registration of trade marks, and particularly in respect of those relating to the drinks industry, for a number of years. Mr Haigh runs a website. A photograph he took in 2004 is posted on that website for anyone to view but the watermark appearing on it makes it clear that the unauthorised use of it is not permitted. Mr Maslyukov's trade mark is identical to that part of Mr Haigh's posted photograph which is not obscured by the watermark.

35. On the balance of probabilities, Mr Maslyukov's trade mark was taken from the image appearing on Mr Haigh's website without any prior permission having been sought and with no permission of any nature having been given. That is sufficient, in my view, to find Mr Maslyukov's behaviour improper and contrary to the standards of acceptable commercial behaviour observed by reasonable and experienced men in business and he knew, or ought to have known that the image forming his mark belonged to another. In view of the above, I find the application for registration of the trade mark was made in bad faith.

Summary

36. The application for the invalidation of the trade mark registration, on grounds under section 3(6) of the Act, succeeds.

Costs

37. The applicant, having succeeded, is entitled to an award of costs in its favour. I make the award on the following basis:

Filing statement and reviewing other side's statement:	£300
Official Fee:	£200
Filing evidence:	£300
Attending and preparation for CMC:	£200
Written submissions:	£200
Total:	£1200

38. I order Mr Pavel Maslyukov to pay Frederic Robinson Limited the sum of £1200 as a contribution towards its costs. This sum is to be paid with seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 16th day of October 2012

**Ann Corbett
For the Registrar
The Comptroller-General**

ANNEX

1

Carl White
Trade Marks Registry
Cardiff Road, Newport
Wales, NP10 8QQ

M3-IPO-NEWPORT
02 / AUG / 2012

Pavel A. Maslyukov
3-ia Vladimirskaia, 12-2-9
111401 Moscow Russia

07.07.2012

Invalidity No: 84199
Trademark registration No: 2429824
Your ref: INV84199/TS/CW



Dear Sir,

Below I response on your letter dated on 12 June 2012. I acknowledge receipt of the pack of papers considered to be Robinson's evidence but let me answer on your communication fist. I ask to attach this comment to the trademark case. A copy is sent to Robinson.

Look, I see no reason why to disclose to you my address in the UK. I am persuaded that the present invalidity proceeding is nothing more but a provocation jointly organized by an English trademark agents and English state intelligence agencies expecting once again to "show" me as a foreigner that your country has zero opportunities for ANY business without making joint ventures with local companies for foreign money laundering. Thus the final result from this your "circus" named "invalidity proceedings" may be predicted from the beginning.

Now more concretely about disposition Rules 11(1)(d) and Rules 12(4)(d) introduced by the Trade Mark Rules 2008.

They are discriminative because affect the rights of trademark owners, the Proprietors of assets in your country. In the other words your disposition is the element of robbery of foreign assets. That is from my side.

From your side, what for to provide you address in the UK when this your UK will not exist, being divided into independent states (like Scotland) not forming part of EEA or when Gibraltar monkeys will continue having citizenship of EU but as Spanish nationals? Unfortunately the Germans didn't cross the Channel in 1940 for your, similar to what could happen with monkeys in Gibraltar after Spanish control, possible own evolution. Instead the Afghans teach you now by heroin trainspotting via your Ministry of Defense... So from your side your newly introduced requirement for address looks short-sighted and asks to do silly monkey business before the changes.

So, sorry, Mr. Carl White but I will not provide you the non Russian address for service. Please could you be so kind after my response to use the address in Russia, for further proceedings concerning the Cat device. I also am not willing my trademark file be withdrawn. Thank you.

Pavel Maslyukov

A handwritten signature in black ink, appearing to be "Pavel Maslyukov", written over a horizontal line.

Hallmark IP Limited
1 Pemberton Row
London, England
EC4A 3BG

Annex
2



927 North Cordova Street • Burbank, California 91505
info@cocktaildb.com

Ms. Jennifer Hitchcock Hallmark IP Limited
1 Pemberton Row
London
EC4A 3BG
United Kingdom
BY FAX & BY EMAIL:
+44 20 3102 9001
<Jennifer.Hitchcock@hallmark-ip.com>

Wednesday, February 23, 2011

Dear Ms. Hitchcock,
RE: Masyukov's U.K. Trade Mark Application No. 2429824

1. I am writing this letter at your request, following our telephone conversation taking place on Thursday November 25th, 2010, to state my position and render information regarding certain properties I own. Please feel free to pass these observations along to the UK Intellectual Property Office (the "UK IPO") for its consideration. I understand that this letter will be used by your firm in evidence before the UK IPO, and I confirm that I have no objection to this letter being put forward to the UK IPO as evidence of the matters set forth below without limitation.

2. I confirm that I am the co-founder and exclusive owner of the website, and the domain name www.cocktaildb.com which provides online access to a database of cocktail information and related imagery. I am responsible for the administration and maintenance of that website and domain name.

3. From our telephone conversation I understand that Mr. Pavel Maslyukov is currently applying to register a trade mark in the United Kingdom under UK trade mark application no. 2429824. I was vexed to learn from you that Mr. Maslyukov is applying to register as his own trade mark the image ("the Maslyukov Image") appended by you as Schedule 1 to this document. The reason for my consternation is that I alone am the owner of that image with any and all rights accorded thereto, and I have never given Mr. Maslyukov permission to use said image in any manner nor, assuredly to apply for a trade mark containing that image. If his assertion of trademark has any basis upon the image of that bottle, it is without my permission, implied or expressed and is fraudulent.

32

The facts explaining how I came to be the owner of the copyright of that original image are set forth below.

4. I am the owner and copyright holder of the photograph based on the fact that that I took said photograph. In further clarification, the image was derived from my digital photograph of the original bottle depicted; a bottle I obtained at auction in 1997. I still own that bottle which is currently on display in an exhibit at The Museum of the American Cocktail in New Orleans, Louisiana.

5. The photograph was taken for use on my Cocktaildb.com website on August 8th, 2004 in a section set forth to define and depict Old Tom Gin. At the time, I was one of two partners owning the site. I am now the sole owner of the site and all of its assets. The website is run as a not-for-profit informational resource on the subject of cocktails and their constituent ingredients. I was not acting in the course of my duties for any employer or organization when I took the photograph. The photography and my decision to use it on Cocktaildb.com was undertaken autonomously by me as then co-owner of the site and full owner of the image and the bottle depicted.

6. All asset images uploaded to Cocktaildb.com are automatically given a digital watermark to assert ownership, to prevent Intellectual Property theft, and discourage use without permission. Every page on the site contains this notice: "All photography on this site is under copyright control" with a link to a page discussing image licensing. I attach hereto a large full color copy of that photograph ("the Original Image") so marked in Schedule 2.

7. I uploaded the Original Image to Cocktaildb.com in September of 2004. Given occasional system maintenance down time, the site has been in continuous operation since that time and the Old Tom bottle image has continuously available since then on an ongoing basis ever since. I attach hereto three full color website page images depicting circumstances where the Old Tom Bottle image appears, so indicated in Schedule 3. As a side note, number three of these images also clearly shows other Old Tom bottle images authored by me that make quite clear the Public Domain status of the term "Old Tom" and the depiction of the feline and the feline and barrel marks. While textual edits have, on occasion, been applied to site from time to time over the years, the Original Image of the Old Tom Gin bottle has not been altered in any manner since its aforementioned original upload.

8. I understand that for the purposes of asserting copyright of a work, the nationality of the author of the work can be important to establish. I can confirm that I am and have been a United States citizen since birth and am domiciled in the U.S.A. I can likewise confirm

that at the time I took the photograph I was a co-owner of Cocktaildb.com, a privately held company with offices in New York City and Los Angeles.

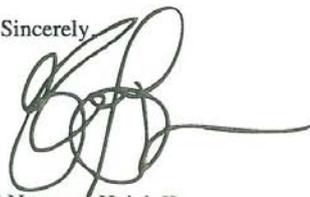
10. I remain the owner of the copyright of the Original Image to this day. I reiterate, I have never given Mr. Maslyukov permission to use my image, and I have certainly not permitted him to use it as the basis of any trade mark application or registration. Moreover, I maintain every email every sent to the published email address of Cocktaildb.com and have never received even a single query from this person.

11. On November 25th, 2010 I spoke to Ms. Hitchcock of Hallmark IP Limited, and she alerted me to the existence of Mr. Maslyukov's UK trademark application. The Image applied for by Mr. Maslyukov is an obvious and direct copy of the top half of my Original Image. Clearly, deleting the bottom half also deletes CocktailBD's digital watermark. As a professional Graphic Designer of 25 year experience, I can assert with complete certainty that, pixel-for-pixel, Mr. Maslyukov's image and mine are absolutely identical.

12. Since I believe my bottle to be quite rare – one-of-a-kind, in fact - Mr. Maslyukov's assertions as relate to the Old Tom bottle could be easily settled by his simply producing the bottle he allegedly owns. I have no doubt he would be unable to do so for the reasons I stipulate in this letter.

13. If you or the UK IPO would like any clarification or further information relating to any of the above, please do not hesitate to contact me. I will be more than happy to assist.

Sincerely,

A handwritten signature in black ink, appearing to be 'E. Newman Haigh II', with a long horizontal flourish extending to the right.

Edward Newman Haigh II
Owner, Cocktaildb.com

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