

20th U.S.–China Legal Exchange: Cross-Border Enforcement of IPR in the Internet Environment

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Private Litigation Options

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Counterfeiting

- In 2015, the International Chamber of Commerce predicted that the global value of counterfeit and pirated goods could reach \$1.77 trillion and put 2.5 million legitimate jobs at risk.
- China is the United States' largest supplier of goods imports (\$440.4 billion in 2013, according to the U.S. Trade Representative).
- It is no surprise that many of those goods are counterfeit.



Counterfeiting and the Internet

- The Internet has opened the door for counterfeiters to reach a wide range of consumers in their efforts to sell counterfeit products, both through online auction sites and through websites set up by the counterfeiters themselves.
- Websites selling counterfeits usually boast openly that their products are “exact replicas” or “100% mirror images” of authentic products sold by luxury brands.

AUTHENTIC



COUNTERFEIT



Traditional Anti-Counterfeiting Tactics Are Often Ineffective at Stopping Internet Counterfeiters

- Most Internet counterfeiters do not maintain inventory in the U.S.
- Instead, goods are individually “drop shipped” to customers from the website’s manufacturers and suppliers in China using China’s postal service (EMS) and the U.S. postal service.
- Customs seizures are ineffective against Internet counterfeiters as each shipment usually contains only a few items for an individual customer.
- Although websites target U.S. consumers, they are often operated from outside the U.S. and provide either no or false contact information.
- The cost to a brand owner of shutting down a website is far more than the cost to the counterfeiter of opening a new website.
- Counterfeiters banned from auction sites may be able to set up new accounts and user names.

Tracing of Internet Counterfeiters

- Nearly all sales of online counterfeits are paid for by credit card.
 - To accept credit cards, the counterfeiters must either:
 - establish a relationship with a credit card processor to accept payment directly through the website; or
 - use an online payment system like PayPal to facilitate the transfer of funds.
- Therefore, Internet counterfeiters must interact with a banking system that keeps records of each transaction.

RiskWithdrawClient response: [false 86400 6 rule id: 34415;f
AChPendingProcessorImpl::ProcessTransaction 41723711378 r
RiskWithdrawClient response: [false 86400 6 rule id: 34415;f
probable unauthorized account access and/or fraudulent with
Web user added new Mobile Phone +86 13570517932
Web user removed Mobile Phone 13631495517
NCountry: C2; Bank Name: Bank of China; Account Type: Wire;
dealbargain999@gmail.com; Visitor ID: 6124897680065944906

PayPal Activity Log

Tracing of Internet Counterfeiters

- Many Internet counterfeiters seek prominent placement in search engine results to attract consumers, and this visibility can make it easier for brand owners to find the counterfeiters as well.

The screenshot displays a website listing for **cheapjordansi.com**. At the top right, it states "This site is **unclaimed**. [Claim this Site](#)". Below the site name, there is a "Statistics Summary for cheapjordansi.com" section. The text indicates that the site's three-month global Alexa traffic rank is 570,237, with a relatively good rank in Putian (#5,547) and almost all visitors coming from China. A "Show More" link is provided. The "Alexa Traffic Rank" section shows a global rank of 570,237 and a rank of 78,018 in China (CN). The "Reputation" section shows a score of 34 from 34 sites linking in, with no reviews yet. A "Did you know?" tip suggests enhancing the site listing by displaying visitors and pageviews. At the bottom, there are navigation buttons for Traffic Stats, Search Analytics, Audience, Contact Info, Reviews, Related Links, and Clickstream.

Alexa Traffic Rank		Reputation	
Global Rank	570,237	Sites Linking In	34
Rank in CN	78,018		(No reviews yet)

U.S. Trademark Law May Apply to Chinese Entities

Extraterritoriality

- The Supreme Court addressed the applicability of U.S. trademark laws in *Steele v. Bulova Watch Co.*
 - Held the Lanham Act applies to the sale of counterfeits in foreign countries where it may affect U.S. commerce



“Congress has the power to prevent unfair trade practices in foreign commerce by citizens of the United States, although some of the acts are done outside the territorial limits of the United States.”

344 U.S. 280, 286 (1952)

U.S. Trademark Law May Apply to Chinese Entities

Personal Jurisdiction

- Companies that are found to have “purposefully availed themselves” of the U.S. forum can be subject to jurisdiction for trademark violations. For example, if they:
 - Operate websites in English;
 - Accept dollars or American credit card payments; and
 - Ship products to the U.S.

Counterfeiters’ “alleged offering for sale of the subject goods on [their] internet site, including to New York customers whose location they knew ... demonstrates the requisite purposeful availment of the New York forum. . . . [I]t was readily foreseeable to the [counterfeiters] that their conduct caused them to have significant contacts with New York, so as to render it reasonable for them to be haled into court here.”

Balenciaga Am., Inc. et al. v. Dollinger et al., 2010 U.S. Dist. LEXIS 107733, at *17-*19 (S.D.N.Y. Oct. 8, 2010)

Relief Available From U.S. Courts

Temporary Restraining Orders

- An order that restrains defendants “and all persons acting in concert or in participation” from “manufacturing, distributing, delivering, shipping, importing, exporting, advertising, marketing, promoting, selling, or otherwise offering for sale Counterfeit Products” requires that:
 - The counterfeiter cease operating their website and engaging in the sale of counterfeit products; and
 - The third-party companies that provide hosting, advertising, shopping cart services or credit card processing to the counterfeiter to cease providing those services or risk contempt of a court order.
- Authority: Fed. R. Civ. P. 65; Courts’ inherent equitable powers; 15 U.S.C. § 1116(d) (trademark); 17 U.S.C. § 502 (copyright)

Relief Available From U.S. Courts

Temporary Restraining Orders

- Example: *Nike Inc. v. Wu*, No. 13 Civ. 8012 (SAS) (S.D.N.Y. 2015), which shut down approximately 1,200 websites.
- Advantages:
 - Reduce costs by shutting down counterfeiters' websites in large batches
 - Disrupt search engine optimization
 - Replace counterfeiters' messages with brand owner's own message

Burberry Limited, et al. v. The Partnerships and Unincorporated Associations Identified on Schedule "A"; Case No. 14-cv-6287

An e-commerce store selling counterfeit Burberry merchandise was formerly associated with this domain. Because the website was harming consumers, BURBERRY took legal action, and the operator of the website was ordered to transfer the domain name to BURBERRY.

BURBERRY is committed to the fight against counterfeiting. Protecting consumers from the substandard craftsmanship and poor-quality materials used in the manufacture of counterfeit Burberry products is a priority for BURBERRY. By monitoring the online sale of counterfeit Burberry goods and taking legal action when necessary, BURBERRY continues to do its part to combat this damaging industry.

Please note that the only way to ensure that you are purchasing genuine BURBERRY merchandise is to purchase it from BURBERRY, online at www.Burberry.com, or at select authorized retailers.

Relief Available From U.S. Courts

Asset Freeze Orders

- An order that restrains defendants, their banks and credit card processors “from transferring, disposing of, or secreting any money, stocks, bonds, real or personal property, or other assets of Defendants... into or out of any accounts associated with or utilized by any of the Defendants” will:
 - Cut off the counterfeiter’s funding
 - Require third-party banks to freeze the counterfeiter’s personal and business accounts
 - Require third-party credit card processors to freeze the proceeds from the counterfeiter’s sales or risk being found in contempt of court
 - Likely result in shutting down multiple websites because counterfeiters often use one credit card processing account for all of their websites

Relief Available From U.S. Courts

Asset Freeze Orders

United States courts can freeze a counterfeiter's assets anywhere in the world:

“[P]ersonal jurisdiction over the defendants . . . is all that was needed for the district court to restrain the defendants' assets pending trial.

. . .

Plaintiffs in trademark infringement actions may recover defendants' profits. . . . In such circumstances, the district court had the inherent equitable authority to issue the Asset Freeze Injunction.”

Gucci Am., Inc. v. Bank of China, 768 F.3d 122, 129-130 (2d Cir. 2014)

Relief Available From U.S. Courts

Authorization for Alternative Service of Process

- Fed. R. Civ. P. 4 generally requires service on a defendant personally, on an adult at the defendant's usual place of abode, or on an authorized agent.
- For international defendants, service by means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents or "other means not prohibited by international agreement, as the court orders."
- Courts allow service of process by email for defendants located in China if Defendants used email to communicate with their customers.

Gucci America, Inc. v. BagsMerchant LLC, 10 Civ. 2911 (DAB) (S.D.N.Y.)

Relief Available From U.S. Courts

Expedited Discovery Against Defendants and Third Parties

- An order requiring defendants and “any banks, savings and loan associations, credit card companies, credit card processing agencies, or other financial institutions . . . who receive actual notice of this order [to] provide to Plaintiffs all records in their possession, custody, or control, concerning any and all assets of Defendants or any other entities acting in concert or participation”
 - Many times, the counterfeiter will not comply or not show up to court, but third parties still must produce documents, including banks, credit card processors, and ISPs who have documents concerning the scope of the counterfeiter’s business operations
 - Expedited discovery provides almost immediate access to the counterfeiter’s financial and business records, which third parties are required to turn over or risk being found in contempt of a court order

Discovery From Chinese Banks Under U.S. Law

The Hague Convention on the Taking of Evidence Abroad

- The Hague Convention allows U.S. litigants to ask for documents or other discovery from non-parties in foreign countries under the rules and procedures of that country.
- Compared to discovery under the U.S. Federal Rules, Hague Convention procedures can be slow, cumbersome, and ineffective.
- For instance, in *Wultz v. Bank of China*, a U.S. District Judge found the Hague Convention did not present a “viable . . . method of securing the information” sought because, among other things, a thirteen-month period had passed since the request was made and the Ministry of Justice of the PRC had not responded, and a review of Hague Convention responses in other cases showed that Chinese authorities had narrowed the scope of the request without explanation.

11 Civ. 1266 (SAS) (S.D.N.Y. Oct. 29, 2012)

Discovery From Chinese Banks Under U.S. Law

Gucci America, Inc. v. Bank of China, 768 F.3d 122 (2d Cir. 2014): Manufacturers of luxury goods obtained an order compelling defendant-counterfeiter's non-party foreign bank to comply with a U.S. document subpoena. BOC appealed, and the Second Circuit held:



- District court properly balanced comity considerations in weighing U.S. interest in enforcing trademark law against Chinese banking privacy law.
- But, the Second Circuit asked the district court to re-evaluate questions of personal jurisdiction in light of the Supreme Court's intervening decision in *Daimler AG v. Bauman*.

Discovery From Chinese Banks Under U.S. Law

Gucci America, Inc. v. Bank of China, 10 Civ. 4974 (RJS) (S.D.N.Y. Sept. 29, 2015)

- On remand, Judge Sullivan found in Gucci’s favor on all counts.
- Court had personal jurisdiction over BOC because of BOC’s “substantial, deliberate, and recurring conduct” in New York, including 2 staffed branches and a correspondent account at JPMorgan Chase in New York in order to facilitate transfers to its customers, which BOC “encouraged its clients to rely on.”
- Found a “strong relationship” between the BOC’s conduct in New York and Gucci’s claims because wire transfers between the U.S. and China through BOC’s New York correspondent account were “crucial components of [the] counterfeiting operation.”
- Document production order comported with the principles of due process and international comity.

When Third Parties Fail to Comply

- *Gucci Am., Inc. v. Curveal Fashion*,
09 Civ. 8458 (RJS), 2010 WL 808639, at *7 (S.D.N.Y. Mar. 8, 2010)
 - United Overseas Bank (“UOB”) Malaysia was served with a subpoena seeking records about counterfeiters that transferred counterfeiting proceeds to the bank
 - The district court concluded that “a parent company doing business in New York is required to produce documents held by its subsidiary, even if located overseas”
 - When UOB refused to produce the documents, the district court held UOB in contempt, awarded Plaintiffs attorneys’ fees, and imposed a coercive fine of \$10,000 per day for each future day of noncompliance
- *Gucci Am., Inc. v. Li*,
10 Civ. 4974 (RJS) (S.D.N.Y. Dec. 1, 2015)
 - When BOC refused to produce documents, the district court held BOC in contempt, awarded Plaintiffs attorneys’ fees, and imposed a coercive fine of \$50,000 per day for each future day of noncompliance
 - The Court of Appeals denied BOC’s request to stay the order

Stopping Counterfeiters Indirectly: Secondary Liability

- The Supreme Court has held that liability for trademark infringement can extend beyond direct infringers: “If a manufacturer or distributor intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement, the manufacturer or distributor is contributorily liable for any harm as a result of the deceit.” *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 854 (1982)
- The flea market or swap meet operator who knowingly provides a booth to a seller of counterfeit goods is the archetype of secondary liability.
 - *Hard Rock Café Licensing Corp. v. Concession Servs., Inc.*, 955 F.2d 1143 (7th Cir. 1992) (“knowledge” prong could be satisfied if a landlord “suspected wrongdoing and deliberately failed to investigate”)
 - *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996) (“it would [have been] difficult for the infringing activity to take place in the massive quantities alleged without the support services provided by the swap meet”)
- Using precedent from “brick and mortar” cases applying *Inwood*, brand owners have attempted, with mixed results, to impose liability on the entities that allow counterfeiters to sell their illegal products to a wide audience via the Internet.

Stopping Counterfeiters Indirectly: Secondary Liability

- Internet Service Providers/Website Hosts
 - *Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc.*, 591 F. Supp. 2d 1098 (N.D. Cal. 2008), *aff'd in part, rev'd in part*, 658 F.3d 936 (9th Cir. 2012): The court denied ISP's motion for summary judgment, noting that defendants' hosting services were "the internet equivalent of leasing real estate." At trial, a jury awarded Louis Vuitton \$10.8 million in statutory damages
 - Confirms that statutory damages may be assessed against secondary infringers
- Credit Card Processors/Financial Institutions
 - In *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 807 (9th Cir. 2007), the Ninth Circuit affirmed dismissal of plaintiff's contributory infringement claims because the credit card company defendants were not aware of their customers' counterfeiting
 - **But**, in *Gucci America, Inc. v. Frontline Processing Corp.*, 721 F. Supp. 2d 228 (S.D.N.Y. 2010), the court sustained plaintiffs' contributory infringement claim, based on the processors' knowledge that they were servicing counterfeiters

Stopping Counterfeiters Indirectly: Secondary Liability

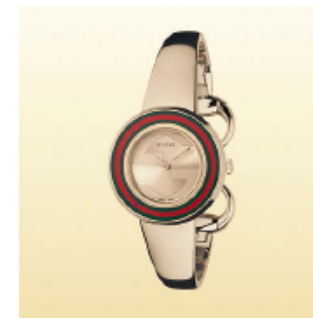
- Search Engines
 - *Rosetta Stone, Ltd. v. Google, Inc.*, 676 F.3d 144 (4th Cir. 2012): The Fourth Circuit reversed the trial court’s grant of summary judgment to Google, finding that Rosetta Stone had adduced sufficient evidence that Google had knowingly assisted counterfeiters by allowing them to serve confusing “sponsored link” advertisements in response to searches for Rosetta Stone’s trademark
- Online Auction Websites
 - *Tiffany (NJ) Inc. v. eBay Inc.*, 576 F. Supp. 2d 463 (S.D.N.Y. 2008), *aff’d in part, rev’d in part*, 600 F.3d 93 (2d Cir. 2010): The court concluded that Tiffany had established the “control” prong of the *Inwood* standard, but failed to prove that eBay had “specific knowledge of infringement” as opposed to “general knowledge,” which was insufficient to impose liability

Gucci America Inc. v. Alibaba Group Holding Ltd.

112. Another replica wristwatch merchant, Merchant Defendant Shenzhen Meigeer Watch Co., Ltd. (“Shenzhen Meigeer”), also a “Gold Supplier” and “Assessed Supplier,” offered the following counterfeit wristwatch bearing an exact copy of Gucci’s federally registered trademark interlocking non-facing “GG” design and green-red-green stripe, at \$10–\$80 per piece with a minimum of 300 pieces per order and 200,000 pieces per month, until this Merchant Defendant was enjoined.



113. The authentic “u-play collection” Gucci watch, depicted below, retails for \$960. The product displayed below bears Gucci’s federally registered trademark GUCCI name, interlocking non-facing “GG” design, and green-red-green stripe. *See* Ex. 1 (U.S. Reg. Nos. 959,338; 3,470,140; 1,123,224). Although it is obvious that Shenzhen Meigeer was selling wholesale quantities of Counterfeit Products from its electronic store, the Counterfeit Product mimics the design of the authentic Gucci wristwatch shown below and bears an exact copy of Gucci’s federally registered trademark interlocking non-facing “GG” design and green-red-green stripe. The Counterfeit Product was intended to confuse both the ultimate retail consumer and persons observing the ultimate consumer into believing that it is a genuine Gucci product.



Gucci America Inc. v. Alibaba Group Holding Ltd.



140. The Alibaba Defendants knew and should have known that VANCS Where Boutique was selling Counterfeit Products not only because of repeated sales at patently unrealistic prices (approximately \$40 for a pair of shoes that retails for close to \$500), but for the very simple reason that Gucci told them that the products VANCS Where Boutique was selling were counterfeit. The Alibaba Defendants enabled this known seller of counterfeits to effectuate sales of Counterfeit Products by providing the marketplace, advertising, and other services to this Merchant Defendant, including payment processing services.



144. Merchant Defendant Jinlong Luxury City was also selling Counterfeit Products to Internet users through Taobao.com, and on May 21, 2014, Plaintiffs' representatives—after inspecting Jinlong Luxury City's products and verifying that the merchant was selling Counterfeit Products—notified the Taobao Marketplace of that fact. Nonetheless, Jinlong Luxury City continued to market Counterfeit Products through Taobao.com. On June 2, 2014, Jinlong Luxury City sold counterfeit shoes to Plaintiffs' investigator through Taobao.com for shipment to New York. Plaintiffs' investigator paid for the order using a Visa credit card and the transaction was processed through Alipay. The shoes, depicted below, bear Gucci's federally registered repeating "GG" design and green-red-green stripe marks, *see* Ex. 1 (U.S. Reg. Nos. 1,483,526; 4,229,081), and were offered for sale by Jinlong Luxury City for 350 RMB, which is approximately \$56, per pair, until this Merchant Defendant was enjoined. On or about June 17, 2014, Plaintiffs' representatives inspected products received from Jinlong Luxury City and verified that the merchant was selling counterfeit shoes bearing the Gucci Marks. The Alibaba Defendants enabled this known seller of counterfeits to effectuate sales of its Counterfeit Products by providing the marketplace, advertising, and other crucial services to this Merchant Defendant, including payment processing services.

Gucci America Inc. v. Alibaba Group Holding Ltd.

**FIRST CAUSE OF ACTION
AGAINST THE ALIBABA DEFENDANTS**
(Trademark Infringement Under Sections 32 and 43(a)
of the Lanham Act, 15 U.S.C. §§ 1114, 1125(a))

252. Defendants were knowing and willful participants and co-venturers in the marketing and sale of Counterfeit Products described above, making them jointly and severally liable for the marketing and sale of such Counterfeit Products. As set forth in greater detail above, the Alibaba Defendants themselves make confusing uses of the Plaintiffs' Marks by selling Plaintiffs' Marks as keywords to third parties who are not affiliated with Plaintiffs and by creating a search system and response pages that are designed to confuse consumers into incorrectly believing that the Alibaba Defendants' merchant clients offer legitimate Plaintiffs' Products or are otherwise affiliated with, endorsed by, or sponsored by Plaintiffs. The sale of wholesale quantities of the Counterfeit Products which are ultimately resold to retail consumers causes confusion among consumers seeking authentic Plaintiffs' Products. Defendants' actions also cause post-sale confusion among consumers who come in contact with the Counterfeit Products and associate their inferior quality with Plaintiffs' Marks.

Other Trademark Claims:

**SECOND CAUSE OF ACTION
AGAINST THE ALIBABA DEFENDANTS**
(Trademark Counterfeiting Under Sections 32, 34, and 35
of the Lanham Act, 15 U.S.C. §§ 1114(1)(b), 1116(d), & 1117(b)-(c))

**THIRD CAUSE OF ACTION
AGAINST THE ALIBABA DEFENDANTS**
(Contributory Trademark Infringement and Counterfeiting Under the Lanham Act)

**FOURTH CAUSE OF ACTION
AGAINST THE ALIBABA DEFENDANTS**
(False Representation Under Section 43(a)
of the Lanham Act, 15 U.S.C. § 1125(a))

**FIFTH CAUSE OF ACTION
AGAINST THE ALIBABA DEFENDANTS**
(Trademark Dilution Under Section 43(c)
of the Lanham Act, 15 U.S.C. § 1125(c))

Gucci America Inc. v. Alibaba Group Holding Ltd.

Pending RICO Claims:

SIXTH CAUSE OF ACTION
AGAINST THE ALIBABA DEFENDANTS
(Violations of Racketeer Influenced and Corrupt Organizations Act (“RICO”)
18 U.S.C. § 1962(c))

292. The Enterprise consists of the Alibaba Defendants, the Merchant Defendants, and unidentified co-conspirators using the Alibaba Marketplaces who have joined together to form an enterprise in fact whose purpose is to sell and profit from the sale of counterfeit goods. The Merchant Defendants knowingly manufactured and sold, among other counterfeit goods, Counterfeit Products bearing Plaintiffs’ Marks, using the Alibaba Marketplaces and the Alibaba Defendants’ services to effect such sales. The Alibaba Defendants knowingly provided the Merchant Defendants with the online marketplaces and other services to facilitate the sale of counterfeit goods, including marketing, shipping, financing, and payment and/or escrow services that allowed the Merchant Defendants to transact their illegal sales of the Counterfeit Products, and the Alibaba Defendants derived substantial profits from such sales.

Gucci America Inc. v. Alibaba Group Holding Ltd.

Forbes

Why Alibaba's Massive Counterfeit Problem Will Never Be Solved



Gucci America Inc. v. Alibaba Group Holding Ltd.

Forbes

Why Alibaba's Massive Counterfeit Problem Will Never Be Solved

Be warned: Jack Ma, the man who oversees the world's largest online retailer and whom Forbes ranks as the 22nd most powerful person in the world, really doesn't like lawyers. Especially those attacking the very underpinnings of the \$200 billion empire he's built. As rail-thin as ever, Ma almost leaps off the sofa in his Hangzhou office when talking about the fancy New York attorneys who have sued him for trademark infringement and trafficking in counterfeits on behalf of their client, [Kering](#), the French luxury goods conglomerate that owns [Gucci](#) and Yves Saint Laurent. There's no chance, he insists, of settling.

"I would [rather] lose the case, lose the money," says Ma. "But we would gain our dignity and respect."

That is true if he means respect in the eyes of the hundreds of thousands of small Chinese entrepreneurs who've made a living on Alibaba's online bazaar, called Taobao. To Ma, whose Chinese retail sites handle five times the volume of eBay—last year \$394 billion of, well, everything—these sellers are his lifeblood. To the sellers Ma is a hero of capitalism, offering them a path to the middle class. In the center of this social compact, however, is an unacknowledged truth: The Alibaba juggernaut has been constructed to a significant degree on illegal, counterfeit products.

Stopping Counterfeiters: International Cooperation

- **Private civil litigation is not a perfect tool to address issues of counterfeiting, but it is an important tool.**
 - Brand owners have the most incentive to pursue counterfeiters
 - Brand owners know their products best
 - Civil litigation allows government agencies to conserve resources
 - Courts take seriously their obligation to protect the rights of the accused
- **The more that Chinese courts and authorities do to assist brand owners in pursuing counterfeiters, the less that brand owners will need to involve third parties operating in the U.S. and China.**



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Mr. Hogan's practice focuses on intellectual property litigation and counseling, including trademark, copyright, patent, false advertising, right of publicity, licensing, and trade secret matters. Many of Mr. Hogan's matters have tested the application of traditional legal principles to the Internet and new media.

Mr. Hogan has successfully represented a number of luxury brands in pursuing innovative strategies to pursue the operators of websites that sell counterfeit goods. Mr. Hogan is the co-author of *Fashion Law and Business: Brands and Retailers*, a treatise published by the Practising Law Institute, and the trademark and domain name chapters of *Intellectual Property Law in Cyberspace*, a treatise published by BNA Bloomberg.

Mr. Hogan received his B.S.F.S., *magna cum laude*, from Georgetown University School of Foreign Service in 1994 in International Relations, Law, and Organization, *Phi Beta Kappa*. In 1999, he received his J.D., *cum laude*, from New York University School of Law.

Mr. Hogan is a member of the bars of New York, Connecticut, and the District of Columbia.