BELMORA LLC V. BAYER CONSUMER CARE AG: UNFAIR COMPETITION AS AN ALTERNATIVE APPROACH TO PENETRATE THE TERRITORIAL PRINCIPLE IN U.S. TRADEMARK LAW

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I. INTRODUCTION

In 2016, German multinational pharmaceutical company Bayer won a motion to dismiss against U.S. company Belmora LLC in front of the Fourth Circuit. The court decided that a foreign trademark owner had standing to make a Lanham Act 43(a) claim—an unfair competition claim—against the owner of the same mark in the United States, even though the foreign company did not have a U.S. trademark. This remarkable decision led to heated discussions in the legal community over whether a protectable mark is a necessary requirement for a non-U.S. trademark owner to obtain Trademark Trial and Appeal Board's (TTAB) decisions on trademark cancellation and the federal courts' decisions on unfair competition.[1] The Fourth Circuit decided against Belmora LLC, who mimicked the package of Bayer's pain reliever medicine solely sold in Mexico, and supported Bayer to make an unfair competition claim against Belmora regardless of the fact that Bayer did not have trademark rights in the United States. Is *Belmora LLC v. Bayer Consumer Care AG*[2] an example of "bad facts make bad law," or is it an indicator of U.S. courts' new attempt to reconfigure the territorial principle of the Lanham Act

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1. *See* Christine Haight Farley, *No Trademark, No Problem*, 23 B.U. J. SCI. & TECH. L. 304, 304 (2017); Bill Donahue, *The Top 10 Trademark Rulings of 2016*, LAW360 (Dec. 20, 2016, 6:05 PM), http://ptslaw.com/wp-content/uploads/2016/12/The-Top-10-Trademark-Rulings-Of-2016-Law360.pdf [https://perma.cc/TY5T-NCG8]; *Standing to Enforce Foreign Trademark Rights After Belmora v. Bayer Certiorari Denial*, JONES DAY (Mar. 7, 2017), http://www.jonesday.com/standing-to-enforce-foreign-trademark-rights-after-ibelmora-v-bayer-certiorari-denial-03-07-2017/ [https://perma.cc/N3VS-48XX]; Alex MacKay, *Unfair Competition is Such a Headache*, STITES & HARBISON, PLLC: TRADEMARKOLOGY (Mar. 25, 2016), http://www.trademarkologist.com/2016/03/unfair-competition-is-such-a-headache/[https://perma.cc/V6DP-643Q].

2. 819 F.3d 697 (4th Cir. 2016).

and to extend the extraterritoriality doctrine from the well-known mark exception to unfair competition? This Note addresses these questions.

According to Professor Curtis Bradley, U.S. laws have a presumption against extraterritoriality: that is, the courts presume that legislation of Congress applies "only within the territorial boundaries of the United States" unless Congress explicitly says otherwise.[3] Applying this presumption to trademark law, it is logical to think that the Lanham Act does not apply to infringement activities outside of U.S. territory. With the presumption, neither does the Act protect the right of a foreign trademark owner who does not use or register the same mark within the borders of the United States. However, with the increasing number of transnational intellectual property cases being litigated in U.S. courts, the presumption against extraterritoriality has been challenged by both scholars and practitioners.[4] Moreover, U.S. federal courts have applied doctrines of extraterritoriality in cases that involve activities infringing U.S. trademarks that occur overseas or U.S. companies' infringement of foreign trademarks.[5]

As early as 1952, the Supreme Court extended the Lanham Act to infringing conduct of U.S. nationals outside of the United States.[6] But, since the 1990s, U.S. federal courts have split over whether foreign trademark owners can sue U.S. companies for trademark infringement even if the foreign company never used or registered the mark in the United States. Federal circuit courts disagreed on whether extraterritoriality could be applied on the basis of the "well-known mark"[7] exception doctrine for internationally well-known trademark holders who are not involved in commerce in the United States. The Ninth Circuit held in favor of the extraterritoriality of the "well-known mark" exception, while the Second Circuit and the Federal Circuit refused, holding that the exception did not apply for foreign mark owners.[8]

3. Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L LAW 505, 510 (1997).

4. *Id.* at 517–19 (summarizing criticisms of the territoriality presumption).

5. *See generally* Tim W. Dornis, *Behind the* Steele *Curtain: An Empirical Study of Trademark Conflicts Law, 1952–2016*, 20 VAND. J. ENT. & TECH. L. 567 (2018) (describing an increasing trend of trademark suits on extraterritoriality from the 1950s to present, especially 2010 onward).

6. *See* Steele v. Bulova Watch Co., 344 U.S. 280, 287 (1952).

7. "Well-known mark" and "famous mark" are used interchangeably in most cases. But this Note uses "well-known mark" only to distinguish from the "famous mark" requirement in proving the cause of action in dilution claims. *See* Gwen Wei, *Taking Care of Article 6BISNESS: How* Belmora LLC v. Bayer Consumer Care AG *Made the Well-known mark exception doctrine Inevitable in the U.S.*, 12 WASH. J. L. TECH. & ARTS 501, 503 n.4 (2017).

8. *See* Grupo Gigante SA De CV v. Dallo & Co., 391 F.3d 1088, 1094 (9th Cir. 2004); Person's Co., Ltd. v. Christman, 900 F.2d 1565, 1571 (Fed. Cir. 1990); ITC Ltd. v. Punchgini, Inc., 482 F.3d 135, 172 (2d Cir. 2007).

Belmora, however, further complicated the picture by introducing a third approach to penetrate the principle of territoriality in trademark law. The Fourth Circuit in *Belmora* decided that foreign mark owners (i.e., the senior user of a non-U.S. trademark) could make unfair competition claims under the Lanham Act against U.S. trademark users (i.e., the junior users who are U.S. companies and often have U.S. registration of the trademark in dispute).[9] This Note focuses on the circuit split over the territoriality principle of U.S. trademark law in protecting non-registered and not-in-use foreign trademarks in the United States. While exploring the most feasible solution to the problem, this Note will also parse out the considerations that led to the diverging court decisions.

Part II explains the definition and history of the territoriality principle and summarizes scholars' discussions on the possible reconfiguration of the territoriality principle. This section also reviews the emergence of the extraterritoriality doctrine in the U.S. courts. Part III focuses on one application of the extraterritoriality doctrine—the well-known mark exception doctrine—and describes the circuit split before *Belmora*. Part III also reviews the critiques on the pre-*Belmora* decisions, explaining the disagreements on whether the well-known mark exception is applicable to non-U.S. trademark owners who do not have trademark rights in the United States. Part IV describes the procedural history and the decision of the Fourth Circuit in *Belmora*. Part IV also discusses critiques against the *Belmora* decision and explains why *Belmora* was correctly decided. Part V discusses the aftermath of *Belmora* decision. First, based on the historical trend of foreign trademark registration statistics in the United States from 1900 to 2017, this Part highlights the confusion the twofold circuit split on the extraterritoriality nature of the Lanham Act brings to foreign trademark owners. Annual trademark registrations filed by foreign mark owners show a continuously increasing trend which stopped around 1997 when the Ninth Circuit made a favorable decision on the extraterritorial application of the Lanham Act. In the following two decades, the annual trademark registration filed by non-U.S. trademark owners stayed stagnant with periodic ups and downs. Second, this Part presents the potential danger of forum shopping that may come with the circuit split based on data collected by Professor Tim W. Dornis in his 2017 research. Finally, this Part proposes several possible solutions that may help reconcile the conflicted decisions across circuit courts. The proposed solutions include urging Congress to take initiative and formalize the extraterritoriality doctrine by amending the Lanham Act, prompting the Supreme Court to adjudicate the well-known mark doctrine, as well as encouraging trademark

9. *See* Belmora LLC v. Bayer Consumer Care AG, 819 F.3d 697, 715 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1202 (2017).

lawyers to emphasize importance of trademark registration to their foreign clients. Part VI provides the conclusion.

II. THE TERRITORIALITY PRINCIPLE AND THE EXTRA-TERRITORIALITY DOCTRINE IN TRADEMARK LAW

It is long-debated whether the Lanham Act extends beyond geographic borders of the United States, either through protecting non-U.S. trademark owners' rights in the United States, or through protecting U.S. trademark owners' rights from being infringed overseas. This is essentially a question about the territorial nature of trademark law. According to McCarthy on Trademarks and Unfair Competition, the territoriality principle in trademark law means "a trademark has a separate legal existence in each sovereign territory where it is registered or legally recognized as a mark."[10] Based on this principle, trademark rights are national and, as such, the Lanham Act does not apply if an infringing activity happens overseas (where foreign laws should apply), or if the plaintiffs do not have a valid trademark right to be protected (i.e., the trademark is neither registered with the United States Patent and Trademark Office (USPTO) nor in commerce within U.S. boundaries).

Courts frequently reference the territoriality principle, which was once considered a primary principle of the U.S. trademark law.[11] However, exploring the history of trademark law and the implication of the current world economy to the enforcement of trademark law, scholars have concluded that territoriality is not a bedrock principle of the trademark law.[12] Federal courts have also been exploring possibilities to reconfigure the territoriality principle or to form a new extraterritoriality doctrine.[13] Before *Belmora*, the extraterritorial application of trademark law was only achievable through the well-known mark exception. *Belmora* adds a new pathway: the unfair competition doctrine.

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10. J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 29:1 (4th ed. 2010) [hereinafter McCarthy on Trademarks and Unfair Competition].

11. *See generally* Am. Circuit Breaker Corp. v. Or. Breakers, Inc., 406 F.3d 577, 581 (9th Cir. 2005); Kos Pharms., Inc. v. Andrx Corp., 369 F.3d 700, 714 (3d Cir. 2004); Buti v. Impressa Perosa, S.R.L., 139 F.3d 98, 103 (2d Cir. 1998); Person's Co. v. Christman, 900 F.2d 1565, 1568–69 (Fed. Cir. 1990); ITC Ltd. v. Punchgini, Inc., 482 F.3d 135, 155 (2d Cir. 2007).

12. *See* Lee Ann W. Lockridge, *Honoring International Obligations in U.S. Trademark Law: How the Lanham Act Protects Well-Known Foreign Marks (and Why the Second Circuit Was Wrong)*, 84 ST. JOHN'S L. REV. 1347, 1350 (2010); *see also* Almacenes Exito SA v. El Gallo Meat Market, Inc., 381 F. Supp. 2d 324, 326 (explaining the bedrock territoriality principle).

13. *See* Graeme B. Dinwoodie, *Trademarks and Territory: Detaching Trademark Law from the Nation-State*, 41 HOUS. L. REV. 885, 971 (2004).

A. TERRITORIALITY PRINCIPLE IN TRADEMARK LAW

The territoriality principle in trademark law is consistent with the presumption against extraterritoriality in other U.S. laws: that is, the courts presume that legislation of Congress applies "only within the territorial boundaries of the United States" unless Congress explicitly says otherwise.[14] This presumption echoes what David R. Johnson and David Post pointed out in 1996: that geographical borders between countries are important determinants of legal rights and responsibilities.[15] Courts and scholars justified the territoriality of trademark law using arguments developed in other fields of law.[16] This Part reviews the historical development of the territoriality principle in trademark law, distinguishes trademark law from other intellectual property laws on the territoriality principle, and summarizes different views by scholars and practitioners on whether this principle is a bedrock principle of trademark law that warrants reaffirmation or whether it should be revisited and revised.

1. *History of the Territoriality Principle in Trademark Law*

The territorial and extraterritorial application of laws differ based, in part, on whether the law concerns protecting private rights or catering to the regulation of the whole economy.[17] For example, securities law is inherently extraterritorial as it protects the public interest and the whole economy.[18] However, intellectual property laws are territorial because intellectual property rights benefit society by "conferring particular property rights on individuals and companies."[19]

Trademark law has always differentiated itself from patent and copyright laws on the universality of trademark rights. Historically, trademark law rights were universal rights in the international context just like other private law rights such as those in securities law or antitrust law.[20] For instance, in some European countries, trademarks were considered the outgrowth of the right of personality and were closely associated with the person who first adopted

14. Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L LAW 505, 510 (1997).

15. *See* David R. Johnson & David Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1368 (1996).

16. *See, e.g.*, Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633, 638–40, 647 (2d Cir. 1956) (discussing the reasons for the territorial scope of the Lanham Act); *see generally* Symeon Symeonides, *Territoriality and Personality*, *in* INTERCONTINENTAL COOPERATION THROUGH PRIVATE INTERNATIONAL LAW: ESSAYS IN MEMORY OF PETR NYGH 405 (Talia Einhorn & Kurt Siehr eds., 2003).

17. *See* Dornis, *supra* note 5, at 579 (citing Bradley, *supra* note 3, at 568–69).

18. *Id.*

19. *Id.*

20. *See* Walter J. Derenberg, *Territorial Scope and Situs of Trademarks and Good Will*, 47 VA. L. REV. 733, 734 (1961); *see also* TIMOTHY H. HIEBERT, PARALLEL IMPORTATION IN U.S. TRADEMARK LAW 29–30 (1994) (discussing universality theory).

them.[21] Therefore, trademarks were entitled to universal protection beyond country borders.[22]

The territoriality principle of trademark law did not emerge until 1930s when the international world formed the Paris Convention,[23] the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS),[24] the Madrid Agreement, and the Madrid Protocol.[25] These agreements acknowledged the territorial limitations of trademark rights, but still encouraged countries to collaborate on protecting well-known trademarks and to fight against unfair competition.[26] Although a number of international treaties and agreements[27] have been signed since then, the world is still far away from being a community of coherent trademark protection.[28] The agreements made admirable attempts to streamline the international trademark registration process, but in general are not robust enough and do no more than provide recommendations.[29] Practitioners sometimes include the Paris Convention *6bis* as a cause of action under the Lanham Act for non-U.S. trademark owners' infringement claims against junior users in the United States.[30] The federal

21. *Id.*

22. *Id.*

23. The United States signed onto the Paris Convention for the Protection of Industrial Property in 1887 and has been a significant party to its revisions since then.

> Under Article *6bis* of the Paris Convention, a foreign trademark's owner can petition the trademark offices in countries which have signed the treaty to refuse or to cancel the registration, and to prohibit the use of virtually any trademark which could be confused with the foreign trademark owner's well-known mark where that mark is being used for the sale of identical or similar goods.

PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY, ART. *6BIS*, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention].

24. TRIPS: AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197, Art. 16(2) (1994) [hereinafter TRIPS Agreement]. TRIPS, signed in 1994, bolstered the protection to foreign trademarks in signatory countries under the Paris Convention by protecting service marks. It also extended the well-known trademark owner's rights to preventing uses of identical or similar trademarks for dissimilar goods or services. *Id.* at 21 U.S.T. 1583, 828 U.N.T.S. 305.

25. The Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, June 28, 1989, 1989 Industrial Property 254, and the new European Community Trademark, Council Regulation 40/94 on the Community Trade Mark, 1994 O.J. (L 11) 1. Both of these arrangements are designed to provide simultaneous protection for marks in multiple countries through a single application.

26. *See* Bradley, *supra* note 3, at 542–43.

27. *See* Roger E. Schechter, *The Case for Limited Extraterritorial Reach of the Lanham Act*, 37 VA. J. INT'L L. 619, 640 n.63 (1997).

28. *See id.*

29. In 1998, the World Intellectual Property Organization (WIPO) bolstered the agreement by way of a "Joint Recommendation Concerning Provisions on the Protection of Well-known Marks."

30. *See* Grupo Gigante SA De CV v. Dallo & Co., 391 F.3d 1088, 1099 (9th Cir. 2004).

courts have not yet reached agreement on whether the Paris Convention or any other international treaty in trademark law provides legal grounds for claims being made under the Lanham Act. Not acknowledging international collaborations on trademark protection creates pressure on domestic laws, such as the Lanham Act, to depart from the territoriality principle. After all, when disputes happen, if no existing international treaty works (or countries do not follow the international treaties), some law has to be applied to make a resolution.

In addition, use-based rights may be territorial, while registration-based rights can be extraterritorial. Scholars like Professor Roger E. Schechter put much hope on establishing a worldwide system of trademark registration that would instantly confer rights in a mark to a single firm in every country of the world.[31]

2. *Differentiating Trademark Law from Other Intellectual Property Laws*

Interestingly, territoriality varies among different types of intellectual property law. Patent law and copyright law are more territorial than trademark law because not much "property" was historically attached to trademarks.[32] Trademark law is more extraterritorial than copyright and patent law.[33] Courts and commentators often say patent and copyright laws do not have any effect extraterritorially,[34] while they often recognize that trademark law does have extraterritorial effects.[35] It is not quite clear why trademark law is distinct from

31. *See* Schechter, *supra* note 27, at 640.

32. *See* David R. Toraya, *Federal Jurisdiction over Foreign Copyright Infringement Actions*, 70 CORNELL L. REV. 1165, 1172 n.41 (1985) (explaining rejected trademark more suitable for extraterritorial enforcement, as such enforcement interferes less with economic interests of foreign governments relative to enforcing patent and copyright rights overseas); *see also* Schechter, *supra* note 27, at 622 (summarizing that Professor Curtis Bradley did not find many differences in the language of the Lanham Act and the statutes of other IP laws).

33. *See* Bradley, *supra* note 3, at 508.

34. For patent law, see, e.g., Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518, 531 (1972) ("Our patent system makes no claim to extraterritorial effect . . . ."); 5 DONALD S. CHISUM, CHISUM ON PATENTS § 16.05, at 16-233 (1997) (explaining that a U.S. patent "confers no protection as to acts taking place in foreign countries"). However, *Deepsouth Packing Co.* was overruled by statute 35 U.S.C.A. § 271(f), as stated in Life Techs. Corp. v. Promega Corp., 137 S. Ct. 734, 743 (2017); *see also* Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 444–45 (2007) (stating that the new § 271(f) "expand[ed] the definition of infringement to include supplying from the United States a patented invention's components," as outlined in subsections (f)(1) and (f)(2)). For copyright law, see, e.g., Subafilms, Ltd. v. MGM-Pathe Commc'ns Co., 24 F.3d 1088, 1093 (9th Cir. 1994) (referring to the "undisputed axiom that United States copyright law has no extraterritorial application"); 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 17.02 (1997) [hereinafter Nimmer on Copyright] ("Copyright laws do not have any extraterritorial operation.").

35. *See, e.g.*, Sterling Drug, Inc. v. Bayer AG, 14 F.3d 733, 745 (2d Cir. 1994) ("It is well established that United States courts have jurisdiction to enforce the Lanham [Trademark] Act

other intellectual property laws on the extraterritoriality principle. Scholars like Professor Bradley and Professor Schechter make several projections but are not convinced any reasons account for the variations in extraterritoriality principles among the three main branches of the intellectual property law. For instance, Bradley mentions that the U.S. Constitution includes copyright and patent rights, but is silent about trademarks.[36] He also points out that patents and copyrights are granted for only a limited term of years, whereas trademarks can receive protection indefinitely.[37] More importantly, Professor Bradley says that patents and copyrights protect certain property rights but trademark law only prevents similar usages that cause consumer confusion.[38]

In addition, trademark rights are different from patent or copyright rights in that the reputation or goodwill of a product can reach beyond the geographic boundary of the market where the trademark is used.[39] The reputation of a product may also reach a market long before the trademark has been created.[40] According to Professor Schechter, the infringement of a U.S. trademark may cause the loss of sales of the trademark owner (the senior user) in a foreign market.[41] Moreover, the infringement may also cause reputational damages that hurt the senior user in the U.S. market.[42] This "double whammy"[43] differentiates trademarks from patents and copyrights.

3. *Scholarly Views on the Territoriality Principle in Trademark Law*

Scholars have reviewed the reasons for the territorial character of trademark law and come up with different conclusions about whether the territoriality principle of trademark law is dated. Early scholastic views, represented by Professor Bradley, argue in favor of territoriality.[44] More recent scholars, represented by Professor Lee Ann Lockridge, propose revisiting and revising the principle through the application of the well-known mark

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extraterritorially in order to prevent harm to United States commerce."); McCarthy on Trademarks and Unfair Competition, *supra* note 10, at § 29.57, 29–101 (stating that the Supreme Court in Steele "liberally interpreted" the extraterritorial sweep of American trademark law).

36. *See* Bradley, *supra* note 3, at 538.

37. *See id.*

38. *Id.*; *see also* 15 U.S.C. § 1114 (referring to uses "likely to cause confusion, or to cause mistake, or to deceive").

39. *See* Schechter, *supra* note 27, at 628.

40. *Id.*

41. *Id.*

42. *Id.* at 629.

43. *Id.*

44. *See generally* Bradley, *supra* note 3.

exception doctrine.[45] Many other scholars, such as Professor Graeme B. Dinwoodie, value the merit of both sides.[46]

Professor Bradley argues that territoriality is still very important for the legal framework in the context of globalization as long as the nation-state remains the principal actor in international relations.[47] He believes that the extraterritorial application of U.S. intellectual property law is inconsistent with the indispensability of territorialism in the international legal framework.[48] He also argues that extraterritorial adjudications are in tension with the division of power in the federal government.[49] He proposes that in order to protect U.S. interests in intellectual property in the international arena, the political branch of the United States should enter international agreements, adjust legislation and trade policy, and pursue international dispute resolutions.[50]

Professor Lockridge reviews the history of the territoriality principle in trademark law and concludes that the territorial nature of trademark law is not a bedrock principle and it thus should be reconsidered and contextualized.[51] She explains why the Lanham Act protects well-known foreign marks after considering the intrinsic and extrinsic territoriality of trademark law, examining the language of the Lanham Act, and considering the international obligations of the United States.[52]

Professor Dinwoodie believes that the historical development of intellectual property law, international treaties, and international conventions is only one of the reasons for the territorial character of trademark law.[53] He argues that it is important to consider both the intrinsic purposes of trademark law and economic policy of political institutions when assessing the resilience of the "principle of territoriality."[54] One of the intrinsic purposes of trademark law is to protect the goodwill of the senior user of a trademark. According to Professor Dinwoodie, since goodwill is geographically shapeless, it is justifiable

45. *See generally* Lockridge, *supra* note 12.

46. *See generally* Dinwoodie, *supra* note 13.

47. *See* Bradley, *supra* note 3, at 584–85. Professor Bradley used the term "territorialism" to refer to "territoriality" in his paper.

48. *Id.*

49. *Id.*

50. *Id.*

51. *See* Lee Ann W. Lockridge, *Honoring International Obligations in U.S. Trademark Law: How the Lanham Act Protects Well-Known Foreign Marks (and Why the Second Circuit Was Wrong)*, 84 ST. JOHN'S L. REV. 1347, 1350 n.179 (2010); *see also* Almacenes Exito SA v. El Gallo Meat Market, Inc., 381 F. Supp. 2d 324, 326 (S.D.N.Y. 2005) (explaining that New York state has adopted the well-known mark exception doctrine, although this case finally decided against the application of the doctrine to federal law).

52. *Id.* at 1413.

53. *See supra* note 13, at 892.

54. *See id.* at 894. Examples of the intrinsic purposes of trademark law include protecting consumers against confusion and protecting the goodwill of producers.

for adjudications to be made in spite of country borders. However, from an effective enforcement perspective, Dinwoodie probably does not think that the extraterritoriality application can go very far because it is ultimately within the political authority of each country to enforce global trademark rights.[55]

B. IS IT NOW TIME TO RECONFIGURE THE TERRITORIALITY PRINCIPLE IN TRADEMARK LAW?

Twenty years ago, Professor Bradley argued that the extraterritoriality of intellectual property law is of particular importance with the increasing number of transnational intellectual property cases being litigated in U.S. courts.[56] Professor Dinwoodie added that the principles of territoriality need to be reviewed and reconfigured, as the normative force of the territoriality principle has declined because commercial organizations now correspond less neatly with national borders.[57] More importantly, in the context of globalization and international trade, the territoriality principle could be disabled if states' authorities are too rigidly restricted within geographic borders. It is extremely hard, even for private actors, to contain the impact of their activities within country borders. It is now necessary to reconfigure the territoriality principle in trademark law because, in a global market, goods and services are not provided on a purely national basis, which puts "the dominant premise of international conventions and Lanham Act registration at odds with social and commercial reality."[58] Even in the domestic context, courts have started to reduce the assimilation between "the scope of rights and the territorial goodwill."[59]

C. THE EXTRATERRITORIALITY DOCTRINE AND ITS CRITICISMS

The U.S. Supreme Court, for the first time, extended the Lanham Act beyond the border of the nation in *Steele v. Bulova Watch*. In this case, Sidney Steele, a U.S. citizen residing in Texas, procured a "Bulova" trademark registration in Mexico without the permission of the Bulova Watch Company, the owner and the senior user of the U.S. trademark "Bulova." Steele assembled U.S. watch parts in Mexico and sold watches with the "Bulova" brand. The Supreme Court decided that Steele's operations were not confined within the "territorial limits of a foreign nation," and found for Bulova even before "the advent of the broadened commerce provisions of the Lanham

55. *Id.* at 971–72.

56. *See* Bradley, *supra* note 3, at 509; *see also* Dornis, *supra* note 5 (describing an increasing trend of trademark suits regarding extraterritoriality from the 1950s to the present, especially 2010 onward).

57. *See* Dinwoodie, *supra* note 12, at 955.

58. *Id.*

59. *Id.* at 963.

Act."[60] After *Steele*, U.S. circuit courts developed a three-prong test that considered an infringer's nationality, effects on U.S. commerce, and conflicts with foreign law in determining the scope of the Lanham Act as the federal trademark statue.[61]

There have been disagreements on the extraterritorial overextension of the Lanham Act. For instance, Professor Tim W. Dornis argues that it is necessary to curb the extraterritorial overextension of the Lanham Act to better align judicial practice with the reality of socioeconomic globalization.[62] In his empirical research, Professor Dornis surveyed all federal and state cases that have applied the *Steele* decisions—cases where American trademarks had been infringed overseas.[63] He found that "the doctrine of trademark extraterritoriality that has evolved in the wake of *Steele* is an anticompetitive detriment rather than a rights holder panacea."[64] In contrast, supporters of extraterritoriality, such as Professor Schechter, argue for the extension of the Lanham Act due to the need of "protecting U.S. rights holders from harmful activities that occur abroad." Some scholars have suggested that, to expand the interpretation of existing language of the Lanham Act to apply to extraterritoriality, Congress should amend the Lanham Act and make the extraterritoriality statutorily explicit.[65]

Professor Dornis's study provides a good overview of the evolution of doctrinal law after *Steele*, but he exaggerates the negative impact of trademark extraterritoriality. This is especially so in the context of globalization, as it is dubious that local economic development depends heavily on the capacity of using a certain trademark, or whether a certain trademark has been used in other countries. Customers are getting increasingly sophisticated with the rapid development of globalization and communications across national borders. It is hard to imagine customers would not be able to discover and distinguish products produced by different countries, but under the same brand name or trademark. Although territoriality has been cited in most cases as a reason for denying the protection of rights of foreign trademark owners,[66] the

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60. Steele v. Bulova Watch Co., 344 U.S. 280, 285–87 (1952) (quoting Skiriotes v. Florida, 313 U.S. 69, 73 (1914)).

61. *See* Dornis, *supra* note 5, at 570, 575–78.

62. *See id.* at 650. For more criticism on the exterritorial application of the Lanham Act, see also Robert Alpert, *The Export of Trademarked Goods from the United States: The Extraterritorial Reach of the Lanham Act*, 81 TRADEMARK REP. 125 (1991); Pamela E. Kraver & Robert E. Purcell, *Application of the Lanham Act to Extraterritorial Activities: Trend Toward Universality or Imperalism?*, 71 J. PAT. & TRADEMARK OFF. SOC'Y 115, 122 (1995).

63. *See* Dornis, *supra* note 5, at 567–68.

64. *Id.* at 568.

65. *See* Bradley, *supra* note 3, at 509.

66. *See generally* Am. Circuit Breaker Corp. v. Or. Breakers, Inc., 406 F.3d 577, 581 (9th Cir. 2005); Kos Pharms., Inc. v. Andrx Corp., 369 F.3d 700, 714 (3d Cir. 2004); Buti v.

territoriality of trademark law is not a bedrock principle that should not be reconsidered and contextualized.[67]

Before *Belmora*, there was already a disagreement between circuit courts on whether non-registered and not-in-use foreign trademarks can be protected under the Lanham Act. Specifically, if these foreign senior users can make a claim against U.S. junior users for trademark infringement based on the well-known mark exception.[68] A series of cases have been decided since the early 1990s and decisions fell on both sides of the disagreement.[69] In 1990, the Federal Circuit decided against the existence of the well-known mark protection in *Pearson's Co. Ltd. v. Christman*, where the defendant was declared not liable for trademark infringement, even though he copied a Japanese clothing trademark who did not use or register the trademark in the United States.[70] But in 2004, the Ninth Circuit recognized a narrow existence of the well-known mark exception, expanding the Lanham Act to protect a Mexican restaurant that never established business or registered a mark in the United States.[71] Three years later, in 2007, the Second Circuit agreed with the Federal Circuit that there was no well-known mark exception in the law, rejecting the Ninth Circuit decision as a policy-driven finding that should have been left to Congress.[72]

If we consider *Steele* as the leading case of the extraterritoriality doctrine of trademark law protecting U.S. trademark owners' rights overseas, a series of circuit court cases on the application of the well-known mark exception illustrate the other important aspect of the extraterritoriality doctrine—protecting non-U.S. trademark owners' rights from being violated within the border of the United States. In the next Section, this Note will discuss the existing circuit split before the *Belmora* case and evaluate the effectiveness of using the well-known mark exception doctrine to achieve the extraterritoriality of the Lanham Act.

Impressa Perosa, S.R.L., 139 F.3d 98, 103 (2d Cir. 1998); Person's Co. v. Christman, 900 F.2d 1565, 1568–69 (Fed. Cir. 1990); ITC Ltd. v. Punchgini, Inc., 482 F.3d 135, 155 (2d Cir. 2007).

67. *See* Lee Ann W. Lockridge, *Honoring International Obligations in U.S. Trademark Law: How the Lanham Act Protects Well-Known Foreign Marks (and Why the Second Circuit Was Wrong)*, 84 ST. JOHN'S L. REV. 1347, 1350 n.179 (2010); *see also* Almacenes Exito SA v. El Gallo Meat Market, Inc., 381 F. Supp. 2d 324, 326 (S.D.N.Y. 2005) (explaining that New York state has adopted the well-known mark exception doctrine, although this case finally decided against the application of the doctrine to federal law).

68. *See* Wei, *supra* note 7, at 503.

69. *See* Person's Co. v. Christman, 900 F.2d 1565 (Fed. Cir. 1990); Grupo Gigante SA De CV v. Dallo & Co., 391 F.3d 1088 (9th Cir. 2004); Int'l Bancop, LLC v. Societe Des Bains De mer Et Du Cercle Des Etreangers A Monaco, 329 F.3d 359 (4th Cir. 2003), *cert. denied*, 540 U.S. 1106 (2004); ITC Ltd. v. Punchgini, Inc., 482 F.3d 135 (2d Cir. 2007).

70. *See Person's Co., Ltd.*, 900 F.3d at 1565.

71. *See Grupo Gigante*, 391 F.3d at 1088.

72. *See ITC Ltd.*, 482 F.3d at 165.

III. CIRCUIT SPLIT BEFORE *BELMORA*: THE WELL-KNOWN MARK EXCEPTION DOCTRINE THAT ACHIEVES EXTRATERRITORIALITY

A. HISTORY OF THE WELL-KNOWN MARK EXCEPTION DOCTRINE

The well-known mark exception doctrine grew out of Article *6bis* of the Paris Convention[73] and was further supported through the TRIPS Agreement.[74] According to the well-known mark exception doctrine, a foreign trademark owner can petition for cancellation of any mark that could be confused with the foreign mark in a member country of the international treaties, as long as the foreign owner can prove their mark is "famous" or "known."[75] This doctrine applies even if the foreign mark owner did not register or use their mark in commerce in the United States.[76] Theoretically, this doctrine may protect any trademark owned by a foreign national if the trademark is recognized as being well-known.

Before *Belmora*, there were two perspectives on how to interpret the relationship between Article *6bis* of the Paris Convention and the Lanham Act section 44(b). The Ninth Circuit held that the Paris Convention had been integrated into section 44(b) and a foreign national is entitled to all benefits arising from the Lanham Act as long as they are from a member country of the Paris Convention. The other view held by the Federal and Second Circuit is that since no U.S. federal trademark legislation existed to codify the Paris Convention or the TRIPS Agreement, neither agreement should be considered law.[77] Debate over the well-known mark exception doctrine in the Ninth and Second Circuit revisited how the territoriality principle should be applied in trademark litigation involving non-registered and not-in-use foreign trademarks. Different interpretations of the well-known doctrine before *Belmora* shows that, as Professor Dinwoodie states, U.S. courts began to reconfigure the doctrines of territoriality for a new age without clearly stating the rationale behind various solutions.[78] The decision of the Fourth Circuit in the *Belmora* case is yet another example of the court reconfiguring territoriality in U.S. trademark law.

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73. Paris Convention, *supra* note 23, at 828 U.N.T.S. 305.

74. TRIPS Agreement, *supra* note 24.

75. *See generally* Am. Circuit Breaker Corp. v. Oregon Breakers, Inc., 406 F.3d 577, 581–83 (9th Cir. 2005); Kos Pharms., Inc. v. Andrx Corp., 369 F.3d 700, 714 (3d Cir. 2004); Buti v. Perosa, S.R.L., 139 F.3d 98, 105 (2d Cir. 1998).

76. *Id.*

77. *See* Wei, *supra* note 7, at 503.

78. *See* Dinwoodie, *supra* note 13, at 971 ("When territorial rules flow from nationally grounded concerns such as economic policy or political sovereignty, they are likely to be subject to a more cautious reassessment.").

B. HOW TO DETERMINE THE WELL-KNOWN STATUS OF A FOREIGN TRADEMARK

The United States has made it more difficult for foreign trademarks to achieve well-known status compared to domestic marks.[79] The Ninth Circuit said that establishing secondary meaning is not enough.[80] If it were, the treatment of foreign trademarks would be indistinguishable from domestic marks.[81] According to the court, doing so would completely deny the existence of the "territoriality principle" in trademark law.[82] Two theories are available to determine if a foreign trademark is well-known: the "passive perception theory" and the "interactional theory."[83] The former theory uses the filtration (through means such as TV, Internet, or printed materials) of trademarked materials into a TRIPS member nation where the foreign mark didn't have a registration.[84] The "interactional theory" uses "evidence of foreign or domestic consumer interaction with a trademark before rights are granted (such as purchases, inquiries, or website activity)."[85]

The passive perception theory operates on the premise that the world and consumers are connected more than ever before. According to the theory, the recognition of a trademark in one part of the world can automatically create consumer recognition in other parts of the world, even though the brand has not yet been used there.[86] This is a low evidentiary bar for proving internationally well-known status, as it assumes trademarks well-known elsewhere already gain the well-known status when they are used by junior users in a new country.[87] International treaties support the passive perception theory. Article 16(2) of the TRIPS Agreement provides that to determine whether a trademark is well-known, members of TRIPS shall "take account of the knowledge of the trademark in the relevant sector of the public, including knowledge in the Member concerned which has been obtained as a result of the promotion of the trademark."[88] The interactional theory, however, sets a

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79. Leah Chan Grinvald, *A Tale of Two Theories of Well-Known Marks*, 13 VAND. J. ENT. & TECH. L. 1, 53 (2010). According to Professor Leah Chan Grinvald, the narrow application of the well-known mark exception doctrine "supports the proactive international policy goal of an effective multinational registration system." Professor Grinvald also suggests that doctrine remain an exception so that only the brands that are truly well-known to foreign users are protected in foreign jurisdictions.

80. *See* Grupo Gigante SA De CV v. Dallo & Co., 391 F.3d 1088, 1097–98 (9th Cir. 2004).

81. *Id.*

82. *Id.*

83. *See* Grinvald, *supra* note 79, at 22.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 6.

88. *See* TRIPS Agreement, *supra* note 24, Art. 16(2).

higher bar and requires showing of consumer interaction with the trademark through "purchases, inquiries, or website activity."[89] This is an attractive option to lawyers, as it ignores social cognitive scientific findings while determining consumer recognition.

Narrow application of the well-known mark exception doctrine is consistent with the international policy goal of having an effective multi-national registration system.[90] It is also necessary for the doctrine to remain an exception so that the protection is saved for brands that are truly well-known to foreign users.[91] However, the challenge of defining well-known mark makes the application of the well-known mark exception doctrine all the more difficult.[92]

C. THE FEDERAL CIRCUIT AND THE SECOND CIRCUIT DECISIONS

In 1990, in *Person's Co., Ltd. v. Christman*,[93] the Federal Circuit court decided that owner of a Japanese trademark registration could not cancel a U.S. trademark registration, even though the U.S. Registrant had seen the Japanese mark while traveling there and had modeled his mark on the Japanese mark upon his return to the United States.[94] Larry Christman is a U.S. citizen who traveled to Japan in 1981 and purchased some clothing items with the "Person's" logo. After returned to the United States, Christman developed designs of his own "Person's" brand clothing based on the Japanese products he bought.[95] In 1983, Christman filed for trademark registration for the "Person's" mark. Around the same time, the Japanese Person's sought to expand to the U.S. market. The Japanese brand subsequently filed to cancel Christman's trademark registration and sued Christman for infringement. However, Christman won all claims.[96] The court held that foreign use has no effect on U.S. commerce and cannot form the basis for a holding that the foreign mark owner has priority in the United States; therefore, Christman did not bank on Japanese Pearson's goodwill when he registered the mark in the United States before the brand expanded their business overseas.[97] The court also held that knowledge of a foreign use does not preclude good faith adoption and use in the United States. Therefore, Christman had not adopted the mark in bad faith.[98]

89. *See* Grinvald, *supra* note 79, at 22.
90. *Id.* at 53.
91. *Id.*
92. *Id.*
93. *See* Person's Co. v. Christman, 900 F.2d 1565 (Fed. Cir. 1990).
94. *Id.* at 1572.
95. *Id.* at 1567.
96. *Id.*
97. *Id.* at 1571–72.
98. *Id.* at 1569.

Similarly, the Second Circuit also did not extraterritorially extend the well-known mark exception in *ITC ltd. v. Punchgini, Inc.*[99] In 2007, an allegedly well-known Southeastern Asian restaurant BUKHARA sued its former employees who opened two restaurants in New York City under the trademark BUKHARA GRILL.[100] The foreign trademark owner sued for trademark infringement, unfair competition, and false advertising in violation of the Lanham Act, as the U.S. restaurant used the same logos, decor, staff uniforms, wood-slab menus, and red-checkered customer bibs. The Second Circuit held that there was no "famous marks exception" to the territoriality principle and insisted that a foreign mark had to have "some use of its mark in the [United States]," otherwise, even if the U.S. competitor "knowingly appropriated that mark," the foreign mark owner could not assert priority rights under federal law.[101] The Second Circuit's decision in *ITC* reversed the New York state court's decision regarding well-known foreign marks.[102] The New York high court affirmed the existence of New York state protection through a misappropriation theory under unfair competition law and tested the eligibility of the foreign mark protection under a fairly generous standard.[103]

However, even district court judges within New York state have not followed the Second Circuit decision in *ITC* consistently. While the Second Circuit found the state law doctrine to be inapplicable in *ITC Ltd. v. Punchgini, Inc.*,[104] a Southern District of New York judge applied it less than a year later, in favor of the owner of a well-known foreign mark.[105] In contrast, in *Almacenes Exito S.A. v. El Gallo Meat Market, Inc.*, the Southern District of New York expressly held that federal trademark law does not protect well-known foreign marks because the court did not discern, from the plain language of sections 44(b) and (h), the congressional intent to incorporate a famous marks exception into the federal unfair competition law. According to the court, unless specified in the Lanham Act, section 44(b) does not cover the

99. 482 F.3d 135, 136 (2d Cir. 2007).

100. *Id.* at 142–43.

101. *Id.* at 156.

102. *See* Almacenes Exito S.A. v. El Gallo Meat Mkt., Inc., 381 F. Supp. 2d 324, 326 (S.D.N.Y. 2005).

103. *See* Lockridge, *supra* note 11, at 1350 n.13.

104. *Id.*

105. *See* Empresa Cubana del Tabaco v. Culbro Corp., 587 F. Supp. 2d 622, 634 (S.D.N.Y. 2008) (granting the owner of a foreign mark a Rule 60(b) motion for relief from an earlier judgment on grounds that the decision of the New York Court of Appeals in *ITC* was an intervening development of law creating "extraordinary circumstances" warranting relief) *rev'd*, 2010 WL 2759416 (2d Cir. July 14, 2010) (reversing the district court on the basis that the New York decision was not an intervening development of law warranting relief under Rule 60(b)).

protection granted to foreign marks by the Paris Convention Article *6bis* and Article 16(2) of the TRIPS Agreement.[106]

The disagreement among New York district court judges on how to apply the Second Circuit decision reflects the ongoing contradictory views on how the Lanham Act should be applied to protect foreign trademark owners' rights, even if they never registered or used the mark in the United States. The Ninth Circuit decision in *Grupo Gigante*, which occurred between *Pearson's* and *ITC*, proposed that foreign trademark owners' rights are protected by the well-known mark exception doctrine.

D. THE NINTH CIRCUIT DECISION

In *Grupo Gigante SA De CV v. Dallo & Co.*, the Ninth Circuit recognized a narrow exception to the territoriality principle for well-known foreign trademarks.[107] The court extended Lanham Act trademark infringement causes of action to owners of foreign marks that are well-known.[108] In 2004, a Mexican grocery chain sued a grocery store in California for trademark infringement. Although the plaintiff never registered its trademark "Gigante," he argued that the mark was well-known and entitled to protection under the Lanham Act by way of Article *6bis* of the Paris Convention.[109] The Ninth Circuit held that the plaintiff had standing to sue even if his trademark hadn't been used in the American market, as long as the plaintiff could prove two elements: First, that the trademark had gone beyond "secondary meaning." Second, "by a preponderance of the evidence, . . . a *substantial* percentage of consumers in the relevant American market [was] familiar with the foreign mark."[110]

The Second Circuit later considered the *Grupo Gigante* decision in its *ITC* decision, but rejected its rationale. The Second Circuit considered the Ninth Circuit's holding in *Grupo Gigante* a decision wrongly motivated by policy, rather than a holding based on clear settled federal law.[111]

106. *Almacenes Exito SA*., 381 F. Supp. 2d, at 326.
107. Grupo Gigante SA De CV v. Dallo & Co., 391 F.3d 1088, 1094 (9th Cir. 2004).
108. *Id.*
109. *Id.* at 1094.
110. *Id.* at 1098.
111. ITC Ltd. v. Punchgini, Inc., 482 F.3d 135, 172 (2d Cir. 2007).

IV. THE *BELMORA* CASE, CRITIQUES AGAINST THE FOURTH CIRCUIT DECISION ON *BELMORA*, AND WHY THE COURT'S DECISION IS CORRECT

A. THE *BELMORA* CASE

The issue in *Belmora* was "whether a foreign trademark owner who has not used its trademark in the [United States] may pursue false-association, false-advertising, and trademark-cancellation claims against the owner of the same mark in the [United States]."[112] *Belmora* involved ambiguous facts similar to those that caused the preceding circuit split on well-known marks. For instance, the case involves a non-U.S. trademark owner with a claimed well-known mark, but one that was never registered, used, or even intended to be used in the United States.[113] Instead of focusing on the well-known mark status of the plaintiff and choosing between either the Ninth Circuit or Second Circuit models, the Fourth Circuit completely avoided discussing whether the mark should be considered a well-known trademark from the perspective of Lanham Act, or whether the "well-known mark exception" exists.[114] Instead, the court distinguished this case as an "unfair competition case, not a trademark infringement case,"[115] and focused its opinion on whether the Lanham Act required the disputed mark to be registered or "in use" prior to bringing civil actions of "false association" or "false advertising."[116]

1. *Background and Procedural History*

Bayer Consumer Care AG (BCC), a multinational company, owns the well-known trademark FLANAX in Mexico and has been selling a pain reliever under this mark in Mexico since 1976.[117] Since 2004, Belmora, a U.S. company, sold a pain reliever using the FLANAX mark and successfully registered the mark in the United States in 2005.[118] The Belmora product closely mimicked the package of the Bayer product in Mexico, causing U.S. distributors and salespeople to believe that their product was the product Bayer was selling widely in Mexico.[119]

Bayer successfully petitioned the TTAB to cancel Belmora's U.S. registration based on deceptive use.[120] Belmora appealed the cancellation in

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112. Belmora LLC v. Bayer Consumer Care AG, 819 F.3d 697, 701 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1202 (2017).

113. *Id.* at 701.

114. *Id.*

115. *Id.* at 708.

116. *Id.* at 705–06.

117. *Id.*

118. *Id.*

119. *Id.*

120. Bayer Consumer Care AG v. Belmora, Cancellation No. 92047741, 2008 WL 9870885 (T.T.A.B. 2008).

federal court.[121] BCC filed a separate claim alleging false association under 15 U.S.C. § 1125.[122] BCC and its U.S. sister company, Bayer Healthcare LLC (BHC, and together with BCC, Bayer), jointly filed a false advertising claim.[123] Bayer lost both claims at the federal trial court.[124] The Virginia district court held that: (1) The Lanham Act's "zone of interests" did not include Bayer's claim because Bayer did not possess a protectable interest in the FLANAX mark in the United States, and (2) A cognizable economic loss under the Lanham Act could not exist as to a "mark that was not used in United States commerce."[125]

2. *The Fourth Circuit Decision and the Petition for Certiorari*

The cases between Belmora and Bayer were consolidated and the Fourth Circuit ruled for Bayer on all counts in 2016.[126] The Fourth Circuit vacated the district court's judgment, ruling that the case was an unfair competition case rather than a trademark infringement case.[127] According to the court, Belmora's ownership of the registered mark did not give it rights to use the mark to deceive customers and constituted a form of unfair competition.[128] The court decided that the plain language of Lanham Act section 43(a) did not require a plaintiff to possess or have used the trademark in U.S. commerce.[129] According to the court, section 43(a) required the defendant's use in commerce of a "word, name, symbol, or device," or of a "false or misleading description [or representation] of fact" that created harm to the plaintiff.[130]

The *Belmora* court built its decision upon the 2014 Supreme Court case, *Lexmark International Inc. v. Static Control Components, Inc.*,[131] emphasizing that courts must not add any requirements that the Congress did not include in the statute to their analysis.[132] Section 43(a) of the Lanham Act requires that the plaintiff is "likely to be damaged" by the junior user's use in commerce of the mark and related advertisements.[133] According to the *Lexmark* court, "likely to be damaged" is not meant "'literally,' rather it is based on two non-overlapping

121. *See generally* Belmora LLC v. Bayer Consumer Care AG, 819 F.3d 697, 706 (4th Cir. 2016).
122. *Id.* at 706
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 697.
127. *Id.* at 706.
128. *Id.* at 713.
129. *Id.* at 706.
130. *Id.*
131. 134 S. Ct. 1377 (2014).
132. *Id.* at 1388.
133. *Id.*

background principles."[134] These two background principles are that (1) the plaintiff's claim must fall within the "zone of interests" protected by the statute, and (2) "a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute."[135]

As to the first background principle, a false association claim falls directly within most of the enumerated interests in section 45 of the Lanham Act.[136] A false advertising claim is encompassed by the Lanham Act if a plaintiff alleged "an injury to a commercial interest in reputation or sales."[137] The Fourth Circuit found that Bayer's false association claim satisfied this first principle because potential consumers, either Mexican-Americans travelling to Mexico or residents living in the border areas between the United States and Mexico, would forego buying the Bayer products due to false association between the Belmora-made FLANAX and the Bayer brand.[138] Bayer's allegations were within the purpose of section 45 to prevent "the deceptive and misleading use of marks" in "commerce within the control of Congress."[139]

Moreover, the court also found that Bayer sufficiently pledged the false advertising claim under section 43(a), as "Belmora engaged in Lanham Act unfair competition by using deceptive advertisements that capitalized on BCC's goodwill."[140] The Fourth Circuit noted that the Supreme Court interpreted the second background principle to mean that the case must show "economic or reputational injury flowing directly from the deception wrought by the defendant's advertising; and that occurs when deception of consumers causes them to withhold trade from the plaintiff."[141] According to the court, since Belmora was targeting Mexican-Americans, it is possible that a subset of this population may forego buying FLANAX products in Mexico.[142] In 2017, Belmora petitioned for certiorari[143] and the Supreme Court denied the request.[144]

B. DISTINGUISHING THE PRE-*BELMORA* CIRCUIT SPLIT WITH THE *BELMORA* CASE

Like the Ninth Circuit in the *Grupo Gigante* case, the Fourth Circuit in *Belmora* also ruled in favor of extending the protections of the Lanham Act,

134. *Id.*
135. *Id.*
136. *See id.* at 1389.
137. *Id.* at 1390.
138. *Id.*
139. Lanham Act § 45, 15 U.S.C. § 1127.
140. Belmora LLC v. Bayer Consumer Care AG, 819 F.3d 697, 712 (2016).
141. *Id.* at 708.
142. *Id.* at 708.
143. Petition for Writ of Certiorari, Belmora LLC v. Bayer Consumer Care AG, 137 S. Ct. 1202 (2017) (No. 16-548), 2016 WL 6156565.
144. *Belmora*, 819 F.3d at 701.

but based on a different rationale. *Belmora* did not discuss the well-known brand exception and territoriality at all. Instead, the court focused on the loss of foreign sales as an injury covered by the Lanham Act. The Ninth Circuit decision in *Grupo Gigante* required the plaintiff to show that a large percentage of persons in the relevant market were aware of the plaintiff's trademark, which is a requirement for the application of the well-known mark doctrine.[145] The *Belmora* court did not provide an explicit statutory requirement to expand the *Lexmark* test to cancellation and other Lanham remedies.[146] The *Belmora* court decided that Bayer's unfair competition claim did not require the plaintiff to have used the mark because it was a section 43(a) claim, not a section 32 infringement suit, which requires the usage of the trademark by the registrant.[147] The *Belmora* court also pointed to "reverse passing off" and generic mark cases to support the proposition that ownership of a U.S. mark is not a pre-condition to bring a section 43(a) claim.[148]

C. CRITIQUES OF THE *BELMORA* DECISION AND WHY *BELMORA* IS CORRECT

1. *Is the* Belmora *Holding Consistent with the Territoriality Principle of Trademark Law?*

Most critiques of the *Belmora* decision emphasize that the decision overlooked one of the fundamental principles of trademark law: territoriality. Christine Farley specifically points out that this litigation strategy could broaden the reach of *Belmora* as an exception to territoriality, as in the Ninth Circuit's *Grupo Gigante* precedent.[149] According to Farley, combining the TTAB decision on the cancellation of the FLANAX trademark registered by Belmora with the Fourth Circuit court decision on unfair competition claim, any party that can bring a section 14(3) cancellation petition in the TTAB can then bring an appeal in the Eastern District Court of Virginia where the TTAB is located. This way, the initial action in a district court will be within the Fourth Circuit.[150] Commentators are also concerned that by expanding the wide array of remedies under the unfair competition clause and the Lanham Act, and by lowering the burden of proof, the *Belmora* decision may potentially reduce U.S. trademark registrations and chill healthy competition.[151] Commentators bring up the well-known mark exception doctrine as a main recommendation for the situation handled in *Belmora*.

145. Grupo Gigante SA De CV v. Dallo & Co., 391 F.3d 1088, 1107 (2004).
146. *Belmora*, 819 F.3d at 708.
147. *Id.*
148. *Id.* at 710.
149. *See* Farley, *supra* note 1, at 317.
150. *Id.*
151. *See* Wei, *supra* note 7, at 529.

The critiques of the *Belmora* decision are wrong on two grounds. First, as already discussed, it not clear that the territoriality principle is a bedrock principle of the Lanham Act. Even if it were, now, in the context of globalization and international trade, it is probably a good time to reconsider this principle because it restricts economic activities in the market.[152] Second, and more importantly, the petitioner overlooked the challenges that are inherent in the well-known mark exception doctrine, especially because the case involves trademark owners from a different country. Discussion regarding the existence of a well-known mark exception is futile without effectively tackling how to determine what a well-known mark is. The *Belmora* court shrewdly focused on the unfair competition clause to avoid stepping into a discussion that probably would require the use of cognitive science to reach resolution. Moreover, whether to apply the well-known mark exception may also depend on two different underlying views about the goal of the trademark law.

a) It Is Wise to Avoid Discussing the Well-Known Mark Exception Because It Is Difficult to Administer This Doctrine

The goal of U.S. trademark law is twofold: first, trademark law aims to prevent consumer confusion, and second, it protects investment in trade symbols.[153] These two intrinsic purposes of trademark law do not prevent application of the well-known mark exception in interpreting the Lanham Act. Similarly, the purposes are aligned with the essence of unfair competition claims. In short, the intrinsic purpose of trademark law is to protect the owners of trademarks and to prevent others from using confusingly similar marks because the trademark owner possesses the goodwill and reputation of the mark.[154]

The well-known mark exception doctrine complements the first purpose of protecting against consumer confusion and "palming off."[155] With this purpose in mind, it was unjustifiable to the Ninth Circuit that the defendant in *Grupo Gigante* used "trademark law to fool immigrants into thinking that they are buying from the store they liked back home."[156] To those who believe in this goal of trademark law, applying the absolute territoriality rule without a well-known mark exception would "promote consumer confusion and fraud."[157] In a country of immigrants like the United States, it is especially important for the law to protect immigrant consumers who tend to have knowledge and exposure to foreign famous brands.

152. *See* Dinwoodie, *supra* note 13, at 955.
153. *See* Lockridge, *supra* note 12, at 1392 n.181.
154. *Id.* at 1392.
155. Grupo Gigante SA De CV v. Dallo & Co., 391 F.3d 1088, 1094 (9th Cir. 2004).
156. *Id.* at 1094.
157. *Id.*

The unfair competition clause fits the second purpose of trademark law to protect the manufacturers when trademark law is considered "a part of the broader law of unfair competition."[158] According to this view, the right to a particular mark depends on its use, not just its adoption. Therefore, the main function of trademark law is to "designate the goods at the product of a particular trader and to protect his good will against the sale of another's product."[159] Under this second view, it is more important to prove the harm the junior user casts on the senior user through capitalizing on the senior user's goodwill. In this context, as long as Lanham Act section 43(a) applies to non-registered and not-in-use foreign trademarks with proof of harm, the plaintiff can file a suit against the junior user. Not surprisingly, here, determining whether the foreign mark is well known is not as essential as determining whether the Lanham Act requires "registration" and use in commerce. The *Belmora* court focuses on the protection of trademark owners' goodwill in its discussion around the application of Lanham Act section 43(a) without getting into the discussion of the well-known mark exception. It is a smart and useful attempt at reconfiguration of the territoriality principle in trademark law.

In addition, some see the well-known mark doctrine as a "safety valve" for trademarks that are not registered in a foreign jurisdiction, but have become well-known among consumers living there.[160] According to the *Grupo Gigante* court, it is necessary to prove that "the court must be satisfied, by a preponderance of the evidence, that a *substantial* percentage of consumers in the relevant American market is familiar with the foreign mark."[161] The *Grupo Gigante* court applied the passive perception theory, which is a relatively low bar.[162] As Professor Leah Chan Grinvald suggests, courts should instead "requir[e] both effective exposure and conscious consumer activity before finding a trademark well-known."[163] Again, the point of using caution to determine if the trademark is well-known is to ensure that the doctrine is applied only where it is truly warranted. Given the existing split between the Ninth Circuit and the Second Circuit, unless the Supreme Court steps in to provide a guidance on how to determine what a well-known mark is, how to apply the well-known mark exception remains an open question for the courts.

158. United Drug Co. v. Theodore Rectanus Co. 248 U.S. 90, 97 (1918) (quoting Hanover Milling Co. v. Metcalf, 240 U.S. 403, 412–14 (1916)).

159. *Id.*

160. *See* Grinvald, *supra* note 79, at 52.

161. Grupo Gigante SA De CV v. Dallo & Co., 391 F.3d 1088, 1098 (9th Cir. 2004).

162. *See id.*

163. Grinvald, *supra* note 79, at 53.

b) It Remains Unclear Whether Well-Known Marks Should Be Bounded by the Territoriality Principle of Trademark Law

In addition to the determination of well-known mark status, the Ninth Circuit in *Grupo Gigante* also disagreed with the Federal and Second Circuit on whether the well-known mark exception exists in U.S. trademark law.[164] The Ninth Circuit was correct in determining the exception exists as long as it is proven that the goodwill or reputation of a brand goes beyond country borders before it is in use. The Lanham Act section 43(a) protects rights created by the existence of trademark reputation.[165] If reputation can exist beyond geographical borders before a trademark is put in use in either domestic or international contexts, confusion may be created and the Lanham Act should apply.[166] Empirical data to show the prevalence of reputation and consumer association in particular geographic areas is beyond the scope of this Note. However, it is easy to come up with anecdotal examples to demonstrate that, for instance, people in a foreign country may have knowledge of the famous brand Coca-Cola before the soda company starts official sales in that country. Proving the local use of a trademark is essentially a proxy to proving goodwill, "which is the keystone of commercial and consumer interests protected by trademark law."[167] If goodwill precedes a trademark being used in commerce, there is no need to prove a mark is "in use." For this reason, the Lanham Act's protection of famous trademarks should not be bounded by country boundaries, as long as a trademark has established reputation and goodwill.

2. *Certiorari Petitioner's Arguments Against the Fourth Circuit Holding in* Belmora *and Why They Are Wrong*

In the petition for certiorari,[168] Belmora made strong arguments against the Fourth Circuit decision. First, the petitioners argued that the Fourth Circuit circumvented the well-known mark exception doctrine by completely avoiding discussion of the "territoriality" principle of trademark law.[169] Second, the petitioner argued that the Fourth Circuit decision deepened the existing circuit split by adding an additional layer to the dispute.[170] Petitioner also argued that the decision would allow foreign businesses to use the Lanham Act's unfair competition provisions to circumvent the territoriality principle of the U.S. trademark law and may cause grave danger to U.S. marks and American

164. Grupo Gigante SA De CV v. Dallo & Co., 391 F.3d 1088, 1098 (9th Cir. 2004).

165. 15 U.S.C. § 1125(a).

166. *See* Lockridge, *supra* note 67, at 1403.

167. *Id.*

168. Petition for Writ of Certiorari at 11–12, Belmora LLC v. Bayer Consumer Care AG, 137 S. Ct. 1202 (2017) (No. 16-548), 2016 WL 6156565.

169. *Id.*

170. *Id.*

businesses.[171] Third, petitioners argued that the Fourth Circuit erred on limiting its interpretation of the Lanham Act within its plain language.[172] Petitioners quoted Judge Jed S. Rakoff of the Southern District of New York:

> Although . . . the Lanham Act itself . . . *see, e.g.*, 15 U.S.C. § 1125(a)(1), does not specify the 'territorial principle' in haec verba, the principle was long established before enactment of the Lanham Act in 1946 and was already so basic to trademark law that it may be presumed to be implied in the Lanham Act.[173]

The petitioner urged the Supreme Court to grant certiorari to achieve "uniformity in the interpretation of the Lanham Act and to reestablish the primacy of the territoriality principle."[174] In the following Sections, this Note will explain why the accusations against the *Belmora* decision in the certiorari petition were incorrect.

a) The Unfair Competition Clause Is a Good Alternative Way for Courts to Re-Characterize the Territoriality Principle in the Trademark Law

As discussed earlier, applying the well-known mark exception to protect consumers is not a straightforward process because determining well-known mark status itself can be confusing and hard to administer. The *Belmora* court, however, offers some guidance on how trademark owners can protect their goodwill through the unfair competition clause. The court makes a commendable attempt to achieve the reconfiguration of the territoriality principle in trademark law without clashing head-to-head with the existing debate around the existence and application of the well-known mark exception in Lanham Act.

Belmora capitalized on FLANAX Mexico and potentially caused the loss of sales of ALEVE and other pain relievers in the United States. The *Belmora* opinion emphasized that this was not a trademark infringement case, but an unfair competition case. If trademark protection is about protecting trademark owner's goodwill, then the key to determine the cause of action should be the amount of lost sales. On the other hand, in *Belmora*, the lost sales of Bayer would have been difficult to calculate, given that the purchase of pain reliever products is very need-based. If someone traveled from Mexico to the United States and needed a pain reliever, that person probably would just buy what was available immediately. However, one might argue that a Mexican traveler is more likely to buy FLANAX based on their knowledge of Bayer's FLANAX

171. *Id.* at 12.
172. *Id.*
173. Almacenes Exito S.A. v. El Gallo Meat Mkt., Inc., 381 F. Supp. 2d 324, 327 n.3 (S.D.N.Y. 2005).
174. Petition for Writ of Certiorari at 12, *Belmora*, 137 S. Ct. 1202 (No. 16-548).

in Mexico. Consequently, as a competitor, Bayer's ALEVE in the U.S. market might lose sales to the U.S. user of the FLANAX brand due to the goodwill of FLANAX in Mexico.

The Supreme Court pointed out in *Hanover Milling Co. v. Metcalf* that if, in two remote and separate markets, two parties independently develop and employ the same mark upon similar goods of the same class,

> the question of prior appropriation is legally insignificant; unless, at least, it appears that the second adopter has selected the mark with some design inimical to the interests of the first user, such as to take the benefit of the reputation of his goods, to forestall the extension of his trade, or the like.[175]

In *Belmora*, there is clearly such a bad faith element when Belmora made its FLANAX package look similar to that of the Bayer FLANAX. In addition, Belmora made efforts to make distributors and retailers believe they were selling the same FLANAX product as in Mexico. Therefore, it is evident that Belmora sought to capitalize on Bayer's goodwill and, as such, the unfair competition clause was the optimal source to protect the trademark owner's rights.

Finally, the remaining question is whether either registration or use in commerce are required for Lanham Act section 43(a) to apply. The *Belmora* court applied the *Lexmark* analysis to determine that, as long as Lanham Act did not require "use of the mark," it should apply. Though there remains disagreement, the *Belmora* court was correct in deciding the case on the plain language of the Act, which does not restrict application to registered or in-use trademarks.

b) Circumventing the Territoriality Debate Is Not a Bad Thing

The Supreme Court's 1952 *Steele* decision created a three-prong test that allowed trademark law to go beyond U.S. borders when the infringing defendants were outside of the United States.[176] However, the Court never determined whether foreign trademark holders can sue for damages or cancellation in the United States against defendant U.S. companies. This battle landed before the Fourth Circuit in *Belmora*, with the territoriality principle at front line. The Federal Circuit and the Second Circuit court both clearly denied the extraterritoriality of trademark law. This currently dead-end debate among circuit courts around the famous-mark exception should be taken up by the Supreme Court or Congress. Until then, *Belmora* creates a better alternative to get around the territoriality debate and pushes the law further to protect rights holders.

175. 240 U.S. 403, 415 (1916).
176. Steele v. Bulova Watch Co., 344 U.S. 280, 282 (1952).

The Supreme Court's refusal to review *Belmora* is consistent with its inclination to apply extraterritoriality in trademark law disputes. The Supreme Court is in a double bind. Due to the well-accepted territoriality of intellectual property laws, if the Supreme Court refused to apply the extraterritoriality view to U.S. infringers against foreign mark holders, it would likely be accused of going against the trend of protecting the right holders. If the Supreme Court decided the other way, it would fail to protect U.S. citizens and companies.

V. THE AFTERMATH OF *BELMORA* AND PRPOPOSED SOLUTIONS

As mentioned by the International Trademark Association's amicus brief supporting the petition for certiorari by Belmora, this case involved an important issue to trademark owners: Can the owner of a foreign trademark establish standing to pursue claims under section 14(3) or 43(a) of the Lanham Act against the owner of the same mark in the United States?[177] Empirical data in trademark law litigation and registration shows that refraining from resolving the circuit split may lead to forum shopping and also increase the confusion of the large volume of foreign trademark owners who hope to get protected under the U.S. Lanham Act.

A. EMPIRICAL DATA AND FINDINGS ON FOREIGN TRADEMARK REGISTRATION IN THE UNITED STATES

This circuit split potentially impacts thousands of trademarks in industries that may worth more than 2.5 trillion dollars for the U.S. economy.[178] The Fourth Circuit decision invites foreign trademark owners to be involved in endless lawsuits against U.S. trademark owners, even if those foreign mark owners are not registered or in commerce, in the United States.[179] Foreign trademark owners may also be incentivized to slack on registering their trademark directly in the United States. Registering trademarks in multiple countries is an expensive and time-consuming process, and the recent futile applications of international treaty-making in trademark protection forces foreign trademark owners to choose between this costly multi-country registration process and the chance of winning a well-known mark or unfair competition claim.

177. Brief for International Trademark Association as Amicus Curiae Supporting Petitioners at 4, Belmora LLC v. Bayer Consumer Care AG, 137 S. Ct. 1202 (2017) at 4.

178. *See* Petition for Writ of Certiorari at 24; Belmora LLC v. Bayer Consumer Care AG, 137 S. Ct. 1202 (2017) (No. 16-548), 2016 WL 6156565.

179. *Id.*

The USPTO has posted registration information by foreign trademark owners in the United States since the 1900s.[180] Figure 1, below, shows an almost-continuous increase of foreign trademark registration in the United States until 1997.[181] However, that trend stalled during the period the federal courts began struggling to interpret the Lanham Act and remains so today. It is unclear from the data how much foreign trademark owners reacted directly to federal circuit courts decisions while deciding if they should register their marks in the United States. In other words, it is hard to determine the net effect of court decisions on foreign trademark owners' choices solely from the data discussed here. However, there are some visible trends in foreign trademark registration volume that correlates well with the back-and-forth decisions in the circuit courts.

According to the USPTO data presented in the Figure 1 below, foreign trademark registration volume across time shows that court decisions on the extraterritorial nature of the Lanham Act may confuse foreign trademark owners. After the Federal Circuit's decision against the well-known mark exception in *Person's Co., Ltd. v. Christman* in 1990,[182] the number of foreign trademark registrations in the United States saw a sharp increase until 1997.[183] Conversely, the sharp drop in foreign trademark registration volume around 1997 corresponds with the Ninth Circuit's decision in favor of the Mexican restaurant chain in *Grupo Gigante*. According to the data as presented in Figure 1, registration volume started to go back up after the Second Circuit decision in 2007. Only time will tell if the *Belmora* decision will have an impact on this trend. Even without a complicated causal inference analysis, it seems unlikely that the correlation between changes in volume of foreign trademark registration in the United States with courts' decisions regarding those trademarks is mere coincidence.

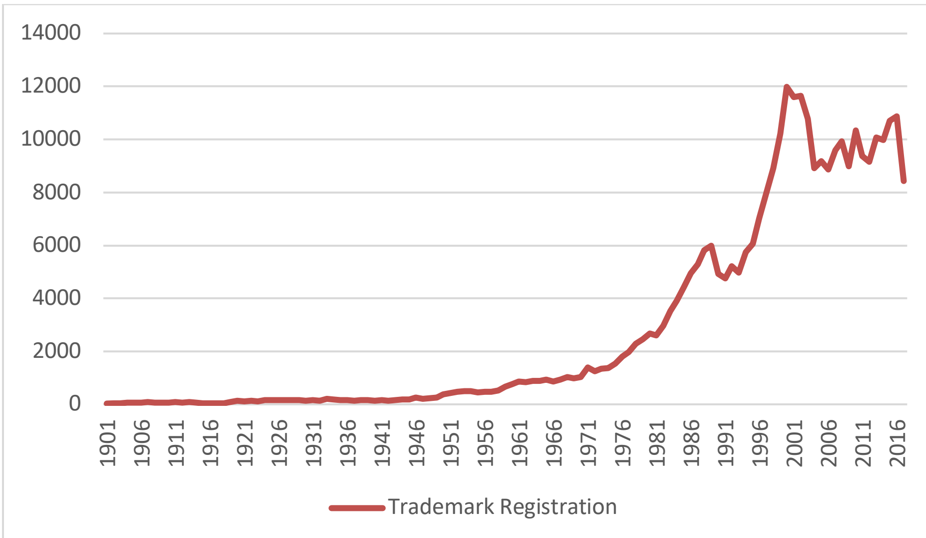
180. *See* STUART GRAHAM ET AL., THE USPTO TRADEMARK CASE FILES DATASET: DESCRIPTIONS, LESSONS, AND INSIGHTS (2013).

181. *See* Tim W. Dornis, *Behind the Steele Curtain: An Empirical Study of Trademark Conflicts Law, 1952–2016*, 20 VAND. J. ENT. & TECH. L. 3, 566, Figure 7 (2018).

182. *See* Person's Co., Ltd. v. Christman, 900 F.2d 1565 (Fed. Cir. 1990).

183. For further data on trademark applications, see *Trademark Case Files Dataset*, USPTO, https://www.uspto.gov/learning-and-resources/electronic-data-products/trademark-case-files-dataset-0 [https://perma.cc/D8GS-872G] (last visited Dec. 24, 2019).

Figure 1: Number of Foreign Trademarks Registered per year with the USPTO 1900–2017

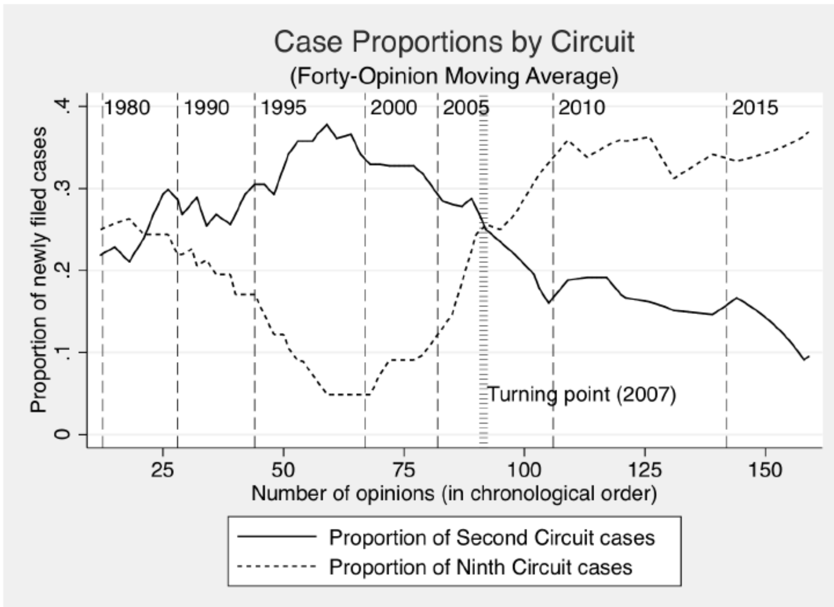


B. THE DANGER OF FORUM SHOPPING

Forum shopping is always a concern for the federal U.S. legal system, as it strives for consistency and predictability in decision-making. The circuit split before *Belomora* already led to a clear trend of forum shopping in trademark litigation. The Ninth Circuit became an increasingly popular destination for filing trademark law cases involving non-U.S. infringers or infringement activities allegedly happening overseas. In Figure 2, Professor Dornis presents that since 1997, the Ninth Circuit has seen a continuous increase in the proportion of newly-filed cases relating to the extraterritorial interpretation of the Lanham Act. The ratio of cases filed in the Ninth Circuit finally exceeds that of the Second Circuit in 2007 after the *ITC* decision. It would be reasonable to project that the Fourth Circuit will become the next popular court for foreign trademark owners seeking Lanham Act protection.

Although the data presented in Professor Dornis's paper focused on cases with U.S. trademark owners as plaintiffs seeking protection from trademark infringement conduct happening outside of the United States, territoriality and extraterritoriality issues are so closely related that it seems the increased filing rate of international trademark cases in the Ninth Circuit is encouraged by the failure of the well-known mark exception claim in the Second Circuit.

Figure 2: Case Proportions by Circuit (Forty-Opinion Moving Average)[184]



C. PROPOSED SOLUTIONS

Belmora created a new route to achieve extraterritoriality in the Lanham Act. In his discussion on whether the territoriality doctrine is a dying principle of trademark law, Professor Dinwoodie asked whether trademark law should be reactive or proactive to social change.[185] If reactive, the increasingly non-national nature of goodwill suggests that *Belmora* correctly engaged the basic objectives of trademark law, i.e., protecting the trademark owners' goodwill in the context of a global market. A reactive theorist would want to elevate the social aspect of territoriality and to protect the goodwill that the global market engenders. But a proactive theorist may "seek solace in the politically grounded aspects of territoriality and the practical value of national rights."[186] Therefore, parties that prefer international protection would be encouraged to use the efficiency-enhancing mechanisms of section 44(e) and the Madrid Protocol, and would be promoted through a narrow interpretation of "use in commerce." Thus, the practical suggestions would enhance the international trademark registration system and encourage international collaboration on trademark protection in reciprocal way.

184. *See* Tim W. Dornis, *Behind the Steele Curtain: An Empirical Study of Trademark Conflicts Law, 1952–2016*, 20 VAND. J. ENT. & TECH. L. 3, 566, Figure 7 (2018).

185. *See* Dinwoodie, *supra* note 12, at 955–56.

186. *Id.*

According to Professor Dinwoodie's reactive perspective, the *Belmora* court made a defensible move to achieve one of the goals of trademark law. However, Professor Dinwoodie's proactive perspective could be counter-productive. Given the proven ineffectiveness of the international trademark registration system and the toothless TRIPS Agreement on international collaborations in trademark protection, it is better to draw on the equity principle in the Lanham Act and request protection for non-U.S. trademark owners against unauthorized users' bad faith behavior. Belmora's intentional mimicking of the FLANAX package is a particularly good example of such bad faith behavior.

Providing a clear path for optimal extraterritorial trademark protection would require reform from courts, the legislature, and practitioners alike. First, Congress should take a proactive role and clarify in the Lanham Act that non-U.S. trademarks are covered by the statute as long as they can prove harm by unauthorized users' capitalization of the goodwill of their trademarks. Therefore, non-U.S. trademark owners may bring in causes of action on the basis of the unfair competition clause in the Lanham Act. Moreover, the Congress should also explicitly include the well-known mark exception in the statute. Ideally, Congress should provide guidance on how to determine the well-known mark statutes based on a combination of social science research findings and the practical considerations of efficiency and administrability.

Second, before Congress amends the Lanham Act, the U.S. Supreme Court should revisit the well-known mark exception doctrine and the unfair competition clause, and endorse the Ninth and Fourth Circuits' efforts in reconfiguring the territoriality principle under the Lanham Act.

Third, practitioners should keep encouraging non-U.S. trademark owners to register in the United States and be vigilant about potential infringement from local users. Even though Bayer won at the Fourth Circuit, on remand in the district court, Bayer lost because the statute of limitations ran in September 2018.

VI. CONCLUSION

The *Belmora* decision in 2017 further exacerbates the pre-existing circuit split on the extraterritorial application of the Lanham Act. Before *Belmora*, the debate between the Ninth Circuit and the Second and Federal Circuits focused on whether the well-known mark exception can be applied to non-U.S. trademark owners against infringement activities by U.S. junior users. The *Belmora* court decided to focus on the unfair competition clause of the Lanham Act and allows foreign trademark owners with no trademark rights in the United States to file a claim against U.S. junior users if harmful activities conducted in bad faith were involved. With the help of data from USPTO trademark registrations and lawsuit case data collected by Professor Dornis, this Note advocates for the importance of addressing the extraterritorial applications of the Lanham Act. In conclusion, *Belmora* is a commendable effort made by the Fourth Circuit in response to a gray area in Lanham Act jurisprudence, which supports the protection of foreign trademark owners from bad faith mimicking by U.S. junior users.