

**PAN AM IN THE AIR AND ON THE RAILS: HISTORIC
TRANSPORTATION TRADEMARKS ARE VALUABLE
INTELLECTUAL PROPERTY ASSETS**

Karen J. Thoms, Ph.D., Professor
St. Cloud State University
St. Cloud, Minnesota

William E. Thoms, J.S.D.
Professor Emeritus of Law, University of North Dakota
and
Affiliated Faculty, Upper Great Plains Transportation Institute,
North Dakota State University
Fargo, North Dakota

Kristi L. Kelly
Student Research Assistant
St. Cloud State University
St. Cloud, Minnesota

October 2012

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The field of intellectual property (often referred to as IP) continues to generate interest and covers a range varied topics, including movies, books, music, machines, and inventions. In fact, IP encompasses four separate fields of law: trademarks, copyrights, patents, and trade secrets. Trademarks, the focus of this paper, are words, names, symbols, or devices used to identify and distinguish one's goods or services and to indicate their source (Bouchoux, 3). A trademark is used in the marketing of a product, whether it be shoes, coffee, or other products. Trademarks are very visible, and it is estimated that the average citizen views thousands of trademarks each day. Think of all the signs along a typical highway: Kentucky Fried Chicken, McDonald's, etc. Trademark recognition is a premium business asset that is so ingrained in the public's consciousness that even children recognize these images and color combinations. The field of IP impacts each of us and the field of transportation includes many examples. This paper will discuss a recent example of a trademark from a now-defunct airline that was shown to continue to have significant value because of its familiarity around the world and because of the style of travel that it represents. This paper will also recap a number of additional railway trademark examples that may have similar value. Finally we'll examine some examples of how railroads are defending their intellectual property rights in court.

AN INTRODUCTION TO INTELLECTUAL PROPERTY

Property can be a vague term when it does not involve land ownership, so intellectual property law basics need to be defined. There are three different distinct types of property that individuals and companies can actually own: real property (which refers to land or real estate), personal property (which refers to moveable items such as cars, jewelry, and stocks), and intellectual property (which refers to the results of human creativity including literature, advertising slogans, songs, or new inventions).

From a business standpoint, "competitive businesses recognize that nearly 80 percent of their value can lie in their intellectual property" (Bouchoux, 11). In addition, technology and global communications help make intellectual property assets more accessible. The changes in technology and the rapidity with which information can be transmitted via the Internet have led to increased challenges in the IP field. Bouchoux points out that the Office of the United States Trade Representative has estimated that U.S. industries lose between \$200 billion and \$250 billion each year from piracy, counterfeiting of goods, and other IP infringements (p. 11). In many cases, the most valuable assets a company owns are its IP assets (think Coca-Cola, Microsoft).

There are basically five different kinds of intellectual property that are addressed by law: trademarks, copyrights, patents, trade dress, and trade secrets. A trademark is a word, name, symbol, or device used to indicate the origin, quality, and ownership of a product or service. Rights in trademarks are created by use of a mark, yet registration with the U.S. Patent and Trademark Office is surprisingly not required, but doing so offers advantages. Copyright protects

original works of authorship, including literary, musical, dramatic, artistic, and other works. Like trademarks, rights in copyrights exist from the moment of creation of a piece in fixed form. Protection does not require registration of a copyright with the U.S. Copyright Office within the Library of Congress, but in the event of infringement accusations, the official copyright provides better protection. A patent is a grant of rights from the U.S. government that permits the owner to exclude others from making, selling, or using an invention. Unlike copyright protection, patents only exist upon issuance by the U.S. Patent and Trademark Office.

A trade secret consists of any valuable commercial information that, if known by a competitor, would provide some benefit or advantage to the competitor. No registration or other formal requirements are needed to create a trade secret, and trade secrets exist as long as efforts are made to protect their secrecy. Trade secrets are governed by various state laws, and registration is not required for existence and ownership of a trade secret.

Trademarks and trade secrets can endure perpetually as long as they are protected, while copyrights and patents will fall into the public domain and be available for use by anyone after their terms expire.

Trademark licensing and service marks are precious corporate assets. Service marks and trademarks reinforce the corporation's distinctive identity and value. Unauthorized use of service marks and trademarks undermines that identity and value. Their power in marketing and the ownership of the trademark rights are economic assets.

A trade dress is the image of a product or a chain restaurant, such as size, shape, color, texture, and graphics that can be protected. The trade dress itself cannot yet be registered as a mark, but it is protected under the laws of unfair competition.

In addition to copyrights, patents, trademarks, trade secrets, and trade dress, other intellectual property rights exist. Examples of other property rights may include semiconductor chip protection, plant variety protection, the right of publicity, and rights relating to unfair competition, including passing off, misappropriation, and false advertising.

The following sections describe how the importance of IP has grown within the transportation industry.

PAN AM ON RAILS AND IN THE AIR

Pan American World Airways (Pan Am) was the principal American flag carrier from the 1930s until airlines were deregulated in the 1980s. As early as 1994, only three years after Pan Am ceased operations, the company's name and logo were licensed for \$1.32 million. (Bryant, 1994).

In 2011, ABC television launched a drama series set in the 1960s which used the Pan Am logo and all its trade dress as background. The Pan Am name and associated IP are now the property of Pan Am Railways, whose blue boxcars adorn what used to be the Boston & Maine and Maine Central Railroads. So even though there are no more Pan Am planes, there are Pan Am trains. The railroad is owned by Guilford Transportation Industries of Massachusetts (Trains, June 2006).

Back in the 1960s, Pan Am American World Airways was a major trunk airline. Nancy Ganis, one of the producers of the Pan Am television series and a flight attendant for Pan Am herself 30 years ago, was quoted in Michael Schneider's article (2011) describing how Sony Pictures TV production president Zack Van Amburg said the idea for the television series came from a meeting between him and fellow proxy Jamie Erlicht, and also with Ganis and her husband/production team, Sid Ganis. When Nancy Ganis began spinning tales of historically relevant intrigue, sex, and what it meant to be a flight attendant in the go-go days of flying, Van Amburg and Erlicht latched to the idea. But, before any airing of the show took place, Sony Pictures TV and the producers, had to secure rights to the Pan Am brand, which was both a novel and complex process. Although no financial details were released, negotiations over the use of the name and trademark took more than four years, according to the Boston Globe (Diaz, 2011).

ABC did a good job showing what life was like being an airline pilot and a stewardess for the airline in the 1960s, but the show was a short-lived series, which premiered on September 25, 2011, and aired its last episode on February 19, 2012. Apparently, the show had little appeal to older viewers, who did not think the Cold War was much fun, nor to the young, who couldn't imagine that flying was once comfortable.

What the series did illustrate was how a historic trademark and name like Pan Am's could continue to have significant value as intellectual property long after the original company ceased operations.

In addition to its present association with rail freight, the Pan Am trademark continues to be used to market handbags, luggage, apparel and accessories to a specific clientele that seeks to recapture the days of luxury travel (Pan Am Brands, 2012).

THE RAILROADS AND THEIR ADVERTISING

As John Kelly, author of "Selling the Services" writes, "Like other companies doing business in a competitive marketplace, the railroads used advertising to create a public image of their railroad that could be used to sell their services." Typically, that image was succinctly captured in a slogan, some memorable iconographic trademark, called a herald in earlier days, but not typically referred to as a logo. Both heralds and slogans were emblazoned in bold letters on the sides of freight cars, featured prominently on the pages of public timetables and travel brochures, and even stenciled on the sides of bridges. As with any kind of service, the most successful

railroad advertisements have stood the test of time, remaining in the consciousness of enthusiasts long after the roads themselves faded into the past. This is "... particularly vital because of the role that trade symbols play in our advertising-conscious economy (Zlinkoff, 955). Given the staying power and value of Pan Am's corporate image, it is likely that there is significant intellectual property value to be captured from iconic railroad company heralds.

One famous railroad herald was the "sleeping kitten" brand for the Chesapeake and Ohio Railroad. This 1933 image of a cuddly kitten was nicknamed "Chessie," which became a popular nickname for the railroad. The motto "Sleep like a kitten" was used to promote the railroad's passenger service. This image was the company's herald for 50 years and became the corporate logo when B&O and C&O combined into CSX Transportation System.

The success of the sleeping kitten ultimately led to competition, and back in those days, burgeoning communities competed with each other to attract new railroads to their borders. In central Ohio, the towns of Bellevue, Norwalk, and New London all campaigned vigorously to be located on the main line of the New York, Chicago and St. Louis Railroad. In using local newspapers to stress the railroad's economic importance, they referred to "the great New York and St. Louis double-track nickel-plated railroad." Based on this motto, the railroad then began to refer itself as the Nickel Plate Road.

Grain was a staple of railroads, therefore drawing them to the Midwest and generating competition among various rail carriers. The largest Midwestern road was the Chicago, Burlington and Quincy, whose corporate slogan was "Everywhere West." Despite the slogan, the railroad did not venture too far West, and in fact, never reached beyond Denver, CO, or Billings, MT. Burlington's trademark was a simple black rectangle with the words "Burlington Route" in white block letters. Other Midwestern railroads used their geographical locations to promote their services. Minneapolis and St. Louis's rolling stock was lettered "The Peoria Gateway," while the Illinois Central Railroad used the slogan of "Main Line of Mid-America" for their advertising. Seaboard Railway's logo contained the words "Through the Heart of the South," while Nashville, Chattanooga and St. Louis used the slogan "The Dixie Line." In 1940, the Kansas City Southern used the popular "Southern Belle" passenger train between Kansas City and New Orleans. They featured an 18-year-old named "Miss Southern Belle," and "Miss Landry" was the spokesperson for the new train, and was pictured on KCS timetable covers. KCS is still independent and has since expanded to Mexico and Panama.

Other slogans promoted a carrier service to market its business. Kansas-Texas (MKT) used "Count on Katy." In the 1930s and 40s, the Alton Railroad between Chicago and St. Louis and Kansas City had as its trademark, "The Only Way." Another example would be the Chicago and North Western which stenciled "The Overland Route" on its boxcars to promote its favorable connection with the Union Pacific at Council Bluffs, IA, and Fremont, NE.

One of the most famous trademarks in railroading would be the Santa Fe's cross and circle emblem, developed in 1901 by passenger agent J. J. Bryne. It symbolized the four points of a compass and a wheel of transportation with the words "Santa Fe" in the center. Johnnie Mercer immortalized the slogan "All the way from Phila-del-ph-I-A, on the Atchison, Topeka and the Santa Fe" in lyrics for the musical movie "The Harvey Girls." The Great Northern and Northern Pacific both competed for traffic between the Midwest and Pacific Northwest. Despite this similarity, the images used to promote their services were intensely different. Great Northern used "Rocky the Goat" as its corporate symbol beginning in 1921. This was the popular trademark used for almost 50 years. This helped develop Glacier National Park, which was what the Great Northern advertised their services for, to come and visit the national park (Kelly). The Northern Pacific Railway used a black and red Chinese yin-yang sign for its emblem. The two railroads then merged to form the "big green" Burlington Northern (Kelly).

Eventually Santa Fe and Burlington Northern merged in 1995, and the new Burlington Northern Santa Fe Railway adopted a modified version of the Santa Fe compass, using it as its corporate logo, mainly trying to use this symbol of the past for the future (Kelly).

In the mid-20th century, the Santa Fe introduced a series of slogans to promote its single-line service between Chicago and California. The motto, "Santa Fe All The Way," was used starting in 1940 and "Ship and Travel All The Way" was introduced 1947. With these logos, slogans, and the colors of red and silver, Santa Fe created a complete image that helped sell transportation (Kelly).

Based on the success of the Great Northern, other western railroads used geographical imagery in their trademarks and advertising. The Denver & Rio Grande Western used the phrase, "Thru the Rockies—Not Around Them" and displayed picturesque scenes of the Rocky Mountains on their route (Kelly).

The Western Pacific partners in the California Zephyr operations ran the train through the famous Feather River Canyon in northeastern California, earning the title, "Feather River Route."

In the 1970s, the Milwaukee Road emblazoned "America's Resourceful Railroad" in bold black letters on its yellow hopper cars for advertisement.

After investing nearly \$2 billion dollars in new equipment, technology, and services in the 1950s, the Canadian National embarked on a redesign of the visuals used on its railroad, down to the uniforms worn by employees in its chain hotels. Today this is called *rebranding* in the marketing sector. The CN emblem has been nicknamed "the lazy 3" because its appearance is similar to the numeral 3 tipped on its side.

Union Pacific Railroad created its famous U.S. shield logo as a symbol of strength and a tie to the company's heritage, enacted by the Pacific Railroad Act. This Act was signed by President

Lincoln and it advanced UP's construction, thus opening up the American West. Introduced in 1887, the UP became one of the oldest corporate logos in the United States. Union Pacific Corporation owns one of America's leading transportation companies. Its principal operating company, Union Pacific Railroad, links 23 states in the western two-thirds of the country and serves the fastest growing U.S. population centers. Union Pacific's diversified business mix includes agricultural products, automobiles, chemicals, energy, industrial products and intermodal freight. The railroad offers competitive long-haul routes from all major West Coast and Gulf Coast ports to eastern gateways. Union Pacific connects with Canada's rail systems and is the only railroad serving all six major gateways all the way to Mexico, making it North America's premier rail franchise (Blaszak, p. 27).

Shore Line East is a railroad service that connects towns in southern Connecticut. The railroad provides services from New London, west to New Haven, then with a continuing service to Bridgeport and Stamford, and connecting services to New York, New York, via Metro-North Railroad's New Haven Line. Shore Line East operates on tracks owned by Amtrak and is a fully owned subsidiary of the Connecticut Department of Transportation.

This section of the Northeast Corridor SLE operates on what was once the New York-Boston mainline of the New York, New Haven & Hartford Railroad. This line was referred to as the "Shore Line" to distinguish it from the main line to Springfield, Massachusetts. ConnDOT (Connecticut Department of Transportation) paints SLE's diesel power locomotives in the New Haven Railroad colors with "NH" markings in recognition of the large role played by the New Haven in the history and heritage of the state of Connecticut.

Shore Line East was not the first railroad to run this route. The New Haven Railroad operated local service on this same route until its merger with Penn Central (Dooley and Thoms, p. 128).

THE RAILROADERS VERSUS THE MODELERS

Railroads are beginning to recognize the intellectual property value of, not only their current logos, but of the logos of historic lines absorbed through purchases and merges. This recognition is evident in recent interactions between railroad companies and model railroad manufacturers and in efforts to preserve and use historic intellectual property.

In 2005, Union Pacific Railroad sued model railroad manufacturers for using, not just their current logo, but all of the defunct railroads such as the Southern Pacific and the Rio Grande. Union Pacific in 2004 painted a number of its new diesel locomotives in the trade dress of predecessor railroads to protect the rights to its intellectual property. Similarly, in 2012 Norfolk Southern is painting twenty "heritage engines" to reflect 30 years of merger, according to Guss (pp. 14-15).

MTH Electric Trains is an American toy train and model railroad designer, importer, and manufacturer. The name, short for Mike's Train House, is a privately held company (MTH Electric Trains, p.3). In its 26 year history, MTH Electric Trains has released O gauge, in Tinsplate, One Gauge, and HO Scale Model trains, which was more than all of its competitors combined. Featuring the industry's highest quality ready-to-run starter sets, MTH products come loaded with digital sounds and control features in traditional railroad liveries and popular branded themes, including the Coors Light Silver Bullet, NFL, Major League Baseball, Harley Davidson, and Caterpillar. As an innovative market leader, MTH products have long been lauded for their use of modern technology to expand and nurture the hobby of model railroading.

On December 30, 2005, the Union Pacific Railroad sued MTH for using its logos, along with the logos of various "fallen flags" (discontinued or merged railroads) that it had acquired, due to not having a license. UP had previously sued other manufacturers, most notably Lionel and Athearn, for their use of the logos. At the time of the suit, UP originally had 104 licensees, and the suit required that MTH stop using the trademarks, pay damages, and send UP-branded inventory to the railroad for destruction.

On November 8, 2006, MTH Electric Trains and Union Pacific Railroad announced that they had harmoniously settled the trademark infringement case that UP filed against MTH in the Omaha, Nebraska, federal court (Union Pacific News Release, 2006). The settlement benefitted both parties, as well as the entire model railroad industry. It allows Union Pacific to continue to protect its intellectual property, and authorizes MTH's use of Union Pacific's trademarks and paint designs on model train products and accessories. Union Pacific has also decided to change its trademark-licensing program so that model railroad manufacturers will no longer have to pay a royalty, and will enjoy a perpetual license to use Union Pacific trademarks and paint designs on model railroad products (Union Pacific News Release, 2006).

"THROUGH THE MOUNTAINS, NOT AROUND THEM"

The Rio Grande was acquired in the 1990s by the Southern Pacific Railroad, which eventually merged into the Union Pacific. Phil Anschutz, owner of the Southern Pacific, retained the Rio Grande intellectual property and used it on one train, which was the weekly Ski Train out of Denver, CO. The Ski Train was a seasonal passenger railroad operated by the Rio Grande in the period of 1940-2009. The train was instituted by the railroad in 1940 and ran from Union Station in Denver, CO, for 56 miles to the ski resort of Winter Park, CO. (Dooley and Thoms, p. 150). The Ski Train lasted until 2009, when it disappeared in an insurance conflict with Amtrak, which was initially going to operate it for Anschutz Investment Company. Anschutz, saw that the company's business was dwindling, prompting him to sell it to the Algoma Central RR in Canada (Thoms, 1998, p. 44).

Iowa Pacific Holdings (IPH), a holding company that owns railroad properties across North America and the United Kingdom (including San Luis and Rio Grande in southern Colorado), made a bid to revive the Ski Train using an improved business model that utilized idle equipment from a SL&RG's subsidiary, Rio Grande Scenic Railroad (Iowa Pacific Holdings). The initiative fell through due to Amtrak, which would be supplying the staff. Classifying the Ski Train as a commuter operation versus an excursion train resulted in higher liability insurance. Amtrak settled the matter in court on December 23, 2009 (Leib).

Iowa Pacific then bought the remaining ANSCO property and operates passenger and excursion trains in Colorado, New York, New Mexico and in some foreign countries. Iowa Pacific operates in Colorado under the name San Luis & Rio Grande, as well as Rio Grande Scenic RR, with variations of the Rio Grande logos (Iowa Pacific website).

CONCLUSION

The intellectual property created by historically significant transportation companies across the company remain valuable assets. They evoke powerful images and emotions that continue to be valuable in marketing and advertising. Their value is made evident as companies negotiate, and sometimes wage legal battles, over who has the right to use them. Whether in negotiations over use of Pan Am trademarks in television shows and luggage or in court cases to determine ownership and use by model train manufacturers or regional railroads, the value of this intellectual property is being increasingly recognized.. Coupled with this recognition is the ability for rapid dissemination and unauthorized use of those trademarks via the Internet. Consequently, we can anticipate seeing more infringement and licensing cases in the coming years.

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