

Issues in Trademark Disputes: Comparative Analysis in India, Japan and United States

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| Received: 05.04.2019 | Accepted: 10.04.2019 | Published: 30.04.2019

DOI: [10.36347/sjahss.2019.v07i04.003](https://doi.org/10.36347/sjahss.2019.v07i04.003)

Abstract

Review Article

Growing international trade and the transnational commerce have provided a fertile field for new trademark disputes both at geographical level and virtual level which has not only given rise to multiplicity of disputes but also have raised novel issues and challenges. The article focuses on how such novel trademark disputes and their multiplicity have posed numerous challenges for expanding the legislative as well as fundamental trademark concepts before any country. The article further deals with the comparative analysis of trademark protection in Japan and USA. A specific attempt is made to study the legislative and judicial approaches in these countries in dealing with issues of jurisdiction in comparison with India that may arise in the trans-border trademark issue in physical as well as virtual world. It is worthy to mention that while drawing comparison the entire scheme of the trademark legislation of Japan and USA is not minutely analyzed. Relevant aspects of the legislation of respective countries that are corresponding to the scheme of the research are only considered. The article concludes with an observation that the courts in these countries would by and large assert international jurisdiction when there is a close connection between the dispute and the forum. The courts in both civil as well as common law system are attempting to apply and adapt the traditional rule of jurisdiction in case of cross border cases. The task becomes more difficult when the dispute involves more than one country.

Keywords: Disputes, Jurisdiction, International Trade, Trademark.

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INTRODUCTION

Globalisation can progress if there is minimum conflict in laws between countries and there are more or less similarities or parity between their laws, especially those relating to areas of common concern like intellectual property laws and more specifically trademark laws. It, therefore, becomes important to get a comparative perspective on law not only for minimizing conflict but for adopting best practices upon a given subject matter. The landscape of trademark protection is changing due to free trade and technological advancements globally. Under international law, one nation cannot create a trademark in the territory of another. The reason is that the trademark rights are territorial by nature and no nation can exercise its sovereignty in another nation's territory. Thus, a trademark that is valid in several countries constitutes a bundle of trademark rights. Each trademark right comprising the bundle correspond to the nations upon which the right depends for its existence.

India: Legislative Trends

The ever escalating importance of trademark in international and domestic commerce is remarkable. Most obvious are the impact of electronic commerce and the growth of internet as a selling medium, a forum that transcends national boundaries and bears no physical location on 'Main Street [1]'. It is an axiomatic principle of Law that trademarks and the rules governing trademark cannot be detached from territoriality. Commercialization and infringement of intellectual property in true sense have become multi territorial.

The law relating to the procedure in suits and other types of civil proceedings in India (except those in the State of Jammu and Kashmir, Nagaland and the tribal areas of Assam) is contained in the Code of Civil Procedure, 1908. (CPC) A civil suit is required to be instituted for initiating a legal action in case of infringement or passing off. Civil suit is instituted by presenting a plaint in an appropriate court of jurisdiction. For determining an appropriate court of jurisdiction provisions regarding place of suing as

provided in the CPC as well the provisions regarding jurisdiction are taken into consideration.

The general provision with regard to the territorial jurisdiction in case of movable property is prescribed under section 20. This section of the Code has been designed to secure that justice might be brought as near as possible to every man's threshold and the defendant should not be put to the trouble and expense of travelling long distances in order to defend himself in cases in which he is involved [2]. Location of the defendant and the cause of action are the focal points of this provision.

Special provisions with regard to jurisdiction under section 134 [3] are prescribed under the Trade Marks Act, 1999 for instituting suit in an appropriate court of jurisdiction in case of infringement. In determining jurisdiction under this provision as well, the cause of action plays a pivotal role. In case of intellectual property rights, where the property rights vest in the plaintiff, an advantage has been given to the plaintiff to file a suit under Section 62(2) of the Copyright Act and Section 134(2) of the Trade Marks Act wherever he resides or carries on business[4].

Therefore under section 134(2) of the new Act, notwithstanding anything contained in the Code of Civil Procedure or any other law for the time being in force, the plaintiff can move the District Court within whose jurisdiction he actually and voluntarily resides or carries on business. In other words, under sub-section (2) of section 134 of the new Act, the plaintiff has option either to go before the court within whose jurisdiction he is carrying on business - that being the sole cause of action or before any other court, where the cause of action has arisen. Such an option was not available under section 105 of the old Act i.e. the Trade and Merchandise Marks Act, 1958

In Section 134(2) of the Trade Marks Act, a deliberate departure is made from Section 20 of the C.P.C to enable the plaintiff to sue one who infringed his right in the court within whose local limit he carried on business at the time of the institution of the suit or other proceedings[1]. Section 134 of the Trade Marks Act, 1999, that it contemplates three types of suits viz., (a) suit for infringement of a registered trademark (b) suit relating to any right in a registered trademark and (c) suit for passing off [5]. In view of the provision under this section, only a court not inferior to District Court shall have jurisdiction to try such types of suits. Sub-section (2) of Section 134, defines the expression 'District Court having jurisdiction' found in sub-section (1), to include a District Court within whose jurisdiction the plaintiff resides or carries on business at the time of institution of the suit, if the suit is in respect of a registered trademark[6]. Therefore, a special privilege is conferred upon the Proprietor of a registered trademark to institute a suit for infringement or a suit relating to

any right in a registered trademark, in the District Court within whose jurisdiction, he resides or carries on business. Section 134 of the Trade Marks Act has carved out an exception to the general rule and it allows filing of a suit for infringement of trade mark at the District Court within whose local limits the person instituting the suit actually or voluntarily resides or carries on business.

Provisions with regards to jurisdiction under section 20 of the CPC and section 134 of the Trade Marks Act, 1999 have been considered by the Apex court as well as various High Courts in different cases. It has been held that the Trade Mark Act, 1999 is a special Act. It provides a special forum under section 134 to initiate action in case of infringement of trademark in addition to the provision on place of suing as prescribed under section 20 of the CPC. The provisions of Section 134 of the Trade Marks Act, 1999 do not whittle down the provisions of Section 20 of the CPC but only provide an additional forum and place for filing a suit in the case of any trade mark violation [7]. The CPC, however, constitutes a *grundnorm*, the ethos and essence of which percolates through all other statutes [8]. It is essential to note that The Trade and Merchandise Marks Act, 1958 did not contain any provision on special forum for instituting suit in case of infringement of trade mark. This provision which has been newly incorporated in the Trade Marks Act, 1999 is a special provision as it enables the plaintiff to enjoy the convenience of filing a suit at the place where he resides or carries on business.

Japan: Legislative Trends

Japan being a country of civil law system, follows a codified law for trademark protection. The Trademark Law [9] is the principal source governing the registration, validity and infringement aspects of trademark. The current trademark legislation was enacted in 1959 as Law No. 127, together with the industrial property statute. The legal protection for trademark in Japan began with the enactment of the Trademark Ordinance in 1884 which was amended in 1888. In 1889 the Trademark Act (Law No. 38) was enacted and in the same year Japan accessed to the Paris Convention. Following new Acts and amendments in 1909 and 1921 finally the existing Trademark Act, 1959 was made. This Act was brought into effect in 1960.

The Code of Civil Procedure and the Rules of Civil Procedure are the principal sources of law and regulation governing the procedural aspects of trademark litigation in Japan.

Trademark law of Japan has adopted first to file principle hence trademarks come into existence upon formal registration which is granted after examination with respect to formalities and substance. Japanese law does not classify the grounds of refusal in

absolute and relative as provided under the Trademarks Act, 1999 of India.

In Japan in case of trademark infringement, a combination of civil remedies including an injunction and compensation of damages, criminal penalties, border measures and alternative dispute resolutions, such as arbitration and conciliation are available to a trademark owner. The remedial structure is similar to that of India. This similarity is due to the international harmonization of intellectual property laws.

In case of trademark infringement, District court is the court of first instance. There are fifty district courts in Japan. Each of them is located in each prefecture of Japan. Decision of the district court is appealable in the High Court (Koso appeal) and then to the Supreme Court (Jokoku appeal). In order to speed up the trial proceedings concurrent jurisdiction is given to the district courts of Tokyo and Osaka in case of trademark, copyright and design infringement cases. There exists a clear bifurcation of physical boundaries for approaching these two specialized district courts. The disputes on trademark that occurs in the eastern Japan are subject to the jurisdiction of the Tokyo district court which has four divisions for intellectual property matters and those occurring in the western part of the Japan are subject to the jurisdiction of the Osaka district court that has two special divisions for intellectual property cases. On 1st April, 2005 the IP High Court was established as a specialized court to deal with intellectual property cases. This court hears the suit against the appeal or trial decisions made by the Japan Patent Office as the court of the first instance and civil cases of intellectual property infringement as the court of second instance.

General Rules on Jurisdiction in Japan

Jurisdiction of the court is determined based on the general rules provided in the Code of Civil Procedure (CPC) in Articles 4 to 12. As per this general rule the plaintiff must file suit at the defendant's forum [10]. This general rule of jurisdiction further provides as to how the forum is to be determined in case of a person, an ambassador, minister, Japanese nationals, legal person, association, foundation and the Japanese government [11]. Apart from this general rule place of suing is identified for various other cases in the following manner:

- The place of tort in case of a wrong [12]
- The place of performance in case of contractual claims [13]
- The place of the defendant's property in case of a dispute over property [14].
- The place of registration in case of a claim concerning registration [15]
- The court of first instance agreed by the parties through agreement [16].
- Jurisdiction determined through general appearance and submission of the defendant [17].

Thus, it can be observed that ordinarily a Japanese court will exercise jurisdiction when the place is identified based on the rules of place of suing as prescribed in the abovementioned manner.

Thus, jurisdictional rules in Japan are a combination of traditional and modern norms. Japan courts exercise jurisdiction based on the domicile of the defendant. The place of harm is considered in case of tort. Till recently Japan did not have any rules to exercise international jurisdiction. However with the new rules in place the situation is more predictable.

United States: Legislative Trends

The US Legal System is a complex organization of Federal and State governmental divisions. It has got several layers compared to other nations. The obvious reason is the federal and state structure. The reason for this multi-layered structure can be found in the history of the evolution of the United States as a nation. The United States was founded not as one nation, but as a union of 13 colonies, each claiming independence from the British Crown. The entire legal system of the US rests upon the traditional legal principles found in English Common Law.

Although both the Constitution and statutory law supersede common law, courts continue to rely upon common law principles to fill in the gaps where the Constitution is silent and Congress has not legislated.

One of the most significant features of US legal system is the dual court system. Each level of government (state and national) has its own set of courts. Thus, there is a separate court system for each state, like one for the District of Columbia, and one for the federal government. Some legal problems are resolved entirely in the state courts, whereas others are handled entirely in the federal courts. Still others may receive attention from both sets of tribunals, which sometimes causes friction. Each State has a legislature that adopts State Laws called "statutes". Those statutes are sometimes compiled into what is referred to as a Code.

Law of Trademarks in United States

In the US, Trademarks are governed by both State and Federal law. Originally, state common law provided the main source of protection for trademarks. Today, federal law provides by and large the most extensive, source of trademark protection, although state common law actions are still available. It is pertinent to mention that the US trademark law is largely influenced by the English Law as the US has also adopted the 'first to use' principle.

In the United States, there are two separate and distinct jurisdictions. One is the jurisdiction of the

States within their own territorial boundaries and the other is the federal jurisdiction. State jurisdiction includes the power to regulate, control and govern real and personal property, individuals and enterprises within the territorial boundaries of the State. Federal jurisdiction, on the other hand, is extremely limited and is exercised only in areas granted to the Federal Government pursuant to the Constitution.

Special IP Court

The United States has one specialized IPR court: the United States Court of Appeals for the Federal Circuit. This is an appellate court whose jurisdiction involves appeals on primarily patent issues. The Federal Circuit has subject matter jurisdiction over patent appeals, appeals from the U.S. Trademark Trial and Appeal Board, and issues arising out of the U.S. International Trade Commission, etc. It was formed to adjudicate IPR cases and to provide guidance to lower courts.

As per this division of the jurisdiction, under title 28 USC § 1338 [18] most intellectual property cases are brought before the federal court. Here a complex question occurs in which federal court should a particular intellectual property action be brought? Since breaches of intellectual property rights often have consequences in many different geographic areas and since there are so many federal courts around the country (there are 94 federal districts and many districts have more than one trial court), the question of the venue in which an action may be brought is always of important consideration. The great majority of plaintiffs elect to file trademark and related unfair competition cases in the Federal Courts for a number of reasons. It is recognized that the Federal Courts, for historical reasons, have far more experience in adjudicating trademark cases than do the state courts. Plaintiffs frequently have to sue defendants in places where the defendants are located but where the plaintiffs have no local ties. The body of trademark law in the United States is largely developed in Federal cases and there is a greater chance of predicting a result especially in a Federal Circuit with a rich collection of precedents and experienced trial and appellate judges. Further, plaintiffs recognize that, even if they file complaints in state courts, the defendants may, and often will, remove them to Federal courts. Further as provided under S. 39 of the Lanham Act, 1846 [19] an action for infringement of trademark can be brought before an appropriate court of jurisdiction as specified in that provision.

Lanham Act's Long Arm Jurisdiction in Case of Trademark Disputes in the Virtual World

The law protecting trademarks has come a long way in the US from common law protection to a comprehensive legislation with internationally divisive remedial system. US are considered to be one of those developed nations where internet is most widely used.

In US each state is considered to be a separate law district. Due to which there are many cases on jurisdictional issues in internet related disputes. The interstate jurisdictional issues in cyberspace have been the subject matter of consideration for the US courts for more than fifteen years between the fairly independent fifty states. Considering the globalized nature of e-commerce in the physical as well as virtual world, extra territorial protection and enforcement of trademark has become a need of the hour.

The courts in US have developed laws to localize the transaction in the virtual world through various tests for exercising jurisdiction. In order to have appropriate jurisdiction the court must have personal as well as subject matter jurisdiction. Personal jurisdiction in the US as applied to internet is divided into two sub categories of general and specific jurisdiction.

General jurisdiction allows US courts to hear claims against a defendant that either

- Is physically present within the forum state, such as a company that maintains an office and phone listing there.
- Engages in continuous and systematic business activities within the forum state, even if the defendant does not have a physical presence there.

A defendant that is subject to general jurisdiction in the forum state may be sued there for any domestic cause of action occurring anywhere in the world.

Specific jurisdiction allows US courts to hear claims against a defendant who is not present within the forum state, if both the following conditions are satisfied.

- The defendant has "minimum contacts" with the forum.
- Those contacts give rise to the plaintiff's claims.

The US court for the first time considered the question of determining the personal jurisdiction in case of *International Shoe Co. v. Washington* [20].

'[d]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he has certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'

In this case it was held that the court can exercise personal jurisdiction over a non-resident defendant provided the defendant has had certain 'minimum contacts' with the forum state such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' There have been several cases dealing with personal jurisdiction over internet [21]. Through various decisions, the US

courts have tried to identify the spectrum of internet activities based on which the jurisdiction can be identified. One of the leading cases has set a standard that many courts have adopted. In *Zippo Manufacturing Co. v. Zippo Dot Com, Inc* [22] the United States District Court for the Western District of Pennsylvania adhered to the long-standing notion of *International Shoe*[23], by looking at the nature and quality of activity to determine whether personal jurisdiction exist over a non-resident defendant. In doing so, the *Zippo* court created a “sliding scale” analysis based on passive, active, and interactive websites. Generally, a passive website does not create contact with a forum state sufficient to confer personal jurisdiction over a non-resident defendant. It is deemed nothing more than an advertisement with no intent to target a specific forum. Consequently, courts hold that “something more” is required. Active websites, on the other hand, are highly interactive. Courts tend to find that these websites are sufficient to confer personal jurisdiction because they enable parties to enter into contracts that contemplate continued business with the forum state, and knowingly and repeatedly transmit files and communicate over the Internet. Interactive websites make up the middle of the sliding scale; jurisdiction based on these websites depends on the nature and quality of commercial activity. The divergence in jurisdictional analysis of interactive websites may stem from a particular court’s interpretation of the phrase, “nature and quality.” Some of the early opinions emphasize the quantity of contacts conducted via a website while others, including more recent decisions, refer specifically to the nature and quality of the contacts.

Although the law is still evolving in this area, previous cases involving jurisdiction in which courts have determined that access to a defendant’s website is sufficient contact to invoke the court’s jurisdiction have generally involved websites that are interactive rather than only informational. Courts have more readily asserted jurisdiction over defendants whose websites enable visitors to purchase merchandise rather than websites that merely provide information or advertise goods or services. However, courts have recently begun to move away from this view and are now asserting jurisdiction over the owners of purely informational websites also. In a recent decision, the Eleventh Circuit reversed a district court’s dismissal of a trademark infringement case for lack of personal jurisdiction. In *Licciardello v. Lovelady* [24], the district court held that the allegedly infringing conduct, operating a website, was insufficient to warrant jurisdiction in the plaintiff’s home state of Florida.

It can be concluded from this detailed discussion on jurisdictional rules and its applicability that the courts in US through precedents have clearly held that it will exercise jurisdiction pertaining to foreign intellectual property right if the court has both

personal as well as subject matter jurisdiction. The complex issue of determining jurisdiction in case of trademark infringement in physical as well as virtual world is being addressed by the court in US on the basis of purpose availment, sliding scale and effect test. Further, the quest for appropriate solution in the trans-border trademark disputes is continued despite the extraterritorial reach and long arm jurisdiction of Lanham Act, 1946.

CONCLUDING REMARKS

From the overview of the legislative and judicial framework of the Japan and USA, it is observed that the courts in these countries would by and large assert international jurisdiction when there is a close connection between the dispute and the forum. The courts in both civil as well as common law system are attempting to apply and adapt the traditional rule of jurisdiction in case of cross border cases. The task becomes more difficult when the dispute involves more than one country. In such cases the intellectual property right exist in several countries. Palpable efforts have been undertaken to achieve the goal of harmonization of intellectual property rights at the global level. However, jurisdictional aspects of complex intellectual property disputes is not addressed by any of the international instruments. In such cases of multistate IP disputes the discrepancy of location of the owner of the intellectual property right and the location of the intellectual property right at stake creates complications. The differences as they exist in various legal systems become obvious in such challenging situations. Courts in Japan would exercise jurisdiction based on the domicile of the defendant whereas the common law countries like US and England would hear the case only when there is personal as well subject matter jurisdiction. In absence of any harmonized norms for asserting jurisdiction, forum shopping has become a regular practice in countries like US.

REFERENCES

1. Leaffer MA. The new world of international trademark law. *Marq. Intell. Prop. L. Rev.* 1998;2:1.
2. Mohan Singh V. Lajya Ram, AIR 1956 Punj 188; Union of India V. Ladulal Jain, AIR. 1963 SC 1681.
3. TM Act, 1999 s 134. Suit for infringement, etc., to be instituted before District Court.-
(1) No suit-
(a) For the infringement of a registered trade mark; or
(b) Relating to any right in a registered trade mark; or
(c) for passing off arising out of the use by the defendant of any trade mark which is identical with or deceptively similar to the plaintiff's trade mark, whether registered or unregistered, shall be instituted in any court inferior to a District Court having jurisdiction to try the suit.
(2) For the purpose of clauses (a) and (b) of sub-section (1), a "District Court having jurisdiction" shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 or any other law for the time being in

force, include a District Court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or proceeding, or, where there are more than one such persons any of them, actually and voluntarily resides or carries on business or personally works for gain. Explanation - For the purposes of sub-section (2), "person" includes the registered proprietor and the registered user.

4. *M/s ST. Ives Laboratories Inc. v. M/s Arif Perfumers and Anr.* 2009; (40) PTC 104 (Del)

5. *Wipro Limited v. Oushadha Chandrika Ayurvedic*, AIR. 2008 Mad 165.

6. *Arvind Laboratories v. Hehnemann Laboratory Pvt. Ltd.* 2007 (35) PTC 244 (Mad).

7. *Ibid.*

8. *Intas Pharmaceutical Ltd v. Allergan Inc*, AIR. 2007 Delhi 108.

9. *Archie Comic Publications Inc v. Purple Creations Pvt. Ltd.* 2010 (44) PTC 520 (Del).

10. Trademark Act (Act No. 127 of April 13, 1959), <http://www.cas.go.jp/jp/seisaku/hourei/data2.html> accessed 10 March 2019.

11. CPC (Jurisdiction by General Venue) art 4 (1) an action shall be subject to the jurisdiction of the court that has jurisdiction over the location of the general venue of the defendant.

12 *ibid* art 4 (2) The general venue of a person shall be determined by his/her domicile, by his/her residence if he/she has no domicile in Japan or his/her domicile is unknown, or by his/her last domicile if he/she has no residence in Japan or his/her residence is unknown.

(3) If an ambassador, minister or any other Japanese national in a foreign state who enjoys immunity from the jurisdiction of that state has no general venue pursuant to the provision of the preceding paragraph, his/her general venue shall be deemed to be located in the place specified by the Rules of the Supreme Court.

(4) The general venue of a juridical person or any other association or foundation shall be determined by its principal office or business office or by the domicile of its representative or any other principal person in charge of its business if it has no business office or other office.

(5) The general venue of a foreign association or foundation, notwithstanding the provision of the preceding paragraph, shall be determined by its principal office or business office in Japan, or by the domicile of its representative or any other principal person in charge of its business assigned in Japan if it has no business office or other office in Japan.

(6) The general venue of a state shall be determined by the location of a government agency that represents the state in a suit.

13. *ibid* art 5(ix) an action relating to a tort: The place where the tort was committed.

14. *ibid* art 5(i) an action on a property right: The place of performance of the obligation.

15. *ibid* art 5(iv) An action on a property right against a person who has no domicile (in the case of a juridical

person, business office or other office; hereinafter the same shall apply in this item) in Japan or whose domicile is unknown: The location of the subject matter of the claim or security thereof or of any seizable property of the defendant.

16. *ibid* art 5(xiii) an action relating to a registration: The place where the registration should be made.

17. *ibid* art 11(1) (Agreement on Jurisdiction) the parties may determine a court with jurisdiction by an agreement only in the first instance.

18. *ibid* art 12 (Jurisdiction by Appearance) If a defendant, before the court of first instance, without filing a defence of lack of jurisdiction, has presented oral arguments on the merits or made statements in preparatory proceedings, that court shall have jurisdiction.

19. 28 USC § 1338. Patents, plant variety protection, copyrights, mask works, designs, trademarks, and unfair competition.

(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights. For purposes of this subsection, the term "State" includes any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands.

(b) The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trademark laws.

(c) Subsections (a) and (b) apply to exclusive rights in mask works under chapter 9 of title 17, and to exclusive rights in designs under chapter 13 of title 17, to the same extent as such subsections apply to copyrights.

[12] 15 U.S. Code § 1121

(a) The district and territorial courts of the United States shall have original jurisdiction and the courts of appeal of the United States (other than the United States Court of Appeals for the Federal Circuit) shall have appellate jurisdiction, of all actions arising under this chapter, without regard to the amount in controversy or to diversity or lack of diversity of the citizenship of the parties.

(b) No State or other jurisdiction of the United States or any political subdivision or any agency thereof may require alteration of a registered mark, or require that additional trademarks, service marks, trade names, or corporate names that may be associated with or incorporated into the registered mark be displayed in the mark in a manner differing from the display of such additional trademarks, service marks, trade names, or corporate names contemplated by the registered mark as exhibited in the certificate of registration issued by the United States Patent and Trademark Office.

20. 326 U.S. 340 (1945).

21. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980); *Asahi Metal Industry Co. v. Superior Court*; *Burger King Corp v. Rudzewicz*, 471 U.S. 462 (1985).
22: 952 F. Supp. 1119 (W.D. Pa. 1997).
23. 326 U.S. 310 (1945).
24. 11th Cir. Oct. 10, 2008.