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Finnegan's monthly review of essential decisions, key developments, evolving trends in trademark law, and more.

Inaugural Issue - September 2008

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Civil Cases

CG Roxane LLC v. Fiji Water Co., 2008 WL 2782745 (N.D. Cal. 2008)

by Robert C. Stanley

ABSTRACT

The Northern District of California granted summary judgment of noninfringement, finding CG Roxane LLC's ("Roxane") registered mark BOTTLED AT THE SOURCE for bottled water invalid for genericness. To overcome the presumption of validity, the alleged infringer Fiji Water Co. ("Fiji") presented extensive evidence of the mark's use by competitors, by the media, and by Roxane itself to refer to products other than Roxane's Crystal Geyser water. Roxane's evidence of secondary meaning had no effect where acquired distinctiveness could not be shown prior to Fiji's use of the mark. Finally, the court noted that Fiji's use of BOTTLED AT SOURCE as an accurate description of its product would have been a fair use, and thus a complete defense to infringement, had Roxane been able to support the validity of its mark.

CASE SUMMARY

PROCEDURAL HISTORY

Roxane filed suit in the Northern District of California alleging infringement, among other things, of Roxane's registered mark BOTTLED AT THE SOURCE by Fiji's use of BOTTLED AT SOURCE. Fiji filed a motion for summary judgment on Roxane's claims and also on its counterclaim for cancellation of Roxane's trademark registration.

FACTS

Roxane manufactures and sells Crystal Geyser water and began using the phrase BOTTLED AT THE SOURCE in 1990 on its cylindrical bottles with mountain-themed labels. It filed for federal registration of the mark in 2002; after an initial descriptiveness rejection, the USPTO allowed the application based upon Roxane's showing of secondary meaning through substantially exclusive and continuous use, marketing efforts, and sales success. Roxane's registration issued in 2003.

Fiji sells water from Fiji in square bottles with tropical-themed labels and began using the phrase BOTTLED AT SOURCE in 1997 on the front label, and beginning in 2005 on the back label. Roxane sent Fiji a cease-and-desist letter in 2006. Fiji refused to stop its use and Roxane filed this suit for infringement of the BOTTLED AT THE SOURCE mark.

ANALYSIS

The district court granted Fiji's motion for summary judgment. While recognizing that Roxane's federal registration was *prima facie* evidence of the mark's validity, the court first noted an initial (and ultimately fatal) "apparent...deficiency: BOTTLED AT THE SOURCE describes a type of water that is manufactured or bottled at the source as opposed to bottled from a tap or municipal source. It does not indicate the source of the bottled water." The court then considered three types of evidence to determine whether Fiji had overcome the "strong presumption of validity against genericness." First, Fiji showed that nearly seventy of Roxane's competitors used the mark on their bottled water or in advertisements for water. This dwarfed previous cases the court cited that found "brick oven" pizza and "kettle chips" to be generic based upon four and ten competitors' uses, respectively. Finding the mark to be "a factual statement about the manufacturing process used to bottle water...that purports to be purer than other forms of bottled water," the court rejected Roxane's attempt to distinguish its competitors' use of the mark in a general way to describe the bottling process and Fiji's alleged use as a trademark to identify its specific bottled water product.

Second, the court looked to the mark's use in the press and media, where Fiji provided approximately fifty examples using the mark to describe either a manufacturing process or a type of water—not Roxane's product. Third, Fiji cited Roxane's generic use of the mark in its own advertisements, including "always bottled at the source to maintain the quality and freshness of our natural spring water" and "our spring water is bottled at the source." Fiji's three substantial sources of evidence clearly demonstrated to the court the mark's invalidity due to genericness.

The court also analyzed Fiji's alternative ground for invalidity—that the mark was descriptive and lacked secondary meaning. Based on the evidence already discussed, the court had little trouble finding that the mark could be merely descriptive. The court then noted that the presumption of validity based upon secondary meaning operates only after the registration becomes effective. Since Fiji's use of BOTTLED AT SOURCE began years before Roxane's registration issued, it was not entitled to a presumption of validity and the court required Roxane to show that secondary meaning existed prior to Fiji's 1997 use in order to prove the mark's validity. The record lacked any such evidence, and Fiji even offered a competitor's use of BOTTLED AT SOURCE in 1985—years before Roxane's original use began in 1990. The court discounted Roxane's evidence of sales and marketing expenditures as "not determinative of secondary meaning" and based upon statements supported only by one of Roxane's employees, which bore "very little probative value."

Finally, even though the mark was found to be invalid, the court addressed Fiji's fair-use defense to Roxane's infringement claims. Noting that a junior user in the Ninth Circuit has the right to use a mark in its "primary, descriptive sense other than as a trademark," the court found Fiji's use of "a factual statement since its water is indeed bottled at a source in Fiji" and that the phrase BOTTLED AT SOURCE "can naturally be placed alone to convey information to a consumer without it being considered a trademark." On those facts, the court easily found Fiji would have had a complete defense based upon fair use.

CONCLUSION

A federal registration, even with its presumption of validity, may not be able to withstand attack by overwhelming evidence of genericness, including abundant use of the mark by competitors and the media to indicate a type of product rather than the registrant's product. Perhaps least helpful to Roxane's case was its own generic use of BOTTLED AT THE SOURCE in its advertising. Had the mark been found merely descriptive but not generic, secondary meaning would only save the mark if it had been acquired prior to the alleged infringer's use, which Roxane could not prove. Finally, even if the mark was

valid and a likelihood of confusion found to exist, Fiji's water would find safe harbor in fair use since it is indeed bottled at the source.

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Civil Cases

***Dessert Beauty, Inc. v. Fox,* 2008 WL 2938060 (S.D.N.Y. 2008)**

by Lynn M. Jordan

ABSTRACT

Owner of registered trademark LOVE POTION for fragrances has no claim of infringement against company that uses the phrase "love potion" descriptively in identifying two of its fragrance products, the Southern District of New York recently held. Finding plaintiff's use of "love potion" descriptive, and not a trademark use, and no evidence of bad faith, the court granted summary judgment in declaratory judgment action.

CASE SUMMARY

FACTS

Fox owns an incontestable trademark registration for the mark LOVE POTION for perfume. Dessert Beauty Products, Inc. ("DBI") began selling beauty products under the mark DESSERT in combination with a logo consisting of a pink lipstick stain. DBI's DESSERT line included two fragrance products: the "Love Potion Fragrance" and the "Belly Button Love Potion Fragrance," identified in text on product packaging as "deliciously kissable *love potion* fragrance" and "deliciously kissable belly button *love potion*." DBI sought a declaratory judgment that its use either did not infringe Fox's trademark or constituted permissive fair use; sought to cancel Fox's trademark registration on genericness grounds; and sued for intentional interference with business relations arising from Fox's public relations campaign about the dispute, which included postings on its website labeling DBI as an illegal, immoral, and unethical bully. Fox counterclaimed for trademark infringement and both parties moved for summary judgment.

ANALYSIS

DBI argued that its use constituted a fair use under Section 33(b)(4) of the Lanham Act. To avail itself of the fair-use defense, DBI was required to demonstrate that it used the phrase LOVE POTION: (1) other than as a trademark; (2) in a descriptive manner; and (3) in good faith. Rejecting Fox's argument that "love potion" can only describe a consumable liquid (as contrasted with a fragrance), the court noted that in making its descriptiveness determination, it was charged with considering "not only whether the mark used describes certain aspects of the alleged infringer's own goods but also whether the mark as used describes an action the alleged infringer *hopes consumers will make of* its product." In addition to dictionary definitions, and in an unusual interpretation of enforcement evidence, the court pointed to more

than eighty demand letters sent by Fox as evidence for DBI that "Love Potion" was widely used by many merchants and was the only "reasonably available word" to capture the intended meaning. The court also found it persuasive that the phrase was used to identify and distinguish types of products within DBI's overall line along with other descriptors, such as "bath bubbles" and "sugar scrubs," rather than as an identifier used to distinguish DBI products from non-DBI products; and that unlike the product's primary trademark DESSERT, the phrase "love potion" appeared in text rather than standing alone, was not accompanied by any form of trademark notice, was placed "off center" on the packaging, and was presented in a smaller size font. Finally, the court rejected Fox's argument that DBI's failure to conduct a trademark search or cease using the phrase following receipt of a demand letter was evidence of DBI's bad faith. The court reaffirmed the Second Circuit's position that failure to perform a trademark search does not, standing alone, prove bad faith. The court also reaffirmed existing precedent that the failure to completely abandon use of a mark after receiving a demand letter is insufficient, as a matter of law, to support an allegation of bad faith in the absence of other evidence of an intent to pass off the product as that of the trademark owner. Noting DBI's good-faith belief that its use of "love potion" was merely descriptive, and the significant differences in the parties' respective product packaging, as well as DBI's prominent placement of its DESSERT trademark, the court concluded that no reasonable jury could find bad faith.

CONCLUSION

The court found DBI's use of "love potion" constituted a fair use under the Lanham Act providing an "absolute defense" to liability. The court declined to reach DBI's claim for cancellation of Fox's mark on genericness grounds, dismissing this claim upon the parties' consent. Finally, the court dismissed DBI's claim of tortious interference, finding no evidence that Fox used wrongful means to interfere with DBI's business relationships with third parties.

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Civil Cases

Soilworks, LLC v. Midwest Industrial Supply, Inc., 2008 WL 3286975 (D. Ariz. 2008)

by David M. Kelly

ABSTRACT

In the latest keyword advertising case, the District of Arizona joined the majority of courts in holding that a company's purchase of a search-engine keyword containing a competitor's trademark satisfied the commercial-use requirement for asserting infringement claims under the Lanham Act. In a departure from several other courts, however, the court held that the purchase of the disputed keyword constituted infringement under an initial-interest confusion theory of liability, even though the competitor's trademark did not appear in the Google sponsored link advertisements.

CASE SUMMARY

FACTS

Plaintiff Soilworks, LLC ("Soilworks") and Defendant Midwest Industrial Supply, Inc. ("Midwest") were competitors in the soil erosion and dust-control products field. Midwest's brands included SOIL-SEMENT. Midwest contacted Soilworks expressing concern that Soilworks' products may infringe two patents about to issue to Midwest. Soilworks filed this action seeking a declaratory judgment of patent invalidity and noninfringement, among other claims. Midwest counterclaimed for trademark infringement, false designation of origin, and unfair competition based on Soilworks' use of "soil sement" as a search-engine keyword and in its website metatags. Although the decision does not state whether Soilworks' sponsored link advertisements contained the SOIL-SEMENT mark, a review of the court record revealed that the sponsored links did not contain the SOIL-SEMENT mark. Rather, the sponsored links prominently displayed Soilworks' "Soiltac" trademark in the headline and its www.soiltac.com URL below the ad text. The parties filed cross-motions for partial summary judgment on Midwest's trademark claims, among other claims.

ANALYSIS

The court first recognized that Midwest's SOIL-SEMENT mark was a valid and protectable trademark. It then addressed whether Soilworks' use of the SOIL-SEMENT mark in metatags and as a keyword constituted commercial use for purposes of the Lanham Act. Citing the Ninth Circuit's decisions in *Brookfield* and *Playboy v. Netscape*, the court held that Soilworks made these uses to capitalize on the SOIL-SEMENT trademark to attract customers to its websites, and thus were commercial uses for purposes of the Lanham Act.

The court then analyzed whether Soilworks' use of the SOIL-SEMENT mark was likely to cause initial-interest confusion. It noted that the Ninth Circuit has applied both the traditional *Sleekcraft* multi-factor test as well as the so-called "Internet trinity" factors in deciding the issue of likelihood of confusion in initial-interest confusion cases. It proceeded to apply both tests. The court initially considered the "Internet trinity" factors because they are the most important factors in the context of the Internet. Specifically, the similarity-of-the-marks factor favored Midwest—Soilworks' keyword "soil sement" was "nearly identical" to Midwest's SOIL-SEMENT mark, and Soilworks' use of the term "sement soil" and the words "sement" and "soil" in close proximity to each other in its metatags was sufficiently "similar" to the SOIL-SEMENT mark in spelling, sound, and meaning. In addition, the relatedness of the parties goods and the marketing channels both favored Midwest because the parties sold competing products and both used the Internet to market their products.

Soilworks did not specifically address these three factors or any of the other *Sleekcraft* factors. Rather, Soilworks claimed that the "Internet trinity" standard did not apply to metatag/keyword cases and that Midwest had to prove "deception." The court rejected these arguments, pointing out that "the wrong in a metatag initial-interest confusion case is not that the consumer is deceived into believing that he is purchasing the plaintiff's products when in fact he is purchasing defendant's, but instead is the diversion of the consumer's initial attention to the defendant's website using the plaintiff's trademark and goodwill." The court noted that this "wrongful conduct" may involve no consumer deception when keywords or metatags are used.

Soilworks also asserted that Midwest presented no evidence of actual consumer confusion, but the court found that the actual-confusion factor was "less relevant in a metatag initial interest confusion case." Moreover, the court again stated that the wrong here was not actual consumer confusion regarding the source of products, but rather the diversion of potential customers to Soilworks' websites. In any event, even if Midwest had to prove that consumers were actually diverted to Soilworks' websites through confusion, it did so. According to the court, "[a] person typing 'soil sement' into a search engine presumably would be somewhat familiar with Midwest's product and would be looking for the product or its maker, and yet would be directed by keywords and metatags to Soilworks' websites. The confusion—thinking one would be connected to Midwest when in fact Soilworks' websites also appear in the search results—would entirely be caused by Soilworks' use of Midwest's mark."

The court then examined the remaining *Sleekcraft* factors—the strength of Midwest's mark, the degree of consumer care, and the likelihood of expansion—and each either favored Midwest or were of "little import" in assessing initial-interest confusion. The court concluded that the undisputed evidence established that Soilworks' use of the SOIL-SEMENT mark in keywords and metatags "divert[ed] the initial attention of potential Internet customers to its websites" and granted summary judgment for Midwest on trademark infringement liability.

CONCLUSION

The court continued the overwhelming trend of courts holding that the purchase of trademark-related keywords constitutes a "use in commerce" or "commercial use" under the Lanham Act. By the author's count, there are seventeen decisions finding such use in commerce and only seven finding no use in commerce. Regarding infringement liability, unlike some other courts, the court here did not factor into its likelihood-of-confusion analysis the fact that Soilworks' sponsored link did not contain Midwest's SOIL-CEMENT mark. For example, the Eastern District of Virginia in *Geico v. Google* and the Eastern District of Pennsylvania in *J.G. Wentworth v. Settlement Funding* both found no likelihood of confusion because

the sponsored links at issue did not contain the plaintiffs' marks.

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Civil Cases

***Surefoot LC v. Sure Foot Corp.*, 531 F.3d 1236 (10th Cir. 2008)**

by Robert C. Stanley

ABSTRACT

The Tenth Circuit overruled its prior precedent, in light of the Supreme Court's decision in *MedImmune*, supplanting the "reasonable apprehension of suit" test for declaratory judgment ("DJ") jurisdiction to focus on whether "all the circumstances" show a substantial controversy between adverse parties "of sufficient immediacy and reality." The Circuit Court found the new test was met where the senior user of the SURE FOOT mark had filed several pending TTAB proceedings against a junior user's applications to register the SUREFOOT mark and also, seven years earlier, had sent cease-and-desist letters and threatened infringement litigation against the junior user. Remand was required, however, for the district court to consider five discretionary factors in ultimately deciding whether to exercise DJ jurisdiction.

CASE SUMMARY

PROCEDURAL HISTORY

The district court dismissed Surefoot LC's ("Surefoot UT") DJ suit against Sure Foot Corp. ("Sure Foot ND"), seeking a declaration of noninfringement for the SUREFOOT mark, based on a lack of a reasonable apprehension of imminent suit under then-current Tenth Circuit precedent. After the district court entered judgment, the Supreme Court appeared to expressly reject the "reasonable apprehension test" in *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 119 (2007), and articulated new standards for DJ cases or controversies under Article III. Surefoot UT appealed, arguing that DJ jurisdiction existed under the new *MedImmune* standards.

FACTS

Sure Foot ND has sold shoe traction and shoe-related products under the SURE FOOT mark since 1985, which it registered in connection with nonskid shoe pads. Surefoot UT started manufacturing custom-fit ski boots and selling them under the SUREFOOT mark in 1994. In 1998, Sure Foot ND learned of Surefoot UT's use and sent a cease-and-desist letter alleging a likelihood of confusion. The parties initially corresponded and attempted to settle, but each held their ground and ended communications in late 1999 without any resolution.

Surefoot UT subsequently filed an application to register SUREFOOT in connection with certain of its products, which was published without opposition by Sure Foot ND, and eventually registered in June

2002. Sure Foot ND filed a cancellation action with the TTAB almost immediately thereafter and, over the next few years, opposed four other Surefoot UT applications for the SUREFOOT mark covering different goods, all of which were eventually consolidated into a single proceeding at the TTAB (Opposition No. 91153685).

In June 2006, believing that Sure Foot ND would continue to oppose its marks and also eventually sue for infringement, Surefoot UT filed its DJ action in the District of Utah. Under the then-precedential "reasonable apprehension of imminent suit" test, the district court dismissed the suit because (1) any apprehension of suit based on the 1998-99 discussions had dissipated by 2006; and (2) the TTAB action did not offer a reasonable basis to fear litigation.

ANALYSIS

The Tenth Circuit reversed and remanded. Most importantly, it reversed its previous precedent requiring a "reasonable apprehension of imminent suit" to support DJ jurisdiction in light of the Supreme Court's *MedImmune* decision. Even though *MedImmune* did not expressly overrule the previous test and discussed it only in a footnote, the Supreme Court found that DJ jurisdiction existed, even where the existence of a live controversy hinged on a future contingency entirely within the DJ plaintiff's control, i.e., whether to continue paying royalties under a license agreement. The Tenth Circuit found the *MedImmune* facts squarely at odds with the reasonable apprehension test, thus requiring a change in precedent. The Circuit Court also rejected Sure Foot ND's arguments that *MedImmune* was restricted only to patent cases or that it only applied to parties in privity, such as a licensee.

The Tenth Circuit relied upon *MedImmune's* own language and decided that "the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Appreciating that the facts here were far more concrete than those in *MedImmune's* "unfulfilled future contingency," the Court easily found DJ jurisdiction existed based upon all the circumstances and that jurisdiction would be unquestionable in a "counterfactual" straight infringement suit brought by Sure Foot ND. The years-old infringement allegations factored into the analysis, since they had never been withdrawn. And even though the pending TTAB proceedings were not conclusive evidence of a live infringement dispute, the "burst of activity" at the TTAB some years after those allegations were originally made signaled Sure Foot ND's continued belief of infringement. Notably, however, the Court also declined to rule whether DJ jurisdiction would exist beyond the exact combination of facts present in this case and specifically noted that it did not decide whether a single TTAB action or single cease-and-desist letter would give rise to DJ jurisdiction under *MedImmune*.

On remand, the Court offered five factors for the district court to consider, in its discretion, in determining whether or not to exercise DJ jurisdiction, including "whether a declaratory action would settle the controversy," "whether it would serve a useful purpose in clarifying the legal relations at issue," and "whether there is an alternative remedy which is better or more effective."

CONCLUSION

Although limited to its facts, the Tenth Circuit's opinion replaces the "reasonable apprehension of suit" test in favor of an assessment of the totality of the circumstances. Notably, those circumstances can include years-old, unwithdrawn infringement allegations followed by instituting standard TTAB proceedings. Despite the potentially lower bar for DJ actions, however, the final decision to exercise DJ jurisdiction rests in the district court's discretion.

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Zobmondo Entertainment, LLC v. Falls Media, LLC, (C.D. Cal. 2008)

by Linda K. McLeod and Stephanie H. Bald

ABSTRACT

A California district court held that a cognizable injury for fraud under Section 38 of the Lanham Act does not arise until the registration itself issues. Thus, a claim of lack of a bona fide intent to use a mark as of the filing date of an intent-to-use application or a request for extension of time to file a Statement of Use cannot form the basis for a fraud claim under Section 38 of the Lanham Act.

CASE SUMMARY

FACTS

Plaintiffs Zobmondo Entertainment, LLC and Randall Horn (collectively "Zobmondo") and Defendants Falls Media, LLC, Justin Heimberg, and David Gomberg (collectively "Falls Media") both set out to create a board game based on the conversation-starter "WOULD YOU RATHER...?" Falls Media conceived the idea for the board game as early as 1995, and in 1997 filed an intent-to-use application with the PTO for the mark WOULD YOU RATHER...? for "printed matter, namely, books and magazines in the field of humor, calendars, greeting cards, comic strips," and "games, namely, board and card games."

After the PTO published Falls Media's application for opposition in 1999, Zobmondo filed an opposition, which was dismissed with prejudice for failure to prosecute. Following the PTO's issuance of a Notice of Allowance, Falls Media filed five requests for extensions of time to file a Statement of Use. After selling a game under the mark in October 2004, Falls Media filed a Statement of Use with the PTO on November 24, 2004. The PTO issued Registration No. 2,970,830 to Falls Media on July 19, 2005, for the mark WOULD YOU RATHER...? for "printed matter, namely, books and comic strips" in Class 16, and "games, namely, board and card games" in Class 28.

Following issuance of the registration, the parties sued each other in New York and California, alleging trademark infringement and other claims. Among multiple claims and counterclaims, Zobmondo alleged that it was entitled to damages because Falls Media had defrauded the PTO under Section 38 of the Lanham Act, 15 U.S.C. § 1120. Section 38 provides that "[a]ny person who shall procure registration in the [PTO] of a mark by a false or fraudulent declaration or representation, oral or in writing, or by any false means, shall be liable in a civil action by any person injured thereby for any damages sustained in consequence thereof." The court resolved most of the other claims by granting cross-motions for

summary judgment. Falls Media subsequently moved for summary judgment on the remaining fraud claim.

In support of its claim, Zobmondo argued that the TTAB substantially lowered the standard for scienter in a fraud-based cancellation proceeding in *Medinol Ltd. v. Neuro Vasx, Inc.*, 67 USPQ2d 1205 (TTAB 2003). Zobmondo relied on *Medinol* to argue that Falls Media defrauded the PTO because it did not intend to create a game when it filed its original intent-to-use application or at the time it filed its requests for extensions of time to file a Statement of Use. It also argued that Falls Media's entire registration was tainted because it claimed use of the mark on "comic strips" before it made such use. Invoking *Medinol*, Zobmondo sought damages under Section 38 for the entire fraudulent registration.

The court declined to consider the question of fraud because Zobmondo failed to proffer sufficient evidence of damages proximately resulting therefrom. In its ruling, however, the court reviewed the *Medinol* case and the fraud standard. To establish a civil claim for fraudulent procurement under Section 38, the court held that a party must prove: (1) a false representation regarding a material fact; (2) knowledge or belief that the representation is false ("scienter"); (3) an intention to induce the listener to act or refrain from acting in reliance on the misrepresentation; (4) reliance on the misrepresentation ("reasonable reliance"); and (5) damage proximately resulting from such reliance. The party alleging fraud bears a "heavy" burden of proof, i.e., clear and convincing evidence.

The court determined the effect of the *Medinol* decision "appears to be two-fold: fraud-based cancellation must be measured by an objective, 'reasonable registrant' standard; and one tainted part will invalidate an entire registration." Further, the court stated that *Medinol* and its progeny were decided in cancellation proceedings, not in the context of Section 38 damages claims. The court inferred that this distinction could be relevant, suggesting that the *Medinol* holding may not apply to claims under Section 38 of the Lanham Act.

The court also ruled that a Section 38 injury does not arise until the allegedly fraudulent registration actually issues. Thus, for the purpose of determining whether the claimant was injured, any alleged fraud that occurred when the application was filed, or during the examination, allowance, or opposition periods would be irrelevant.

Finally, the court rejected claims of damages in the form of legal expenses incurred from opposing Falls Media's application and subsequent proceedings, explaining that Section 38 damages do not include legal expenses.

CONCLUSION

Under *Zobmondo*, a claim of a lack of a bona fide intent as of the filing date of an intent-to-use application or requests for extensions of time to file a Statement of Use cannot form the basis for a fraud claim under Section 38 of the Lanham Act. This decision leaves open the question of whether this type of claim constitutes or may rise to the level of fraud in an opposition or cancellation proceeding before the Board under the *Medinol* standard.

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Finnegan's monthly review of essential decisions, key developments, evolving trends in trademark law, and more.

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TTAB Cases

by Linda K. McLeod, former TTAB Judge

Gap (Apparel), LLC v. Gap One Enterprises, LLC, Opposition No. 91172505 (TTAB 2008)

by Linda K. McLeod and Stephanie H. Bald

ABSTRACT

The TTAB sustained Gap (Apparel), LLC's ("Opposer") opposition against Gap One Enterprises, LLC's ("Applicant") application for the mark GAP ONE for "general business merchandising services, namely, marketing" on the ground of likelihood of confusion. The TTAB found, among other things, that Opposer's GAP mark was famous, that Applicant's marketing services and Opposer's retail clothing store services were related, presumed to move in similar channels of trade, and offered to the same consumers, and that the parties' marks were similar. In reaching its decision, the TTAB emphasized that there is "no excuse for even approaching the well-known trademark of a competitor."

CASE SUMMARY

FACTS

Opposer, one of the world's leading consumer retail stores, has used the marks GAP and THE GAP in connection with retail clothing store services, clothing, and related products since at least as early as 1969. Opposer's testimony established that since 1996, it has also sold personalized apparel and accessories, such as bags, wallets, frames, and credit card holders, displaying customers' logos and trademarks. Opposer argued that its GAP marks became famous prior to Applicant's first use of the mark GAP ONE, and Applicant's use of the mark GAP ONE in connection with the applied-for services was likely to cause confusion and dilution. Applicant used the GAP ONE mark in its business as an independent sales agent rendering marketing services, including arranging for the sale of promotional products, such as shirts, hats, jackets, and coffee mugs, that display the customer's logo or trademark.

ANALYSIS

The TTAB found that priority had been established for the goods and services identified in Opposer's registrations, and that Opposer established additional common-law rights through the sale of personalized apparel and accessories since at least as early as 1996, whereas Applicant's earliest date of first use of its GAP ONE mark in connection with its services was July 1997.

The TTAB then applied the following likelihood-of-confusion factors: (1) the strength or fame of the GAP marks; (2) the number and nature of similar marks in use for similar goods; (3) the similarity of the parties'

marks; (4) the similarity of the parties' goods and services; (5) the similarity of the parties' trade channels and classes of customers; (6) the sophistication of the purchasers; and (7) the nature and extent of any actual confusion.

The TTAB noted Applicant's admission in its answer that Opposer's GAP marks had become famous, and found, based upon Opposer's evidence of sales revenues, advertising expenditures, and submissions of numerous news articles and third-party coverage regarding GAP and its products, that the GAP trademarks were famous, and thus entitled to a broad scope of protection.

The TTAB rejected Applicant's contention that Opposer's GAP marks were entitled to only a narrow scope of protection because of the existence of a number of third-party registrations for marks containing the term "GAP." The TTAB explained that the third-party registrations were of little probative value in the absence of proof that these marks were in commercial use or that the public was familiar with them.

The TTAB also found unpersuasive Applicant's arguments that the parties' marks GAP and GAP ONE differed in meaning and commercial impression, as the letters G.A.P. were the initials for Applicant's owner George A. Peterson, and the term "gap" in Applicant's mark was intended to reference an opening or space in one's marketing program, whereas Opposer's mark was derived from the term "generation gap." Noting that consumers were unlikely to be aware of these underlying meanings, and that the addition of the term ONE in Applicant's mark did nothing to convey the nature of GAP as an acronym or initials, the TTAB reasoned that "GAP" was the dominant element of Applicant's GAP ONE mark and that the additional word "ONE" in Applicant's mark did not serve to distinguish the marks because of its suggestive laudatory meaning. The TTAB also emphasized that because Opposer's mark was famous, the degree of similarity between the marks need not be as great.

Turning to the factors relating to the similarity of the goods and services, trade channels, and classes of consumers, the TTAB noted that in addition to the retail clothing store services, clothing, tote bags, and other goods covered by Opposer's registrations, Opposer sold personalized apparel and accessories displaying customers' logos and trademarks. As such, Applicant's marketing services were essentially identical, or at least highly related, to Opposer's goods and services. The TTAB emphasized that for famous marks, "special care is necessary to appreciate that products not closely related may nonetheless be confused as to source by the consumer because of the fame of the mark," and thus consumers may be likely to believe that Opposer, whose GAP marks are famous for clothing and retail store services in the field of clothing, was the source of GAP ONE marketing services that include personalized apparel and other related products.

The TTAB found that one factor favored Applicant, namely, the conditions under which Applicant's sales were made. Applicant's owner testified that its sales resulted from personal calls to a customer interested in buying corporate apparel or logo-imprinted products followed by an in-person sales presentation during which Applicant's owner, Mr. Peterson, would explain that GAP ONE Enterprises means "George A. Peterson, one-man enterprise." Nevertheless, the TTAB explained that its analysis was not limited to the conditions of purchase under which Applicant *currently* offers its services, but rather must encompass how such services may be offered in the future, as defined by the identification of services in the application. Finally, the TTAB found that the actual confusion factor was neutral because there had been no opportunity for actual confusion to have occurred due to Applicant's relatively limited, local marketing efforts.

In balancing the likelihood-of-confusion factors, the TTAB concluded that Opposer had demonstrated that

Applicant's use of the mark GAP ONE was likely to cause confusion with Opposer's GAP trademarks and sustained the opposition. The TTAB did not reach the issue of dilution.

CONCLUSION

The TTAB repeatedly emphasized the importance of its finding that the GAP mark was famous on the remainder of its analysis. Notably, the discussion of the mark's fame was not limited to likelihood-of-confusion factors such as the strength of the GAP mark and the similarities of the marks. Rather, even when assessing the similarities of the goods and services, the TTAB warned that "special care" must be taken to appreciate that products not closely related may still be confused because of the fame of a mark. This decision thus provides insight into the significance of establishing fame for purposes of a claim of likelihood of confusion in a TTAB proceeding.

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TTAB Cases

by Linda K. McLeod, former TTAB Judge

In-N-Out Burger, Inc. v. BB&R Spirits Ltd., Opposition No. 92048909 (TTAB 2008)

by Linda K. McLeod

ABSTRACT

The TTAB issued its first decision concerning the requirements for initial disclosures under the new TTAB rules. Although the Board agreed that Fed. R. Civ. P. 26(a)(1) does not require a "great deal of specificity," it held that the mere listing of general categories of documents that do not pertain to specific claims or defenses are insufficient under the Rule. Although not citable, in this important decision the Board concluded that initial disclosures must be sufficiently detailed and specific to address each of the parties' claims and defenses, as well as each of the individual factors that are used to evaluate each claim and defense.

CASE SUMMARY

FACTS

In-N-Out Burger, Inc. ("Petitioner") filed a Petition to Cancel BB&R Spirits Ltd.'s ("Respondent" or "BB&R") registered mark DOUBLE DOUBLE for whisky and liquors on the grounds of likelihood of confusion, lack of bona fide intent to use, likelihood of dilution, and false suggestion of a connection or association. Petitioner based its claims on, among other things, its prior use and registration of the mark DOUBLE DOUBLE for sandwiches. Respondent filed an Answer, including affirmative allegations that there is no likelihood of confusion, the marks "differ in meaning and commercial impression," and "the respective goods, purchasers, channels of trade, marketing and distribution of the goods at issue are vastly different."

Respondent served initial disclosures, identifying two categories of documents: (1) trademark application papers; and (2) documents located at BB&R's corporate office or the offices of its undersigned counsel. After Petitioner objected to Respondent's disclosures as insufficient, Respondent served supplemental initial disclosures identifying eight different categories of documents: (1) documents showing there is no likelihood of confusion between the marks at issue; (2) documents pertaining to Registrant's business; (3) documents pertaining to the history of Registrant's business; (4) documents pertaining to the goods sold by Registrant and channels of trade; (5) documents pertaining to sales; (6) documents pertaining to advertising; (7) copy of Registrant's website; and (8) all documents which may be relevant in supporting BB&R's defenses. Respondent also conferred with Petitioner regarding its supplemental disclosures.

Petitioner subsequently filed a motion to compel more detailed initial disclosures and requested a telephone-conference hearing to adjudicate its motion. In support of its motion, Petitioner maintained that Respondent's supplemental disclosures were "insufficiently detailed." Respondent, on the other hand, argued that Federal Rule 26(a)(1) does not require the level of specificity demanded by Petitioner. Respondent also argued that Petitioner would have ample opportunity to seek and obtain specific documents during discovery.

ANALYSIS

Although the Board agreed with Respondent that Federal Rule 26(a)(1) "does not require a great deal of specificity," it nonetheless granted Petitioner's motion. The Board held that "the Rule requires more specificity than the exceedingly general categories of documents Respondent disclosed, as the Rule specifically requires that parties disclose documents relating to their respective claims or defenses." The Board found that Respondent's supplemental initial disclosures "insufficiently related to its defenses, and do not serve as a substitute for a certain amount of traditional discovery and...provide a more efficient means for exchange of information that otherwise would require the parties to serve traditional discovery requests and responses thereto."

Further, the Board noted that none of Respondent's disclosures specifically related to or mentioned the meaning and commercial impression of Respondent's mark, goods sold or intended to be sold under Respondent's mark, or Respondent's use of or intent to use its mark in the United States. And, with one exception, Respondent's disclosures did not specifically relate to the factors that would be used to evaluate Petitioner's claims of likelihood of confusion, dilution, and false suggestion of association. Thus, the Board required detailed and specific disclosures addressing each of the parties' claims and defenses, as well as each of the individual factors that are used to evaluate each claim and defense. For example, in a footnote, the Board referred to the Respondent's potential identification of "documents related to Respondent's lack of any intention to expand its use of DOUBLE DOUBLE beyond the goods identified in its registration."

The Board also stated, in dicta, in a footnote, that initial disclosures must reflect a party's plans for defending the action at trial. It also suggested, in a footnote, that "[t]he most efficient means of making initial disclosures of documents, and the option the Board encourages parties to use, is to actually exchange copies of disclosed documents, rather than merely identifying their location."

CONCLUSION

Although this decision is not citable, it is significant as it is the first to offer guidance on the level of specificity required for initial disclosures in TTAB cases.

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Living with Confusion: A Trademark Memoir

by Robert D. Litowitz

The past few months have been eventful and tumultuous. One by one, I lost a parent, the family dog, and turned 50. While perhaps not mired in a full-blown midlife crisis, I catch myself unusually prone to soul searching. How did I end up spending half my life practicing trademark law? Nothing in my college trajectory of English courses, American studies, and theater suggested I would spend tens of thousands of billable hours debating the esoteric dividing line between genericness and descriptiveness, the test for functionality, and the proper design for consumer surveys, not to mention the ever popular Madrid Protocol.

But that's where I find myself. How did I get here? Did something in my formative years, or in my DNA, help shape this destiny?

I think back to my childhood, growing up in Trenton, New Jersey. Long before shopping malls siphoned off businesses and families, downtown Trenton, the state capital, was a vibrant, robust commercial center. And at the heart of State Street, down the block from Broad, stood the city's two most exclusive men's clothiers. On the east side, where my Dad shopped for Botany 500 suits, was the posh men's enclave, R.A. Donnelly. Directly across the street was R.A. Donnelly's arch rival, F.W. Donnelly. With their display windows staring each other down, the two pillars of Trenton haberdashery stood in a kind of permanent showdown, not unlike the gunfights that were staples of the slew of TV westerns that were as plentiful back then as crime dramas are today. (If pressed, I can still spit out credible versions of the theme songs to *Bronco*, *Sugar Foot*, *Maverick*, *Cheyenne*, *Daniel Boone*, and *Wyatt Earp*.)

Even as a child, I was struck by the proximity of two stores with such similar names competing mano-a-mano at the epicenter of downtown. Were F.W. and R.A. father and son? Distant relatives? Had there been a terrible family schism, pitting brother against brother in a sartorial civil war? Only decades later did I begin to appreciate that my rudimentary childhood musings had been captioned in a term of art that was the foundational concept for the entire body of trademark law: "confusion as to source, origin, and sponsorship."

Eventually, the urban riots of the 1960s led to urban flight, and the rise of bedroom communities such as the one my family moved to in 1967. F.W. Donnelly traveled with us to our new community of Lawrence Township, New Jersey, ending, in my mind, its generation-long feud and leaving R.A. Donnelly to fend for itself in the blighted downtown. After short-sighted civic visionaries decided to rip up State Street and convert it into a sterile pedestrian mall, R.A.'s fate was sealed. In a strange, ironic twist, its owner became a politician.

Now safely ensconced in the suburbs, my brushes with "confusion" continued. I attended Lawrence High School. Less than a mile down the street, another secondary school shared a strikingly similar name, "The Lawrenceville School." I had no trouble distinguishing the two, one being our humble public school, the other, an elite boarding school with a campus surpassing most colleges. Yet beyond the borders of our suburban township, confusion was rampant. I suppose I shouldn't have minded if people thought I'd received a top-notch private education at an elite prep school, but my anti-elitist streak compelled me to set the record straight whenever I could.

Years later, studying trademark cases questioning the effectiveness of disclaimers in eliminating what the Lanham Act calls "confusions, mistake or deception," I took guilty delight realizing that despite my efforts to disclaim a relationship with the Lawrenceville School, some people probably thought I had that vaunted private-school pedigree.

When I moved on to college, I figured I'd left all that confusion behind. But no such luck. I enrolled at Dickinson College in Carlisle, Pennsylvania, a liberal arts institution founded in 1773 by John Dickinson, the signer of the Constitution vilified as the pro-British loyalist in the Broadway musical, *1776*. Gracing the college library was not only a mammoth portrait of alumnus James Buchanan, the President who ushered the country toward civil war, but a bust of Supreme Court Chief Justice Roger Taney, author of the notorious *Dred Scott* decision. Little wonder that Rosie O'Donnell spent just two years at Dickinson before fleeing to her hugely successful career in entertainment.

Still, the college boasted classic, ivy-covered buildings designed by the architect of the U.S. Capitol, Benjamin Latrobe, soaring oak trees, and a reputation for academic excellence. I had passed over a number of well-known universities to go there. Still, when I'd tell friends, family, or prospective employers the name of my school, they were less than impressed. "Oh, you mean Farleigh Dickinson?" as if they thought I didn't know the actual name of the school I attended. "Farleigh Dickinson." Of New Jersey, the state I'd fled to avoid confusion. "Farleigh Dickinson," a middling school without ivy walls or notorious past heads of two of the three branches of government. This "Farleigh" confusion was not just fairly annoying, it was marring my image. This was my first exposure to a concept that I'd later deal with on practically a daily basis—dilution by tarnishment.

To make matters worse, adjacent to Dickinson College—in fact, across the narrow alley behind my dorm room—was the Dickinson School of Law. Same town, same name, contiguous campuses. The law students even shared our cafeteria. Anyone could be forgiven for assuming it was all part of "greater Dickinson." And they would be wrong. The college and law school were completely separate. Confusion dogged me once again.

By this time, I was beginning to see the expression "what's in a name?" in a whole new light. So although I attended law school with thoughts of focusing on entertainment law, I jumped at the first detour that presented itself. An upperclassman I knew from back home—the Trenton connection—invited me to interview for a position at the firm where he worked. Their specialty? Trademark law. Tired of being victimized by confusion, I began fighting it, or vindicating the rights of trademark owners wrongly accused.

Believing that knowledge indeed brings power, I assumed that confusion would no longer haunt me. Until the day I was tapped to take a new associate to breakfast at the tony Hay-Adams Hotel, a stone's throw away from the White House. When we arrived, something seemed not right. The maitre d' greeted me

warmly, like a regular. The waiter, ignoring my guest, gracefully helped me to my seat, pulled out the chair, and even unfolded my napkin, yet I'd never been to the Hay-Adams before. Then it dawned on me. I'd booked the table under my name, Litowitz, which differs from the name of the noted diplomat and former chairman of Xerox, Sol Linowitz, by a mere consonant. Could confusion be insinuating itself again? Ambassador Linowitz not only was a political mover and shaker. He was a Trentonian too, and both families started out in the fruit business. I can only imagine that the confusion spawned by the Litowitz v. Linowitz rivalry made the similarity between F.W. and R.A. Donnelly seem benign by comparison.

Perhaps this thing with confusion is in my DNA after all.

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